Court of Queen's Bench of Alberta

Citation: Zul K. Verjee Professional Corporation v Condominium Corporation No. 9012335, 2015 ABQB 338

Date: 20150601
Docket: 1401 11597
Registry: Calgary

Between:

Zul K. Verjee Professional Corporation

Applicant

- and -

Condominium Corporation No. 9012335

Respondent

Memorandum of Decision
of
K.R. Laycock, Master in Chambers

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[1] The applicant, Zul Verjee Professional Corporation, is the owner of a commercial unit located in Hong Kong Plaza, a mixed residential commercial condominium project in Calgary. The application alleges that the respondent's Board of Directors or certain members of the Board have engaged in improper conduct, which is oppressive, unfairly prejudicial to, and unfairly disregards the interests of the applicant. The applicant relies upon the *Condominium Property Act*, RSA 2000, c. C-22, s. 67 for its remedies and alleges that the Board has misinterpreted the condominium bylaws, in particular paragraph 44.

[2] The complex consists of six commercial units occupying the first 2 floors of the building, 57 residential units and 42 separately titled parking stalls. The applicant's unit, which takes up the entire second floor, was initially built out as a restaurant when the bylaws were enacted in 1990. The applicant purchased the unit in March 2012, was elected to the Board the following month and continues to be a board member. The remaining members of the Board own

residential units. For many years the common expenses have been allocated by the Board and paid by the unit owners on a unit factor basis.

[3] On September 9, 2014, Jenny Chan, the president of the Board requested the building management company to prepare a 2014 – 2015 budget allocating certain common expenses disproportionately against the commercial unit holders, allegedly in accordance with the bylaws. On September 23, 2015 the occupants or owners of the commercial units requested the Board continue the long-standing practice of contributions being based on unit factors. By letter dated September 26, 2014 from Mr. Cline, counsel for the applicant, the calling of an extraordinary general meeting was requested. A board meeting had been previously scheduled for September 29, 2014 and the agenda items included the consideration of the allocation of common expenses.

[4] In reaction to the letter of September 26, 2014, Ms. Chan canceled the Board meeting set for September 29, 2014 and rescheduled a Board meeting for September 27, 2014. Mr. Verjee objected to the change of dates because he was not available on September 27, 2014. Exactly what transpired at the meeting of September 27 is unclear, because the Board minutes have not been provided, but it is acknowledged that the Board decided to hire legal counsel to deal with the emerging issues.

[5] The issue of allocation of common expenses was adjourned to a meeting held on October 7, 2014 which was attended by Mr. Verjee and other Board members. Board minutes were not provided for the court, but it is agreed that the Board decided to change its method of allocation of common expenses. The majority of the Board agreed that the method suggested by Ms. Chen was required by the By-laws. The Condominium management company was requested to do the necessary calculations and prepare the next year's allocation accordingly. On October 15, 2014 the management company provided a draft of the proposed budget and 3 methods of calculating the unit owners' contributions. The first was based upon the direction given by the board on October 7, 2014. The applicant would have annual contributions of $72,873.15. The second method was based on a continuation of the unit factor allocation. The applicant would have annual contributions of $70,979.29. The third was based on the management company's interpretation of the Bylaws which resulted in the contribution for the applicant of $55,067.37.

[6] The management company commented that the first budget scenario is what the Board directed but only outlined certain sections of the Bylaw pertaining to the allocation of the shared expenses. The management company's comment that the third scenario is the full enforcement of the Bylaws allocating shared costs having regard to the last two paragraphs of 44 C and D. The management company concluded that "If the Board is looking to follow the bylaws as they are written then scenario 3 is what in essence will need to be followed". Notwithstanding the comments made by its management company, the Board proceeded with scenario 1.

[7] The issue raised by the applicant involves the proper interpretation of the By-laws and the allocation of common expenses. The stated issue is whether the court should intervene by declaring the Board has acted in a manner that is oppressive. I propose to deal with the interpretation of the By-law dealing with allocation first because it is the most important aspect of the applicant's complaint and is the reason that underlies all other complaints of improper conduct by the Board and Ms. Chan.

[8] The *Condominium Property Act*, s. 39(1)(c) provides that a Corporation can levy condominium contributions either on all owners on a unit factor basis, or, if provided in the Bylaws, on some other basis. S. 32(6) of the *Act* provides:

> The bylaws bind the Corporation and the owners to the same extent as if the bylaws had been signed and sealed by the Corporation and by each owner and contained covenants on the part of each owner with every other owner and with the Corporation to observe and perform all of the provisions of the bylaws.

