2017 SKQB 83
Saskatchewan Court of Queen's Bench

Harvard Developments Inc. v. Park Manor Condominium Corp.

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HARVARD DEVELOPMENTS INC. AND WESTERN SURETY COMPANY (APPLICANTS) and PARK MANOR CONDOMINIUM CORPORATION (RESPONDENT)

J.D. Kalmakoff J.

Judgment: March 23, 2017
Docket: Regina QBG 338/17

Counsel: Courtney E. Keith, for Applicants
Marc D. Kelly, for Respondent

Subject: Property

APPLICATION by unit owners for order prohibiting condominium corporation from amending by-laws.

***J.D. Kalmakoff J.*:**

INTRODUCTION

1 This fiat relates to an originating application, brought by Harvard Developments Inc. [Harvard] and Western Surety Co. [Western]. They seek an order prohibiting Park Manor Condominium Corporation [Park Manor] from amending its bylaws to implement a new scheme of apportionment for assessing unit owner's contribution to common and reserve fund fees [condo fees].

BACKGROUND

2 The respondent, Park Manor is a condominium corporation. Harvard and Western own condominium units within Park Manor, having purchased those units in 2007.

3 When Harvard and Western purchased their condominium units, Park Manor was a relatively new development. At the time, Park Manor used a formula for condo fee apportionment that took into account not only the square footage of each individual unit, but also purported to account for usage of the "common elements" that could be attributed to each unit.

4 Based on that formula, the range of "unit factors" that could be assigned to a unit, for the purpose of apportionment of condo fees, ranged from 433 to 701. Under that formula, Harvard's unit, which is the largest in the building at 2,932 square feet, was assigned a unit factor of 701. Western's unit, which covered 1,364 square feet, was assigned a unit factor of 445. This translated to monthly condo fees of $730.81 for Harvard, and $448.47 for Western.

5 In 2014, Lana Axelson, who also owns units in Park Manor, raised a question with the corporation's Board regarding the calculation of condo fees. Ms. Axelson's situation is somewhat unusual, in that she purchased two adjoining units, and had the wall separating them removed so that they could be used as a single dwelling. The two units that make up her residence cover 2,720 square feet. Under the unit factor system implemented in 2007, the units comprising her residence had unit factors of 418 and 415, respectively. This meant that her total monthly condo fees were $895.53. Ms. Axelson

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noticed that her monthly fees were significantly higher than some unit owners who owned similarly-sized or larger units. For instance, another owner, whose unit covered 2,746 square feet, was paying only $619.92 per month in condo fees.

6 As a result of Ms. Axelson's inquiry, Park Manor's Board began to investigate the issue of how unit factors were calculated. Following this investigation, the Board attempted to take the steps necessary to amend the condominium plan to change the unit factors assigned to each unit. However, the Board was unable to obtain all the consents required by s. 14 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*Act*]. As a result, the Board decided, rather than taking steps to amend the condominium plan, that they would proceed in a different fashion, namely establishing a scheme of apportionment with respect to owner contribution to common expense and reserve funds, by amending Park Manor's bylaws, pursuant to s. 48 of *The Condominium Property Regulations*, *2001*, RRS, c C-26.1, Reg 2 [*Regulations*].

7 On December 15, 2016, a vote was held during a properly constituted special general meeting of Park Manor's unit owners. At issue was a resolution to amend Park Manor's bylaws to provide for a new scheme of apportionment of condo fees. This new scheme of apportionment would be based only on the square footage of each individual unit. The resolution passed, with 16 of Park Manor's 21 unit owners signifying their consent to the amendment to the bylaws, by providing written consent, in accordance with ss. 48(2) of the *Regulations*. Harvard and Western, of course, did not consent to the proposed amendment.

8 The amendment to the bylaws would result in a change to the scheme of apportionment, and would bring about a calculation of condo fees which is quite different from the formula used to determine the unit factors. For instance, the new scheme of apportionment would see Harvard's factor set at 8.98/100 (instead of 701/10,000), resulting in monthly condo fees of $910.52. The new apportionment scheme would see Western's factor set at 4.18/100, instead of 445/10,000, resulting in monthly condo fees of $423.83. For Harvard, the new scheme would mean an increase in fees of $179.71 per month. For Western, the new scheme would mean a decrease in fees of $24.74 per month.

