Scotwick Realty Services Inc. v. The Owners: Condominium Plan No. 7510479, 2003 ABQB 550

Date: 20030611
Action No. 0201 19052

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

SCOTWICK REALTY SERVICES INC.
AND BRIAN WITWICKI

Applicants

- and -

THE OWNERS: CONDOMINIUM PLAN NO. 7510479

Respondents

ORAL REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE F. F. SLATTER

APPEARANCES:

J.P. Roggeveen
for the Applicants

K. M. Eidsvik
C. Weisenburger
for the Respondents

[1] These are my reasons for decision in the application between Scotwick Realty Services Inc. and the Owners of Condominium Plan No. 7510479.

[2] This application relates to the responsibilities of a condominium corporation when it experiences major repairs that were not contemplated by its reserve fund study and accordingly are not planned for in its reserve fund plan. Specifically, the issue is whether the condominium corporation can pay for the unexpected repairs out of its reserve fund, and if so, what the consequences of that might be. The main argument of the Applicants is that the unexpected expenditures are capital improvements under Section 38(2) of the *Condominium Property Act* R.S.A. 2000, c. C-22, and accordingly such expenditures may not be made without a special resolution of the condominium corporation.

[3] The Originating Notice of Motion claims many types of relief, including relief for oppressive conduct, access to corporate records, and so forth. By agreement of the parties, this application this afternoon has been limited to the relief claimed in Clause 6 of the Originating Notice of Motion. I can summarize this relief as being an injunction to restrain the Board from spending funds from the reserve fund on the unanticipated expenses and from entering into any contracts of that nature. It is, in short, an application for an injunction. The basis of the injunction application is that such expenditures by the Board would be *ultra vires*.

[4] The facts can be briefly stated. The condominium corporation commissioned a reserve fund study, obtained a reserve fund report and set up a reserve fund plan in the year 2000, all as required by the *Act*. Shortly thereafter, it became apparent that certain repairs would be accelerated and would cost more than anticipated. For example, $23,563 had been set aside for replacement of the west windows in 2005, but that replacement became necessary in 2002 and 2003. Furthermore, it appears that the repairs will cost about $75,000 to $80,000, that is, more than the $23,563 that was budgeted. This is because it has been discovered that the west wall is in need of repair, not just the windows on the west wall. The west wall was not mentioned in the reserve fund report that was commissioned.

[5] The issue is whether the Board can pay for these repairs out of the reserve fund notwithstanding that the expenditure was not budgeted for until 2005, notwithstanding the extra cost, and notwithstanding the absence of any mention of the west wall itself in the report. The Board has attempted to deal with this problem by imposing a special levy of $40,000. The Board has however paid, or intends to pay, some of the other expenses out of the reserve fund. To give some indication of the magnitude of the problem, as of September 30th, 2002, the reserve fund held $97,478, not counting the special levy of $40,000.

[6] The new provisions of the *Act* respecting the creation of a reserve fund have certain obvious objects. One object is presumably to ensure that the housing stock in the province does not become dilapidated and worn down. By ensuring that funds are set aside for major repairs, the government can ensure that condominiums will be renovated when the time comes. There is also an element of consumer protection involved. If a consumer was to buy a condominium unit with a large, unfunded repair liability, the consumer is arguably not getting what he or she expects. There is also an element of owner discipline involved. Making the reserve fund mandatory forces condominium corporations to take a more conservative financial approach to

their repair obligations, and helps overcome the problems associated with special assessments in the democratic environment of a condominium corporation.

[7] The provisions of the *Act* on reserve funds are quite short and the bulk of the detail is to be found in the *Condominium Property Regulation*, A/R 168/2000. Section 38(1) of the *Act* sets out the main purpose of the reserve fund. It is "to be used to provide sufficient funds that can reasonably be expected to provide for major repairs and replacement". This major theme is picked up in Regulation 27(1), which states that a corporation must maintain the funding of its reserve fund at an appropriate amount or in an appropriate state, so that the requirements of the *Act*, "continue to be met".

[8] It is my view that all of the other provisions of the *Act* are really supportive of this main theme. The theme is that the reserve fund must be sufficient to meet the reasonably anticipated repair needs of the corporation. Regulation 27(1) specifically states that these requirements must, "continue to be met". All the provisions about the commissioning of a reserve fund study, the preparation of a reserve fund report and plan, and the implementation of that plan, are really there to support the basic idea that the reserve fund must always be sufficient to meet the needs of the condominium corporation.

[9] There are other provisions that relate to expenditures from the fund, to commingling, to reporting to the condominium corporation owners and to audit requirements. These too are supportive of and secondary to the main concept that the fund should be there at all times and available for repairs.

[10] I next turn to the concept of a capital improvement. Section 38 of the *Act* draws the distinction between major repairs and replacement, on the one hand, and capital improvements on the other. In my view, a capital improvement is an addition of a new amenity or feature to the condominium, as opposed to the mere repair or replacement of an existing feature or amenity. For example, if the condominium corporation has an elevator that wears out and needs replacement, that is a repair or replacement. However, if the condominium corporation does not have an elevator at all, but thinks that one would be a nice amenity, then the installation of an elevator would be a capital improvement. Likewise, if a condominium has a swimming pool that needs repair, that is repair. But if a condominium corporation decides that it would like to install a new swimming pool, that is a capital improvement.

[11] There can obviously be a grey area between capital improvements and repairs. For example, if the condominium corporation was to replace existing windows because they were worn out, but were to replace them with much larger patio doors, that might arguably be a capital improvement or it might simply be regarded as a repair. Likewise, if a condominium corporation has an above-ground swimming pool that needs replacement and decides to replace it with an in-ground swimming pool, one could argue that that is also a capital improvement or a replacement, depending on how one looks at it.