Allocation of Common Expenses

[9] Paragraph 44 A of the Bylaws summarizes 11 categories of expenses that are defined as being covered by the term "common expenses".

[10] Sub-paragraph B states:

> B. The common expenses will be paid by the unit owners in accordance with the following formula:
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> (a) the commercial owners shall pay, proportionately as among themselves based on their unit factors, within 30 days of notice by the condominium Corporation, the following:
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> (1) one hundred percent (100%) of the following expenses:
>
> (a) window washing to the commercial units, including all canopies;
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> (b) storefront maintenance;
>
> (c) plate glass insurance for the commercial units, including glazed canopies;
>
> (d) snow, ice and debris removal along the 2nd Avenue S.E. and for the portion for which the building extends along 1st Avenue S.E.;
>
> (e) the commercial units consumption of power, gas, water and like utility usage as determined by separate meters where available. The commercial unit owners will not be responsible for any utility costs to the recreational or amenity areas showing on the Condominium Plan but shall be responsible for their proportional share of the heating costs of that part of the common property designated commercial parking;
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> (f) the door locks to the commercial area;
>
> (g) the maintenance and replacement of all HVAC units servicing the commercial units;
>
> (h) the commercial units private refuse removal service;
>
> (i) commercial sign maintenance;
>
> (j) the maintenance of the common properties so designated on the Condominium Plan as commercial parking. Such maintenance shall include cleaning, painting and parking lanes and numbers when necessary, replacing the lights and repairing and maintaining the overhead door and HVAC equipment; and
>
> (k) dumbwaiter servicing and maintenance.
>
> (2) Its proportional share based on the ratio of its total unit factor of the following expenses:

(a) wages and other costs of the caretaker, all costs and charges for all manners of consulting, professional and servicing assistance required by the Corporation, but excluding the professional manager, which may be hired by the Corporation of which the commercial unit owner shall pay 50% of such costs;

(b) insurance;

(c) landscaping, gardening and ground maintenance, excluding the amenity privacy and recreational areas which will be the full responsibility of the residential unit owners;

(d) maintenance of the exterior walls and other structural costs of the building; reserve fund or depreciation contribution towards the roof, including that covering the podium units, and those mechanical systems which service the entire building.

(3) 60% of garbage removal costs.

C. in consideration of the rights surrendered as described in Bylaw 63, the commercial unit owners shall not be required to share in payment of any part of the other expenses of the condominium Corporation provided always that the intention of this Bylaw is that the commercial unit owners shall share only those expenses from which they derive a benefit and should all unit owners require an adjustment on the expenses to be shared by the commercial unit owners and unanimous agreement cannot be obtained on the said requirement or such adjustment, then the same shall be referred to the architects and designers of the building, (or failing them, by an engineer pointed upon motion to a Judge of the Court of Queen's Bench of Alberta) and the adjustment made by such engineer shall be binding on all unit holders;

D. the common expenses not included in subparagraph (A) herein shall be paid by the residential unit owners in the same proportion that their unit factor bears to the total unit factor of the residential units.

[11] At some time, the Board recognize that an error had occurred in drafting subparagraph D in that the reference to "subparagraph (A)" should have referred to "subparagraph (B)". By a special resolution passed on March 28, 1992, the error was corrected. Even in correcting the error the resolution misdescribed the site of the correction. The amendment stated: "In Section 44 D of Part B, the words "subparagraph (A)" are hereby deleted and the words "subparagraph (B)" are substituted therefor". There is no Part B. But it is clear that there is only one Section 44 D and the amendment makes sense that it is Section 44 D (PartV) that is meant to be corrected.

[12] Paragraph 44(C) refers to reduced sharing of common expenses because of a restriction of the commercial units rights described in paragraph 63. Paragraph 63 states:

Restriction On Use Of Common Property By Commercial Unit Owner

Other than the right to access and use of that portion of the common property designated commercial and parking and notwithstanding the ownership of the undivided interest in the common element in the Condominium Corporation and

> the payment of a portion of the condominium fees that may include some of the costs of maintaining, repairing and replacing the recreational facilities and other common property, the owners, lessees and invitees of the commercial units shall not be entitled to access or use of that portion of the common property above the second story of the building and the commercial unit owners shall ensure that their tenants and invitees do not enter upon or use any such common property, and do hereby indemnify and save harmless the Condominium Corporation from any claim made against the Condominium Corporation by any licensee or invitee for said use and enjoyment or for any damages or claims thereunder.

