Court of Queen's Bench of Alberta

Citation: Mount Royal Properties Limited v. Condominium Corporation No. 0113054, 2009 ABQB 660

Date: 20091116
Docket: 0601 07018, 0601 09865
Registry: Calgary

Between:

Action No. 0601 07018

Mount Royal Properties Limited

Applicant

- and -

Condominium Corporation No. 0113054

Respondent

And Between:

Action No. 0601 09865

Condominium Corporation No. 0113054

Applicant

- and -

Mount Royal Properties Limited

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice A.D. Macleod

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[1] Developers of condominium projects in this province often structure projects in such a way that parking stalls are described as "units" in the plans and the bylaws and individual Certificates of Title are issued for each parking stall in addition to residential or commercial units. Such is the case with respect to a fashionable commercial/residential condominium development located in Calgary near Mount Royal on 8th Street and 16th Avenue S.W. Mount Royal Properties Limited is the developer.

[2] The Condominium Corporation (the Corporation) is the vehicle through which the unit holders exercise ownership control of the development.

[3] The developer claims that in a "show of hands" vote of the Corporation it is entitled under the bylaws to vote each of its units including the 216 parking units which would give it 217 "hands" or votes enabling it to control all votes by a show of hands.

[4] On June 8, 2006, Mr. George Schluessel, president of the developer, wrote a letter to the president of the Board of the Corporation in part as follows:

> On my review of the bylaws (which I have reviewed with a couple of lawyers) each titled parking stall has 1 vote at a general meeting since each parking stall is a condominium "unit" as defined in the registered condominium survey plan. ...if you are not going to allow Mount Royal Properties 1 vote per "unit" then please let me know by noon Friday, June 9, 2006 as I may proceed to obtain a legal judgment on this issue.

[5] The Corporation refused and on June 9, 2006 the developer issued an Originating Notice of Motion under the *Condominium Property Act*, RSA 2000, c. C-22 (the *Act*) for an Order directing that the Corporation cease its improper conduct with respect to the way it proposed to handle votes by a "show of hands".

[6] In August, 2006 the Corporation brought a cross application alleging improper conduct and oppression on the part of the developer in structuring the bylaws and plans in such a way that the developer could control the voting and thus prevent the other owners from meaningfully participating in the project.

[7] Nothing of consequence has happened with respect to these two applications until now. In the interim, the Corporation has been conducting annual meetings utilizing "poll votes". In poll votes, unit factors are the determinant to any vote outcome and while the developer can still cast enough votes to prevent the passage of a special resolution, the developer has only just over 30% of the vote because parking stalls receive a very low unit factor for obvious reasons.

[8] Under s.67 of the *Act* the Court may make a number of remedial Orders if it is "satisfied that improper conduct has taken place". The use of the word "may" indicates that the Court has discretion.

[9] In response to the developer's application, the Corporation takes the position that if it initially misinterpreted the *Act* and the bylaws, the problem has corrected itself since during the annual meetings poll votes have been conducted which give the appropriate weight to unit factors. S.26(1) of the *Act* states that the voting rights of the owner of a unit are determined by the unit factor. Accordingly, says the corporation, any improper conduct has been cured and there is no mischief to correct.

[10] The Developer says that it is entitled to have the bylaws adhered to and under those bylaws it is entitled to vote as set out in Mr. Schluessel's letter of June 8, 2006.

[11] Under section 33 of the *Act*, the bylaws of the Corporation are originally as set out in Appendix "1" of the *Act*. Those may be revoked or changed by a special resolution. In this case the developer filed amended bylaws upon the registration of the condominium plan at a time when it controlled all of the "units". The amended bylaws contained the following in section 34:

> On a show of hands, each person entitled to vote for any Unit shall have one vote for that Unit. On a poll, the votes of persons entitled to vote for such unit shall correspond with the number of unit factors for the respective units owned or mortgaged to them. Notwithstanding anything to the contrary herein contained, the Chairman, if he determines such procedure is prudent, may hold a vote by secret ballot (one vote per unit) in regard to election to the Board.

