Court of Queen's Bench of Alberta

Citation: Magnus v Mason, 2019 ABQB 341

Date: 20190524
Docket: 0901 11714
Registry: Calgary

Between:

Timothy Magnus and Magnus Diversified Inc

Plaintiffs

- and -

Frank A Mason, Frank A Mason Professional Corporation, Mason Silver, and Mason Silver Groves

Defendants

Reasons for Decision
of the
Honourable Mr. Justice D.B. Nixon

I. Introduction

[1] This summary trial concerns the question as to whether a condo corporation had an exclusive right to sue third parties for certain specified damages to the common property of the condo owners.

[2] The Defendants in this case are Frank A. Mason and his associated law practices (collectively, "**Mason**"). They have applied for an order by way of summary trial to determine whether Timothy Magnus and Magnus Diversified Inc. (collectively, "**Magnus**") had the right to

commence an action against third parties for damage to the common property of a condo complex.

[3] Magnus was a condo owner, and a former client of Mason. Mason was initially retained by Magnus to represent him in a legal dispute concerning the Condo Complex.

[4] Magnus subsequently commenced an action against Mason for negligence. In this hearing Mason argues that Magnus, as a condo owner, had no right to commence an action against a third party for damage to the common property of the condo complex. The rationale underlying Mason's argument is that the condo corporation has the exclusive right to commence such an action. Magnus rejects the suggestion that condo corporations have the exclusive right to sue in respect of common property.

II. Facts

[5] Condominium Plan 9511228 is a corporation established under the *Condominium Property Act* (the "**Condo Corporation**"). That corporation holds title to Condominium Plan 9511228.

[6] In August 2009, Magnus commenced an action against Mason alleging negligence. The alleged negligence was that Mason had allowed the Magnus' action against Canada Finance Corporation Limited ("**CFC**") to lapse for want of prosecution.

[7] The background to the CFC action is important context to this hearing. In the 1990s, CFC developed a 19-unit condominium complex styled "The Lofts on 17 Avenue" (the "**Condo Complex**").

[8] Between December 1998 and April 1999, Magnus purchased four units in the Condo Complex. Three of those units were purchased directly from CFC.

[9] Each of the purchase agreements executed by CFC (as vendor) and Magnus (as purchaser) included a promise to complete the construction of the common property in a good and workmanlike manner. The relevant clause in each of the purchase agreements reads as follows.

> If the Unit or portion of the common property be as yet unstarted or be in the process of construction, the Vendor agrees to complete the same in accordance with the site plan and specifications as set out in Schedule "B" attached hereto, all work and services to be done and performed in a good and workmanlike manner appropriate to the style and nature of the Unit.

[10] Between 1997 and 1999, the Condo Corporation identified substantial deficiencies with parts of the common property in the Condo Complex. These deficiencies were allegedly attributable to CFC.

[11] On February 28, 2001, Magnus commenced an action against CFC, the City of Calgary (the "**City**"), Canada Mortgage and Housing Corporation ("**CMHC**"), Eric Nissen, and Cliff Spence. That action is Court File No. 0101-05207 (the "**CFC Action**"). The CFC Action was for damages resulting from deficiencies with the common property in the Condo Complex, and the resulting special assessments that Magnus was required to pay.

[12] Between 2000 and 2005, the Condo Corporation issued notices to the unit owners for special assessments concerning repairs to the Condo Complex. The assessments levied aggregated to $572,000. The purpose of the aggregate funds levied by the Condo Corporation was to address the deficiencies with the common property.

[13] At some point between 2004 and 2005, Magnus retained Mason to act on litigation matters concerning the Condo Complex.

[14] On March 22, 2007, Mason filed an application to consolidate the CFC Action with a separate action that he had commenced for Magnus against the Condo Corporation (the "**Condo Corp Action**"). The Condo Corp Action was commenced by Magnus, apparently on the basis that the Condo Corporation failed to pursue an action against CFC.