[13] The effect of paragraph 63 is to acknowledge that the commercial unit owners or their guests cannot access or use that portion of the common property above the second floor of the building. Because of this restriction, paragraph 44C provides that the commercial unit owners do not have to pay for "any of the other expenses of the Condominium Corporation".

[14] Paragraph 44C also provides that any change in the contributions of the commercial unit holders shall be by unanimous consent of all the unit holders. If there is a request by any party to an adjustment in contributions, and unanimous consent cannot be obtained, "then the same shall be referred to the architects and designers of the building, (or failing them, by an engineer pointed upon motion to a Judge of the Court of Queen's Bench of Alberta) and the adjustment made by such engineer shall be binding on all unit holders". There has not been any change approved by the required consent of the unit holders, there is no evidence of changes by the architect and designer of the building and no application has been made to the Court.

[15] The commercial unit owner's contribution for common expenses is defined by paragraph 44A and 44B. The applicant argues that the Bylaws properly interpreted, would result in an allocation of expenses based on the third calculation prepared by the condominium management company. The respondent argues that the Bylaws properly interpreted, would result in an allocation of expenses based on the first calculation provided by the condominium management company.

[16] The list in Paragraph 44A is an extensive list of what was considered to be most, but possibly not all, of the common expenses. Paragraph 44B defines that portion of the paragraph 44A common expenses the commercial units must pay in whole or in part. Anything not mentioned is not an expense the commercial units must share.

[17] To summarize, the commercial owners must pay 100% of the expenses listed in paragraphs 44 B(a)(1)(a) to (k); 50% of the costs of the professional manager hired by the Corporation (see paragraph 44B (a)(2)(a)) apportioned amongst the commercial units based on their unit factors; a unit factor share of the expenses defined in paragraphs 44B(a)(2)(a) (but excluding the professional manager) and the expenses defined in 44 B(a)(2) (b) to (h); and, 60% of the garbage removal costs pursuant to paragraph 44B(a)(3). I notice that the draftsman of the Bylaws missed subparagraphs 44B(a)(2)(e), (f) and (g) by jumping from (d) to (h). Nothing flows from the numbering error.

[18] This interpretation of the method of calculation may be the same as or similar to the third option suggested by the management company. I say this because the detailed method of calculation used by the management company has not been provided to me.

[19] In part, the approach taken by the Board is incorrect. They start out by allocating budget items "management fees, garbage and defined snow removal" to the commercial owners 50%, 60%, and 100%. While the treatment of garbage and snow removal is correct as defined in the Bylaws, it is hard to determine from the information provided within the "management fees" fall within the 50% category defined in paragraph 44B(a)(2)(a). There is simply not enough detail. Cost of the professional manager may or may not be the same as "management fees".

[20] The next step taken by the Board in calculating their allocation is to assess 100% of the costs of "Cable TV" to the residential units because the commercial owners derive no benefit from this expense.

[21] The third step in the process of allocating common expenses is to look at individual expense items and determine whether or not they benefit both residential units or commercial units. If the board concludes that the expense benefits both, the allocation is split amongst all owners on a unit factor basis.

[22] In my view the Bylaws cannot be interpreted by the Board starting the analysis by determining what expense is a benefit to both the residential and commercial unit owners. While the intention of the Bylaws is stated in paragraph 44C to be that the commercial unit owners shall share only those expenses from which they derive a benefit, the specific provision in paragraph 44B is a detailed analysis of the expenses that benefit the commercial unit owners and an allocation of expenses accordingly. In order to override the specific provisions, the bylaws must be amended. Alternatively, pursuant to paragraph 44C an adjustment may be made by the unanimous consent of all unitholders or, failing agreement, an adjustment may be made following a hearing before the original architects and designers of the building or by an engineer appointed by Judge of the Court of Queen's Bench of Alberta. There is no evidence that any of these methods of change have occurred.

[23] Mr. Cline suggested that it was unfair for the commercial units to pay 60% of the garbage. He guessed that it was so defined because the original 2nd floor tenant was a restaurant that generated substantial garbage and that they only generate a small amount of paper waste. He also suggested that the snow removal allocation was unfair. However, these and other complaints are properly dealt with under paragraph 44C, by agreement or by a decision of the original architect and designers of the building or an engineer appointed by the Court. In the context of this application, I cannot do anything, nor do I offer an opinion about the fairness of the allocation.

[24] Subject to my direction in paragraph 35, the Board is directed to recalculate the 2014 – 15 allocation between the commercial and residential units in accordance with this decision and continue to calculate future allocations accordingly.

