In the Court of Appeal of Alberta

Citation: Maverick Equities Inc. v. Owners: Condominium Plan 942 2336, 2008 ABCA 221

Date: 20080611
Docket: 0703-0154-AC
Registry: Edmonton

Between:

Maverick Equities Inc.

Respondent
(Applicant)

- and -

The Owners: Condominium Plan 942 2336

Appellant
(Respondent)

And Between:

Q.B. Action No. 0503-18193

The Owners: Condominium Plan 942 2336

Appellant
(Applicant)

- and -

Maverick Equities Inc.

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice R.P. Belzil
Dated the 4th day of May, 2007
(2007 ABQB 314, Docket: 0503-18311)

Memorandum of Judgment

The Court:

[1] This appeal concerns the rights of the owner of a condominium unit to make alterations to that unit, and the duty of that owner to respect rules and regulations adopted by the Board of the condominium corporation.

Facts

[2] The respondent owns one of 132 units in the appellant condominium corporation. The units of the condominium are designed for commercial use, and a number of the owners have constructed mezzanine floors within their units. The respondent wishes to construct such a mezzanine floor. A dispute has arisen between the appellant and the respondent over the conditions that will apply if the respondent proceeds with the intended construction.

[3] The condominium units are defined as the space within the floors, walls, and ceilings of the structure of the building. In other words, the unit owner does not actually own the walls or floors, which are part of the common property.

[4] The relevant provisions of the condominium bylaws read as follows:

> 2.02 An Owner shall not:
>
> (g) make any changes to the floor, Party Walls, in the plumbing or heating, air conditioning, mechanical or electrical systems within or outside any Unit *without the prior written consent of the Board*;
>
> (t) make or cause to be made any structural alteration or addition to its Unit which has not otherwise been specifically referred to herein, without first having the design specifications or such alteration or addition *approved in writing by the Board*. . . .
>
> 2.03 The Board shall make such policy statements and rules as are required to clarify the general restriction in By-law 2.02 and those policy statements and rules shall have the same force as any By-laws of the Corporation provided such policy statements and rules are passed by a clear majority of the Board. The Board shall further inform all Owners of those policy statements and rules through such means as the Board deems proper.

3.02 In addition to the powers of the Corporation set forth in the Act, the Corporation may:

(f) Make such rules and regulations as it may deem necessary or desirable from time to time in relation to the use, enjoyment, safety, maintenance and cleanliness of the common property or of any Corporation Property and do all things reasonable necessary for the enforcement of the By-laws and for the control, management, maintenance and administration of the common property generally and of any Corporation Property.

Since it appears that the proposed construction will involve piercing or otherwise compromising the floors, walls or ceilings and the mechanical systems, the respondent requires the consent of the Board.

[5] At its July 14, 2004 annual meeting the appellant adopted Rules and Regulations to be followed by unit owners who wished to alter the building structure. The Rules state that they were enacted pursuant to bylaw 3.02 (f). The Rules were adopted by a simple majority of the members, and were never registered at the Land Titles Office as an amendment to the bylaws. It is common ground that s. 32(3) of the *Condominium Property Act*, R.S.A. 2000, C-22, requires that amendments to the bylaws be enacted by special resolution (a 75% majority) and that they be registered at the Land Titles Office.

[6] The Rules and Regulations deal with obtaining the consent of the Board for renovations that will penetrate the ceilings and walls, or will affect the mechanical systems of the building. The provisions relating to wall penetrations illustrate the general form of the Rules:

Wall Penetrations and/or Alterations

The owner shall *submit to the board for its approval*, detailed and accurate engineered drawings, describing the intended use, height, width and the location of the proposed penetration or alteration, etc. *If the board approves* of the owners initial submission then the owner shall be required to enter into a written binding agreement with the corporation in accordance with the following terms. (emphasis added)

The "following terms" specify that the unit owner must obtain a development permit, retain a qualified contractor, and provide a damage deposit. The contractor must provide a one-year warranty.

[7] A disagreement arose between the appellant and the respondent, and the respondent commenced construction of the mezzanine floor without obtaining the consent of the Board. The appellant commenced action 0503 18193 claiming in part the following relief:

2. Declaring that by altering Corporation Property and Unit Property without the prior written consent of the Board as provided for in the Condominium Corporation Bylaws, the Respondent has conducted itself improperly as defined in the Condominium Property Act, Section 67(1)(a)(ii);

3. Directing that the Respondent cease any further alterations to its Unit on the Corporation Property without first obtaining the written consent of the Board;

The primary relief claimed did not therefore relate to the Rules and Regulations, but rather to the failure to obtain the consent of the Board.

[8] The respondent then commenced cross application 0503 18311 seeking in part the following relief:

5. Declaring that the Respondent's subject rules and regulations are in fact matters enforceable only by bylaw, and that the rules and regulations are enforceable.

6. That the conduct of the business affairs of the Respondent in imposing or attempting to impose its rules and regulations and appealing the Development Permit of the Applicant, is a conduct of business affairs of the Respondent in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests the Applicant and that the Respondent has conducted itself improperly as defined in the Condominium Property Act, section 67(1)(a)(ii) or alternatively (iii).