[15] On August 21, 2007, Master Laycock dismissed the CFC Action for want or prosecution or inordinate delay. An appeal to this Court was dismissed on February 15, 2008.

III. Issue

[16] On April 10, 2018, the Court ordered that the following issue be tried summarily under Rules 7.1 and 7.5 of the *Rules of Court* (the "**April 10 Order**"). The relevant component of the April 10 Order reads as follows.

> Did the Plaintiffs have the right to make the claims set out in paragraphs 17, 18, 19, 22, 24, 25 and 26 in the Statement of Claim in Action 0101-05207, or was the right to bring those claims the exclusive right of the Owners Condominium Plan 9511228…?

[17] The CFC Action asserts a number of allegations. The relevant assertions in the CFC Action are as follows (for convenience, the relevant paragraphs in the Statement of Claim are referenced (collectively, the "**Magnus Claims**")).

(a) It alleges a breach of the purchase agreement between Magnus and CFC regarding CFC's obligation to complete the work on the common property in a good and workmanlike manner. See paragraph 17 of the Statement of Claim in the CFC Action.

(b) It alleges that CFC breached a common law duty of care owed to Magnus to take reasonable and prudent steps in the construction of the Condo Complex. See paragraph 18 of the Statement of Claim in the CFC Action.

(c) It alleges that CMHC and the City breached common law duties of care owed to Magnus based on a failure to adequately inspect and review the Condo Complex. See paragraphs 22 and 24 of the Statement of Claim in the CFC Action.

(d) It alleges that two former directors of the Condo Corporation breached their fiduciary duties and duties of care owed to Magnus as a condo owner. See paragraph 25 of the Statement of Claim in the CFC Action.

(e) It particularizes the damages claimed by Magnus, which included damages for the special assessments that have been, or would be, charged by the Condo

> Corporation as a result of the failure to construct the Condo Complex properly, and associated wrongdoings. See paragraph 26 of the Statement of Claim in the CFC Action.

[18] Given the parties' submissions in this summary trial, I have not been called upon to determine whether the claims against the City, CMHC, or the past directors were well founded in the law of negligence or in contract. The core of the Magnus Claims center on the deficiencies with the common property. The sole issue to be decided in this summary trial is whether Magnus had a right to commence an action for the deficiencies in respect of the common property of the Condo Complex.

IV. Law & Analysis

[19] The overarching position of Mason is that the Magnus Claims were all claims for damages, for which the Condo Corporation had the exclusive right to sue. Mason asserts that Magnus suffered no loss when the CFC Action was dismissed for want of prosecution because it had no right to commence an action in respect of the Magnus Claims.

[20] To support its argument, Mason relies ***Terrace Corporation (Construction) Ltd v Condominium Plan 752-1207***, 1983 ABCA 126, 26 Alta LR (2d) 147 ("***Terrace***"). In ***Terrace*****,** our Court of Appeal had to decide whether a condo corporation could impeach a long-term lease of parking stalls that the developer had granted to itself before selling the condo units.

[21] The developer in the ***Terrace*** case challenged the condo corporation's standing to bring an action because the corporation did not have a proprietary interest in the parking stalls. The parking stalls in the ***Terrace*** case were common property, owned by all of the unit owners as tenants in common.

[22] In writing for the majority in ***Terrace***, Stevenson JA reasoned that the condo corporation could bring an action regarding the common property because the legislation empowered that corporation to act in a capacity analogous to a trustee of a trust. Stevenson JA noted in *obiter* that there was no danger of a flood of litigation from every unit owner because the remedy of the common property owners would be analogous to the proprietary remedy of the trust beneficiary. A beneficiary's action gives rise to the right to restore the property to the trust: ***Terrace*** at para 13. Applying that principle, the lease of the parking stalls was set aside.