POSITION OF THE PARTIES

9 Harvard and Western argue that the amendment to the bylaw is oppressive, unfairly prejudicial, and that it unfairly disregards their interests. Western makes this argument, even though the bylaw would result in a reduction in its condo fees. Harvard and Western both argue that the "hybrid" approach initially used to determine the unit factors was well-reasoned, and fair from a "global perspective." They argue that the "new scheme of apportionment reflects the desire of the majority to benefit themselves personally by reducing their common area costs at the expense of a few."

10 Park Manor argues that the new scheme of apportionment was proposed and validly enacted as an amendment to the bylaw through the process set out in ss. 48 and 49 of the *Regulations*. It was chosen by Park Manor's Board, through a form of democratic process, as it was felt to be a more equitable and just distribution of common expenses. The mere fact that it affects Harvard negatively, while it affects other unit owners positively, does not mean that the Board's conduct in amending the bylaws was oppressive, unfairly prejudicial, or that it unfairly disregarded the interests of Harvard and Western.

RELEVANT LEGISLATIVE FRAMEWORK

11 The amendment to Park Manor's bylaws establishing the new scheme of apportionment was enacted under s. 48 of the *Regulations*, which reads, in part, as follows:

> 48(1) Subject to subsection (2), a corporation may establish a scheme of apportionment for owners' contributions to the common expenses fund or a reserve fund that is not in proportion to the unit factors by amending the bylaws of the corporation to include that scheme of apportionment and by filing those bylaws with the Director.
>
> 48(2) A corporation shall not amend its bylaws to include a scheme of apportionment unless written consent to that scheme has been obtained from at least 75% of the owners.

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> . . .
>
> 48(7) The amendment to the bylaws pursuant to this section becomes effective on the filing with the Director of the amendment to the bylaws or a certified copy of a court order made pursuant to section 50.

12 Section 49 of the *Regulations* permits a unit owner to bring an application to the court to object to a scheme of apportionment implemented by a condominium corporation in this fashion. It reads, in part, as follows:

> 49(1) Within 30 days of being served, a person on whom a copy of the amending instrument and notice is required to be served pursuant to subsection 48(3):
>
> > (a) may apply to the court to object to the scheme of apportionment included in the amending instrument;
> >
> > . . .
>
> (2) An applicant shall serve written notice of the application on the corporation.
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> . . .
>
> (4) If the corporation has received notice of an application pursuant to subsection (2), the corporation shall not amend and file bylaws to include the scheme of apportionment that is the subject of the application except in accordance with an order made pursuant to subsection (5).
>
> (5) On an application, the court may:
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> > (a) accept any evidence that the court considers appropriate; and
> >
> > (b) make any order that the court considers appropriate, including an order amending the scheme of apportionment included in the amendment to the bylaws.

13 Subsection 49(5) of the *Regulations* appears to grant broad discretion. If I am to exercise my discretion by making the order that Harvard and Western seek in this case, there must be a basis for doing so. Harvard and Western argue that such a basis exists, because the proposed scheme of apportionment is the result of oppressive or unfairly prejudicial conduct by Park Manor, and that it unfairly disregards the interests of Harvard and Western.

14 Oppression, unfairly prejudicial conduct, and unfair disregard for the interests of a unit owner are addressed in s. 99.2 of the *Act*, which reads as follows:

> 99.2(1) An owner, a corporation, a developer, a tenant, a mortgagee of a unit or other interested person may apply to the court for an order if the applicant alleges that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.
>
> (2) On an application pursuant to subsection (1), if the judge determines that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, the judge may make any order the judge considers appropriate, including:
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> > (a) an order prohibiting the conduct alleged in the application; and
> >
> > (b) an order requiring the payment of compensation.