7. Directing that the Respondent provide its consent to the Applicant to complete its construction in its unit in accordance with its plans and Development Permit as provided by the City of Edmonton, or alternatively directing that such consent is dispensed with.

The two applications were heard together.

[9] In reasons reported as ***Maverick Equities Inc. v. Condominium Plan No. 942 2336***, 2007 ABQB 314, the chambers judge found in favour of the respondent. He ruled that the *Act* did not permit the Board to enact rules and regulations, except by way of a formal amendment to the bylaws by special resolution that was properly registered at the Land Titles Office. As a result, he held that the respondent was not bound by the Rules and Regulations enacted by the Board. He went on to hold at paras. 31 and 35:

> [31] It is not necessary for me to examine the remaining allegations individually. Given that I have already ruled that Maverick is not bound by the purported rules and regulations enacted by the Board, it necessarily follows that Maverick was and is entitled to proceed with interior alterations in compliance with the registered by-law and in compliance with City of Edmonton development requirements.
>
> [35] In the result, Maverick is entitled to proceed with its interior alterations provided that the registered by-law and City of Edmonton development requirements are fully complied with. The Board of Directors is directed to consent to this, failing which consent will be dispensed with. Maverick is entitled to have the interim injunction granted by Binder, J. cancelled.

The chambers judge also held that by attempting to enforce the invalid Rules and Regulations, the respondent had engaged in "improper conduct" as that term is defined in section 67 of the *Act*, and he granted the respondent leave to advance claims for compensation.

Standard of Review

[10] This case involves the interpretation of a statutory provision and a corporate bylaw by the chambers judge, both questions of law, and the standard of review is correctness.

The Right to Make Alterations

[11] The chambers judge identified the issue as being whether the Rules and Regulations enacted by the Board were binding. In our view this improperly characterizes the issue. The unit owner has no right to alter the common property, and the bylaws clearly provide that such alterations may not be undertaken without the consent of the Board. The operation of a condominium corporation on a day-by-day basis is too complex and varied to enable setting down in the bylaws detailed rules covering every possible contingency. There is nothing objectionable to the bylaws providing that certain things can only be done with the consent of the Board.

[12] The true issue here is whether the Board has unreasonably withheld its consent to the respondent's proposed alterations. The chambers judge did not rule on this issue, nor did he identify which of the conditions the Board placed on its consent that he found to be unreasonable. In paras. 31 and 35 of his reasons (quoted at para. 9, *supra*) he assumed that it would be unreasonable for the Board to refuse to consent to alterations that had been approved by the City. This is not necessarily the case, as the bylaws call for the consent of the Board, not the consent of the City. The requirements of the City represent the minimum standards required in the public interest, and there is nothing inherently unreasonable in the Board stipulating higher standards. The respondent argued that the conditions proposed by the Board (essentially those in the Rules and Regulations) were unreasonable on their face, but that proposition is not self-evident. The proposed conditions must be examined on their merits and in context to determine if they are reasonable.

[13] It is therefore not necessary for us to rule in this case on when and whether policies that are not enacted by special resolution are "binding" on unit owners. We should not be taken, however, as ruling that following policies that are not set out in the bylaws makes the exercise of the Board's discretion *per se* unreasonable. The Board is entitled to some considerable scope as to how it will exercise his discretion in granting or withholding consent, and there is nothing objectionable to the Board setting down rules and regulations as to how its discretion will be exercised in the normal course. Writing down the rules and regulations has many advantages. It gives unit owners a clear idea of what will be expected of them. Having the rules approved by the unit owners gives them added legitimacy. It brings greater transparency and equality to the process, because the provision of consent on the basis of the established rules will have a known source. While the existence of the Rules does not fetter the Board's discretion, the withholding of consent, or the provision of consent on different terms, might well call for some explanation. There is nothing in the *Act* that prohibits the establishment of guidelines for the granting of consent.

[14] Finally, our conclusion that the Board was entitled to set out guidelines as to how it would normally exercise its discretion to consent to renovations means that there was no "improper conduct" of the type found by the chambers judge. We should not, however, be taken to have pronounced on the proposition that the assertion in good faith through established legal procedures of a legal position amounts to improper conduct, even if that legal position turns out to be erroneous.

Conclusion

[15] The appeal is allowed, and the order of the chambers judge is set aside. The matter is returned to another judge of the Court of Queen's Bench for an adjudication of the allegation that the Board has unreasonably withheld its consent. The appellant is entitled to solicitor and client appellate costs, as provided for in the bylaws. Costs in the Court of Queen's Bench shall be dealt with when the matter is re-heard.

Appeal heard on June 5, 2008

Memorandum filed at Edmonton, Alberta
this 11th day of June, 2008

Berger J.A.

Slatter J.A.

Authorized to sign for: Rowbotham J.A.

Appearances:

J.R. Pawlyk
for the Appellant

R. Noce, Q.C.
for the Respondent