Improper Conduct

[25] Having determined that the Board's methodology is incorrect in calculating the sharing of common expenses, I now turn to the issue of whether the Board engaged in improper conduct.

[26] S. 67(1) of the Act provides:

(a) Improper conduct means

> (i) Non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,
>
> (ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of an interested party,
>
> (iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of an interested party,
>
> (iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or
>
> (v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

[27] By definition the applicant is an interested party, who has a right to apply to the Court for various remedies set out in s. 67(2). The applicant argues that the Board exercised its powers in a manner that was oppressive or unfairly prejudicial to the applicant as a commercial unit owner.

[28] In ***934859 Alberta Inc. v. Condominium Corporation No. 0312180***, 2007 ABQB 640, Justice Chrumka stated:

> Oppression or oppressive conduct has been defined and discussed in a number of cases cited above. It has been defined to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.
>
> The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.
>
> The term "unfairly disregards" may be defined as unjust and inequitable. Unfairly itself has been defined as "in an unfair manner, inequitably, unjustly". Fair has been defined as "just, equitable, free of bias or prejudice, impartial". Prejudice means "injury, detriment or damage caused to a person by judgment or action in which the person's rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of such action". Prejudicial means "causing prejudice; detrimental damaging to rights, interests, etc."

[29] In ***Leeson v. Condominium Plan No. 9925923***, 2014 ABQB 20, the court considered the conduct of prior Boards in allowing cats to stay in the building contrary to the provisions of the Bylaws. The sudden decision to change the policy to exclude cats amounted to "improper conduct".

[30] The applicant alleges that the Board failed to investigate the reason for the common expenses being historically allocated on a unit factor basis, refused to consider the recommendations from the management company on the proper calculation of the apportionment, failed to give reasonable notice of the meeting scheduled for October 27, 2014,

refused to entertain the request by the commercial units for the holding of an Extraordinary General Meeting, calling of board meetings without sufficient notice to Mr. Verjee, and the preparation and circulation of an email and petition to the residential unit owners only, seeking their support which were delivered after the initiation of this proceeding.

[31] In partial response to the applicant's concerns, the Board argues that they never received a proper request for an Extraordinary General Meeting as required by the Bylaws. The requisition is to be signed by owners representing at least 2500 unit factors. The actual documents purportedly signed by the commercial unitholders did not request an Extraordinary General Meeting. The documents merely objected to the method of allocation of the common expenses. The request for the Extraordinary General Meeting was made by letter from Mr. Cline. The respondent argues that failing to hold an Extraordinary General Meeting following the receipt of the request by Mr. Cline does not comply with the Bylaws and the failure to call a meeting could not constitute improper conduct.

[32] I agree that the request for an Extraordinary General Meeting did not comply with the requirements of the Bylaws. The request was not signed by the appropriate number of unit owners.

[33] In further answer to the applicant's complaints, it is submitted that a consideration of the past practice of the Board in allocating common expenses was not relevant because the board is required to comply with the Bylaws. They argue that the Board believed that the budget and the allocation of common expenses complies with the Bylaws and that they were not acting in bad faith or with any ulterior motivation. They believe that they were merely correcting past improper actions of the Board and were not acting contrary to any Bylaws.

[34] In my view a detailed review of the past records is essential.

[35] The past practice of the Board in allocating the expenses based solely on unit factors is a substantial departure from the bylaws. Some inquiry into the reasoning for this practice should have been undertaken. If it was merely a Board decision, then some previous Board acted improperly in making the change. If the change in allocation of expenses was based on a unanimous consent of all unitholders, this application would have been unnecessary. If there was unanimous consent of all unitholders in the past to calculate contributions based on unit factors, the 2014/ 2015 budget and all future budgets shall comply with that agreement.

[36] The failure to even consider searching past records is inappropriate of Ms. Chan and the Board.

[37] Ms. Chan swears in her affidavit that notices of all Board meetings were provided to Mr. Verjee and the Bylaws allow the calling of a meeting at the discretion of the chairman. The Respondent argues that the Bylaws do not provide for minimum notice periods. The applicant complains that while the Bylaws may not specify a minimum notice period, it must be a reasonable notice period. The applicant argues that notice sent out on September 26, 2014 for a meeting on September 27, 2014 was not reasonable.