[23] In this case, Mason submits that ***Terrace*** decided that condominium corporations hold the exclusive right to seek a remedy in respect of the common property of the corporation. The thrust of Mason's argument is that condo owners are analogous to beneficiaries of a trust, and they do not have the status to sue in respect of the Magnus Claims because that right has been exclusively granted to the condo corporation under the now repealed *Condominium Property Act*, RSA 1980, c C-22 (the "**Alberta 1980 Act**"). In effect, Mason argues that the remedies available to condo owners do not include the right to seek an individual remedy for loss in respect of common property. A condo owner can only sue to restore the "trust" or common property.

[24] In my view, Mason's position fails to consider Stevenson JA's comments in ***Terrace*** in context. The relief sought by the condo corporation in ***Terrace*** was to have the lease set aside. Stevenson JA's comment in ***Terrace*** to the effect that the unit owners' remedy would always be to restore the trust property has to be read with that situation in mind. Importantly, the Court in

Terrace did not have before it a claim for individual losses incurred by a condo unit owner after the deficiency with the common property had been identified and, to some extent, repaired. In my view, this is an important distinction.

[25] With all due respect, the argument advanced by Mason takes Stevenson JA's trust analogy too far out of context. While the Alberta 1980 Act imposes responsibilities on the Condo Corporation to manage, control, and administer the common property in section 19(1), this does not create a trust relationship. This is an important distinction because the condo unit owners retain title over that property.

[26] Stevenson JA did not hold that the condo corporation-unit owner relationship is a trustee-beneficiary relationship in all respects. He simply used the law of trusts to reason by analogy for the purpose of reaching a result that was appropriate for the case in front of him.

[27] The trust analogy is useful, but it only goes so far. Unlike the beneficiary of a trust, whose interest in the trust property is equitable, the condo owners – not the condo corporation – have legal title to the common property as tenants in common. This is legislated by section 4(2) of the Alberta 1980 Act. In particular, that section of the Alberta 1980 Act provides that the "common property" is held by "the owners of all the units as tenants in common".

[28] When the Legislature uses a legal term with a well-understood legal meaning, it is presumed that it intended to incorporate that legal meaning into the statute: *R v DLW*, 2016 SCC 22 (CanLII) at para 18, [2016] 1 SCR 402. As I read the law, co-ownership as tenants in common is a form of shared ownership of land that has been long recognized at common law: see Bruce Ziff, *Principles of Property Law*, 6th ed (Toronto: Carswell, 2014) at 338-340, 358.

[29] At common law, tenants in common may sue individually for damages arising out of their proportionate shared interest in the land: ***Cyr v Ste-Anne de Madawaska (Village)*** (1971), 24 DLR (3d) 284, 1971 CarswellNB 76 (WL Can) at paras 36-39 (NBCA) ("***Cyr***"). In ***Cyr***, the plaintiff was a tenant in common of a parcel of land with a home situated on it.

[30] Ms. Cyr was unlawfully evicted from her home, and the land was listed for sale. She successfully sued for possession and was granted damages to repair the property, among other things. The Appeal Division of the New Brunswick Supreme Court held that the plaintiff was entitled to recover damages proportionate to her interest in the property as a tenant in common.

[31] The judicial history underlying ***Cyr*** is instructive. In ***Cyr***, the Court followed Devlin LJ's judgement in ***Baker v Barclays Bank Ltd,*** [1955] 1 W.L.R. 822 at page 830, [1955] 2 All ER 571 [***Baker***]:

> It has been settled for a very long time past that one of several co-owners of a chattel can sue for conversion, relying on his own right to possession and recovering damages according to his interest in the chattel. Thus in *Bloxam v. Hubbard*, Lord Ellenborough, C.J. held that three out of four co-owners of a ship might recover three-fourths of the value of that ship, saying that each might recover according to this own interest. He said:
>
> > As to the first of these objections, assuming it to be well founded, and we think it so, it has only the effect of precluding the plaintiffs, who are three out of the four assignees in whom the property of the ship originally was (and until a new assignment is made under the order of the Lord Chancellor, continues to be) vested, from

> recovering more than their three-fourths parts in value of the property in question. For it is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort, viz. that all the several part owners in a chattel have not joined in an action of trespass, or of tort brought in respect to it, by plea in abatement. I will only refer to *Addison v. Overend*, in which most of the cases on the subject are collected; and *Sedgworth v. Overend*.