ANALYSIS

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15 In this case, the amendment to Park Manor's bylaws containing the proposed scheme of apportionment was passed under authority granted by, and in accordance with the procedure set out in the *Regulations*. A special general meeting of unit owners was convened to address a resolution that related to amending the bylaws in that fashion. The evidence before me indicates that, at the meeting, a quorum was present. A motion was made, and seconded, to pass the resolution to approve the amendment. Discussion took place regarding the resolution, and following that, the requisite proportion of owners, as prescribed by the *Regulations*, consented to the resolution being passed. Minutes from that meeting read, in part, as follows:

> 5) Discussion commenced regarding the resolution to amend the Bylaws. The main inquiries were from S. and F. Kenny. The responses were provided by K. Whittle, L. Axelson, B. Brass and N. Kaufman. Discussions centred on the following topics:
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> • the history regarding the unit factors and creation of the current common expense structure
>
> • the timeline and the right of dissenting owners to apply their objection to the court
>
> • the average difference in dollars per year in contributions paid by the owners.
>
> 6) M. Wagner reiterated that the new scheme of apportionment will make the contributions by owners fair because it is based on the actual square footage occupied by the owners. Discussions ended to the satisfaction of the owners.
>
> 7) M. Wagner announced that based on the signatures obtained, 75% of unit owners gave written consent and accordingly this amendment is passed.

16 Given all of that, I am in no position to interfere with Park Manor's decision to amend its bylaw unless I am satisfied that its conduct in amending the bylaw to implement the proposed scheme of apportionment was oppressive or unfairly prejudicial towards, or that it unfairly disregarded the interests of Harvard and Western, as set out in s. 99.2 of the *Act*.

17 I am not aware of any reported decisions interpreting s. 99.2 of the *Act*. However, judicial interpretation of s. 135 of Ontario's *Condominium Act, 1998*, SO 1998, c 19 (which is worded in a very similar fashion to s. 99.2 of Saskatchewan's *Act)*, has established a two-part test to be applied in determining whether impugned conduct amounts to oppression. In order to establish that there has been oppressive conduct warranting a remedy, the claimant must demonstrate (1) that there has been a breach of its reasonable expectations; and (2) that, considered in the commercial context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667, 285 O.A.C. 372 (Ont. C.A.); *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2016 ONCA 650 (Ont. C.A.).

18 In *Ryan v. York Condominium Corp. No. 340*, 2016 ONSC 2470 (Ont. S.C.J.), Justice Perell had this to say about the application of s. 135 of Ontario's *Condominium Act*, at paras 75 - 79:

> 75 The oppression remedy in the Condominium Act, 1998 grants the court the jurisdiction to protect condominium owners, corporations, declarants, and mortgagees from unfair treatment. In *McKinstry v. York Condominium Corp. No. 472* (2003), 68 O.R. (3d) 557 (Ont. S.C.J.) at para. 33, Justice Juriansz described the nature of the court's jurisdiction as follows:
>
>> 33. .... This new creature of statute should not be unduly restricted but given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant. Once that prerequisite is established, the court may "make any order the judge deems proper" including prohibiting the conduct and requiring the payment of compensation. This broad powerful remedy

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and the potential protection it offers are appropriately described as "awesome". It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.

76 The test for oppression has two parts: (1) the claimant must demonstrate that there has been a breach of its reasonable expectations; and (2) that, considered in its context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp.*, 2011 ONCA 667 (Ont. C.A.) at para. 6.

77 The oppression remedy addresses three kinds of unfair conduct: (1) oppressive conduct; (2) unfairly prejudicial conduct; and (3) conduct that unfairly disregards the interests of the claimant.

78 Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance.: *Niedermeier v. York Condominium Corp., No. 50*, [2006] O.J. No. 2612 (Ont. S.C.J.); *Walia Properties Ltd. v. York Condominium Corp. No. 478*, [2007] O.J. No. 3032 (Ont. S.C.J.), varied 2008 ONCA 461 (Ont. C.A.); *1240233 Ontario Inc. v. York Region Condominium Corp. No. 852*, [2009] O.J. No. 1 (Ont. S.C.J.); *Metropolitan Toronto Condominium Corp. No. 1272 v. Beach Development (Phase II) Corp., supra*; *Hakim v. Toronto Standard Condominium Corp. No. 1737*, 2012 ONSC 404 (Ont. S.C.J.); *Dyke v. Metropolitan Toronto Condominium Corp. No. 972*, 2013 ONSC 463 (Ont. S.C.J.); *Grigoriu v. Ottawa-Carleton Standard Condominium Corp. No. 706*, 2014 ONSC 2885 (Ont. S.C.J.); *Wu v. Peel Condominium Corp. No. 245, supra*; *3716724 Canada Inc. v. Carleton Condominium Corp. No. 375*, 2015 ONSC 6626 (Ont. S.C.J.) and 3716724.