[38] I agree with the applicant's position that Ms. Chan acted improperly on September 26, 2014 in canceling the scheduled meeting for September 29, 2014 and calling a meeting for the next day. It would have been more appropriate to continue with the meeting is scheduled on September 29, 2014 and proceed with as many items of business on the agenda as possible. Some agenda items involving the applicant could have been adjourned to a later date, if the

Board felt it was necessary to obtain legal advice or obtain further guidance from its management company. While there is no minimum notice required for calling of a board meeting in the Bylaws, reasonable notice must be given. Less than 24 hours notice of a meeting, is inappropriate. Mr. Verjee's complaint that he could not attend the meeting on such short notice was ignored.

[39] The respondent argues that the email addressed to the residential unit owners dated March 19, 2015 was for the purpose of providing a copy of Bylaws to the residential unit owners for information only. Also they argue that the petition amounted to information with respect to the apportionment of common expenses.

[40] The email of March 19, 2015 from Ms. Chan to the residential unit owners and the door to door distribution of the petition by Ms. Chan was improper. The issue of the interpretation of the bylaw was before the court. The one-sided presentation of information to the residential unitholders did not help resolve the dispute. There is no evidence that Ms. Chan advised anybody about the request of the commercial unitholders to call an Extraordinary General Meeting to obtain import of all unitholders. There is no evidence that Ms. Chan advised anybody about the concern expressed by the management company about the proper interpretation of the bylaws for calculation of the common expenses.

[41] Although the commercial unit owner's request for an Extraordinary General Meeting did not comply with the bylaws, the board should have considered calling such a meeting, especially in light of comments made by the board's own management company on the proper calculation of common expenses. All parties, including the residential and commercial unit owners, the management company and the Board would have been present to fully inform all the parties of the issues. Such a meeting with full disclosure and discussion may have avoided this legal proceeding.

[42] The applicant argues that the tone and the form of the documents were not impartial or informative but were designed to garner support for the position taken by the Board in changing the common expense apportionment. The applicant argues that the information was not a balanced disclosure of the issues raised by the applicant. Information in the email about expenses paid by the commercial units was not totally correct.

[43] In order to garner support Ms. Chan and another board member went door to door with the petition to speak to the residents and obtain their signatures. Exactly what was said is not clear, but the information in the petition accuses the commercial units of not paying their proper share.

[44] The applicant argues that for many years the Board allocated expenses based on unit factors rather than following the sharing principles set out in the Bylaws. It is not so much that the Board made a sudden change, but it is the way the Board proceeded with the change, without investigating the reason why prior Board charged to a unit factor basis. In addition, the condominium management company suggested that the Board method of calculation was not in accordance with the Bylaws. The Board ignored the concerns of the commercial unit owners and ignored the advice of its own management company.

[45] In summary, Ms. Chan and the Board (excluding Mr. Verjee) engaged in improper conduct. Their behavior constitutes a marked departure from fair conduct required of the Board. Their actions show a disregard for the interests of the commercial unitholders and a bias against

them. The email and petition seems to be intended to create discord between the residential and commercial unit owners. The cumulative effect of the Board conduct unfairly disregards the interests of the minority commercial unitholders.

[46] Paragraph 4(a) of the bylaws provides that the Board has a duty to control, manage, maintain and administer the common property in any Corporation property for the benefit of all of the owners and for the benefit of the entire project. One of the principles enunciated by the court in ***Leeson*** was that the selection of a remedy should be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases. In the Condominium Property Act section 67 (2)(c) the court may give directions as to how matters are to be carried out so that the improper conduct will not recur or continue and pursuant to section 67(2)(f) give any direction or order that the court considers appropriate in the circumstances.

[47] I am advised by the parties that there is an upcoming election for the Board. Given Ms. Chan's single-mindedness with respect to this issue and her failure to appreciate the interests of others, she shall be immediately removed from the Board and barred from standing for election in 2015. It is difficult from the evidence to determine whether the balance of the board was merely following the directions of an aggressive board chairman or entirely supported her decisions. In any event the board failed to act fairly and impartially which in the end resulted in conduct that was oppressive and unfairly prejudicial to the commercial unit owners. For that reason all board members, excluding Mr. Verjee, will be prohibited from being a candidate in the upcoming election.

[48] Any overpayments made by the commercial unitholders for improperly assessed expenses in the budget 2014/2015 will be credited to the unitholders in the upcoming year. Any underpayment by the residential unitholders will similarly be paid by them in the upcoming year.

[49] Counsel for the parties shall fix a date for further application dealing with costs of this application.

Heard on the 20th day of April, 2015.

Dated at the City of Calgary, Alberta this 1st day of June, 2015.

K.R. Laycock
M.C.C.Q.B.A.

Appearances:

Peter W. Cline
Verjee & Associates
for the Applicant

Jamie Polley
McLeod Law LLP
for the Respondent