[12] The *Act* tries to deal with this distinction in several ways. Section 38(2) says that the reserve fund can be spent on capital improvements, but two conditions must be met. The first condition is that there must be a special resolution of the condominium corporation. The second condition is that, after removal of the funds, there must still be sufficient funds remaining in the reserve fund to meet the requirements of Section 38(1). This is the provision that I have referred to as the foundation of the scheme, namely, that the reserve fund must always be sufficient to meet the anticipated repair needs of the corporation. In other words, capital improvements can be made from the reserve fund if there is a surplus in that fund over and above what is anticipated for major repairs.

[13] Regulation 28 picks up on this theme. It provides that the condominium corporation can build into its reserve fund and its reserve fund plan an expenditure for a capital improvement. This could be a planned expenditure for something that is clearly a capital improvement, such as a first-time elevator, or it could be used to build in funds for one of those improvements that falls into the grey area and is arguably a repair. Regulation 28 simply says that whatever the correct categorization of the expenditure might be, if it is planned for in the fund, it can be spent for that purpose. It does not say that an unexpected repair is a capital improvement and subject to Section 38(2) of the *Act*.

[14] The Applicants argue that an unanticipated expenditure is a capital improvement. In my view, that is not the correct interpretation of the *Act*. The *Act* draws a clear distinction between repairs and improvements. An unanticipated or accelerated or overbudget repair is still a repair. Such items do not become capital improvements within the scheme of the *Act*.

[15] The next question is then the consequences of there being an unexpected expenditure from the reserve fund. One possible interpretation of the *Act* is that the corporation is not permitted to make any expenditure from the reserve fund unless that expenditure is anticipated in the reserve fund study and the reserve fund plan. In my view, this is not the correct interpretation of the *Act*. Preparing a reserve fund plan that projects many years into the future is always going to be a bit of a guessing game. The exact timing of the expenditure and the exact quantum of the expenditure will always be an estimate only. I note that Regulation 23 specifically states that the study is to be an "estimate". That the estimate will not always be accurate is obvious.

[16] In this case, for example, the roof was scheduled to be replaced in 2002, but the owners have managed to squeeze a few extra years out of it and that expenditure has not yet been made. There will be other cases where unexpected expenditures arise.

[17] In my view, the condominium corporation can spend the reserve fund on major repairs, even if they were completely unexpected and unanticipated. This is in keeping with the basic purposes of the *Act*, of maintaining the housing stock, consumer protection and owner discipline. I do not regard unexpected expenditures as being a capital improvement and they do not require a special resolution of the condominium corporation. Expenditures of this nature from the fund are in the hands of the Board.

[18] In any event, I note that this particular capital fund plan contemplated funds for emergencies. It says that right in the first part of the report. The report also says that it has been designed to ensure that there is always a positive balance in the reserve fund. Therefore, this particular plan actually does contemplate unexpected expenditures, although perhaps not of this magnitude.

[19] One must then go on to consider what happens if an unexpected expenditure is made from the fund. This will, in many cases, put the fund in a deficit position, particularly when the expenditures are of the magnitude being experienced in this case. In my view, this takes the condominium corporation back to Section 38(1), which I have noted requires that the fund at all times, "provides sufficient funds that can reasonably be expected to provide for major repairs and replacement". Regulation 27(1) states that this requirement must "continue to be met". The only conclusion that I can reach is that a Board confronted with an unexpected expenditure then has a duty to revisit the reserve fund plan and make any necessary adjustments to the reserve fund levy to accommodate this unexpected expenditure. In some cases, a whole new reserve fund study might be needed. In other cases, the Board might simply wait for the 5-year anniversary of the reserve fund study, at which time the *Act* requires a new study in any event. In other cases, the Board could make a special levy, as was done in this case. The Board is also at liberty to fund such expenditures from its general operating account. The Board could also increase the reserve fund levy so that the reserve fund will be back on track. In most cases, the Board will probably use a combination of these techniques.

[20] As I have noted, the Regulations require that the condominium corporation do a reserve fund study at least every 5 years. In my view, this is a minimum requirement only. If it becomes apparent to the Board that the initial reserve fund study was defective in some respects, such as when an unexpected and unbudgeted expenditure actually becomes required, it is incumbent on the Board to re-examine the situation, perhaps even before the 5 years have passed. As I have indicated, these provisions are really only supportive of and secondary to the main concept in the *Act*, which is that the reserve fund must at all times be adequate to meet the expected repair requirements of the condominium. Therefore, I conclude that the 5-year time limit is merely an outside deadline. It does not relieve the Condominium Board of the responsibility of reviewing the reserve fund within the 5-year period.

[21] With respect to the exact relief to be granted in this case, I conclude that the Board was entitled to expend reserve funds on the unanticipated expenses without a special resolution. To that extent, the application for an injunction must be dismissed.

[22] The application to require the calling of a meeting is also dismissed, because, as I have indicated, these expenditures do not fall within Section 38(2) and the expenditure of the reserve fund is within the control of the Board.

[23] With respect to the obligation of the Board to revisit the reserve fund, I do not believe that any further relief is required at this time. The Board has already acted by imposing a special levy of $40,000. Document C-58 shows that the Board analyzed the reserve situation in

light of the unexpected expenditures and from that analysis came up with the $40,000 number as being required. There is nothing on the record to indicate that the Board will not continue to deal with the reserve fund situation in good faith and in a reasonable way, as the situation unfolds. As the parties have agreed, the rest of the originating notice is to be dealt with on another day, and so I will make no further comments about that.

[24] That concludes my reasons, unless there is something that I have overlooked, counsel.

HEARD on the 11th day of June, 2003.
DATED at Calgary, Alberta this 11th day of June, 2003.

"F. F. Slatter"

J.C.Q.B.A.