[12] This represented a change to Appendix "1" which had provided as follows:

> 23(1) At an annual general meeting or a general meeting, a resolution shall be voted on by a show of hands unless a poll is demanded by a person entitled to vote and present in person or by proxy, and unless a poll is so demanded, a declaration by the chair that a resolution has on the show of hands been carried is conclusive proof of the fact without proof of the number or proportion of votes recorded in favour of or against the resolution.
>
> (2) If a person demands a poll, that person may withdraw that demand and on the demand being withdrawn the vote shall be taken by a show of hands.
>
> 26(1) If a vote is taken by a show of hands, each person entitled to vote has one vote.
>
> 27 Except for matters requiring a special resolution, all matters shall be determined by a majority vote.
>
> 28 On a show of hands or on a poll, votes may be given either personally or by proxy.

[13] It is common ground that if the bylaws and the *Act* conflict the *Act* prevails and, indeed, the bylaws and the *Act* so provide. Pertinent sections of the *Act* also include:

> 1(1)(y) "unit" means
>
> (I) in the case of a building, a space that is situated within a building and described as a unit in a condominium plan by reference to floors, walls and ceilings within the building, and
>
> (z) "unit factor" means the unit factor for a unit as specified or apportioned in accordance with section 8(1
>
> 26(1) The voting rights of the owner of a unit are determined by the unit factor for the owner's unit.

[14] The Developer argues that by virtue of section 34 of the bylaws the Developer can, on a show of hands, cast a vote for each unit held including the "parking units". Opposing counsel agrees that that paragraph can be read in such a way. Nevertheless, in my view that conflicts with section 26(1) which makes it clear that unit factors are to be the determinant with respect to voting rights. The original bylaws which are set out in Appendix "1" permit owners one vote on a show of hands. To give the Developer in this case one vote for each parking stall would be to subvert the intention of section 26 of the *Act* that unit factors determine the voting rights. Insofar as they purport to give an owner one vote for each parking unit owned, the first and third sentences of section 34 of the bylaws are contrary to the *Act* and they are hereby declared to be void and of no effect. Votes may be held by a show of hands but the counting of votes must be in accordance with Appendix "1" (i.e., each owner entitled to vote has one vote).

[15] Counsel for the Corporation also put forward the proposition that parking stalls are not "units" within the meaning of the *Act*. He suggests that they do not comply with the definition of unit and that the *Act* read as a whole, indicates that it was not the intention of the legislature that parking stalls could be "units". However, counsel also agreed that if I could determine the matters before me without making that decision it would be more prudent because everyone involved with this development has proceeded on the basis that parking stalls are units and this is common throughout the industry. Accordingly, it was generally agreed that if that issue was going to be determined by this Court, other interested parties ought to be given a chance to speak to it.

[16] With respect to the cross application by the Corporation, the developer has over 30% of the unit factors apart altogether from the parking stall issue. While 75% is needed for a special resolution there is no evidence before me that the developer's unit factors reflect anything other than its financial stake in the development. There is no basis for me to find that the developer has conducted itself in such a manner that is oppressive or unfairly prejudicial to the other owners or the Corporation. Accordingly, I would dismiss both claims regardless of whether or not a parking space is a unit within the meaning of the *Act*.

[17] Nevertheless, I appreciate that the issue of whether or not a parking stall is a unit is of significant importance to the Corporation, the developer and any other owner or mortgagee of an

owner. It may also be of some importance to other members of the private and public sector. If either party to this application wishes to pursue that issue I am prepared to do so but would like to make certain directions under sections 66 and 67 of the *Act*. I am prepared to do so at the instance of either or both of the parties.

[18] In the interim, I am directing that the application by the developer and the cross application of the Corporation be dismissed.

Heard on the 22nd day of October, 2009.
Dated at the City of Calgary, Alberta this 16th day of November, 2009.

A.D. Macleod
J.C.Q.B.A.

Appearances:

Christopher S. Davis
c/o Municipal Counsellors
for Condominium Corporation No. 0113054

James E. Polley
McLeod & Company LLP
for Mount Royal Properties Limited