79 In *Walia Properties Ltd. v. York Condominium Corp. No. 478, supra*, at paras. 23-24, Justice Harvison Young described conduct that falls within the oppression remedy of the *Condominium Act, 1988* as follows:

23. In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:

... "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.

24. When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

19 In my view, given the similarity in legislation, Justice Perell's analysis is applicable to s. 99.2 of the *Act* in Saskatchewan.

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20 Harvard and Western bear the onus of demonstrating that Park Manor's conduct was oppressive, unfairly prejudicial, or that it unfairly disregarded their interests. In my view, the evidence adduced on this application falls short of demonstrating anything of the sort. It is clear, from the decisions that have analyzed the analogous sections of Ontario's legislation, that demonstrating oppression, unfairly prejudicial conduct or unfair disregard of interest requires much more than merely demonstrating that one party did something that the other did not like, or did something which produced a result that was unfavourable to the other party's interests.

21 While the evidence in the affidavits of Paul Hill, Adam Niesner and Ross Keith set out reasons why the unit factors for Park Manor were initially determined as they were, I cannot conclude it would be reasonable for them to expect that the unit factors, or apportionment of condo fees, would never change. The *Act* and *Regulations* set out methods for amending unit factors, and for condominium corporations to amend their bylaws to implement new schemes of apportionment, just as Park Manor did in this case. If unit factors were meant to be set in stone once they were established, there would be no need for such legislation. I find myself in agreement with Park Manor's submission that a reasonable expectation, for parties in the position of Harvard and Western, would be that the allocation of common expenses would only change if the condominium corporation made those changes in a way that complied with the *Act*, the *Regulations*, and the condominium corporation's bylaws. And in this case, the process Park Manor followed in amending the bylaws did just that. Accordingly, the applicants have not met the first branch of the test to establish oppression, and the application must fail.

22 Furthermore, I cannot conclude, based on the evidence, that Park Manor's actions in this case were unfairly prejudicial, or that they unfairly disregarded the interests of Harvard and Western. Park Manor began its inquiry into the apportionment of common expenses based on a question raised by one unit owner. The matter was subsequently explored, investigated, debated, and canvassed at a duly constituted special meeting of the owners. Each of the unit owners had the opportunity to attend the meeting and participate in the discussion. Each of the unit owners had the opportunity to "vote", by either consenting or not consenting to the proposed amendment. The scheme of apportionment was approved through a form of democratic process, specifically provided for in the relevant legislation.

23 Furthermore, the scheme of apportionment that Park Manor has chosen is not arbitrary, and there is nothing inherently unfair about it. It is based on the size of each unit. It is concrete, ascertainable, and attached to a characteristic of each unit that makes sense in the context of real estate.

24 In the end, the scheme of apportionment chosen by the Board of Park Manor may turn out to be better for some unit owners, and worse for others than the "hybrid" unit factors formula was. It may or may not amount to a more just and equitable overall distribution of common expenses. That is not for me to say at this stage, nor is it the determining factor on this application. The Board's decision to amend the bylaws to implement a new scheme of apportionment will have an adverse effect on Harvard, but I am unable to conclude that this adverse effect was the result of unfair or inequitable treatment, or that Harvard or Western's interests were unfairly ignored or treated as being of no importance.

25 Accordingly, the application by Harvard and Western must be dismissed.

26 Pursuant to ss. 48 and 49 of the *Regulations*, Park Manor shall be permitted to amend its bylaws to include the scheme of apportionment approved at the special general meeting held on December 15, 2016, and shall be permitted to file the amendment with the Director.

COSTS

27 I am not satisfied that this is an appropriate case for solicitor-client costs on the basis set out in *Hallmark Place Condominium Corp. v. McKenzie*, 2015 SKQB 260, 482 Sask. R. 309 (Sask. Q.B.). While the application brought by Harvard and Western was unsuccessful and, in my view, did not have a strong evidentiary basis, it was an application made in accordance with the process set out in the relevant legislation, and was made in response to a

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proposed amendment that negatively affected their interests. Accordingly, it is distinguishable from a situation where the applicants' conduct is in flagrant breach of a bylaw or where an application brought is frivolous or scandalous.

28 Therefore, in the circumstances, I am satisfied that Park Manor is entitled to the costs of this application, but on a party-and-party basis.

Application dismissed.

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