I was also referred in the course of the argument to a statement by Lord Denman, C.J. in *Wilkinson v. Haygarth*, where he said: "The plaintiff can recover such damages only as are "proportionate to his interest in the property. . . ."

Bloxam v. Hubbard makes it plain that the only objection that can be taken to one of several part-owners suing is the procedural objection taken by means of a plea in abatement.

Plea in abatement was a purely procedural matter which has disappeared under the Judicature Acts and has been replaced, if one can call it replacement, by R.S.C., Order 16, r. 11, which provides: "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

I think that makes it quite plain that, whereas before by plea in abatement one could require as a matter of procedure that all the relevant parties should be brought before the court, now under Order 16, r. 11, it is immaterial to the rights of the parties to the cause or action whether all the proper parties are before the court or not; no cause or matter shall be so defeated, and the court is entitled to deal with the rights and interests of the parties actually before it. The rule goes on to provide, of course, that the court may, at any state of the proceedings, make such order as might be just with regard to striking out the names of parties who are improperly joined; and then says that the court may order that "the names of any parties, whether plaintiffs or defendants, who ought to have joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

[*Footnotes omitted.*]

[32] As this right of action concerning Magnus is an incident of shared ownership in real property, the Legislature is presumed to have known that a tenancy in common would confer this right when it enacted section 4(2) of the Alberta 1980 Act. Given that premise, I cannot attribute to the Legislature the inconsistent purpose of vesting legal title of all the common property in the condo unit owners as tenants in common, with all the legal rights that implies, at the same time that it supposedly deprived those condo unit holders of the right of co-owners of property to sue for damage to the co-owned property.

[33] If the Legislature had intended to deprive condo unit owners of the right sue, its intention must be discernable from the text of the Alberta 1980 Act. I turn to review that Alberta 1980 Act with that issue in mind.

[34] The Alberta 1980 Act provides in section 20 that a condo corporation "may" sue in respect of any damage or injury to the common property. The relevant legislative provision is section 20(3) of the Alberta 1980 Act, and it reads as follows.

> **20(3)** Without limiting the powers of the corporation under this or any other Act, a corporation may
>
> > (a) sue for and in respect of any damage or injury to the common property caused by the any person, whether an owner or not, and
> >
> > (b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

[35] I note that section 20(3) of the Alberta 1980 Act (now repealed) is identical to section 25(3) of the current *Condominium Property Act*, RSA 2000, c C-22.

[36] Section 20(3) of the Alberta 1980 Act enumerates some of the powers of a condo corporation. The use of the term "may" in that statutory provision is empowering and permissive, granting such a corporation the authority to bring an action in respect of the common property. In my view, it does not follow that the Legislature intended to oust the condo unit owners' right to sue individually as tenants in common.

[37] Given this context, I find that the Magnus Claims in negligence can be sustained as an implied incident of his statutory ownership of the common property as a tenant in common. That said, I view the Magnus Claims in contract as a separate matter.

[38] Mason argues that the right to sue for breach of contract also runs contrary to the Condo Corporation's exclusive right to sue. In making this argument, I note that Mason does not argue that the term in the contract was a nullity or void. Instead, Mason argues that the Condo Corporation is the proper party to commence the action as the "trustee" of the common property.

[39] In my view, there is no reason per se that Magnus should be precluded from contracting with CFC regarding the quality of the workmanship of the common property that he was buying when he entered into the purchase agreement.

[40] Again, the Legislature is presumed to intend not to interfere with the right to bring an action: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis, 2014) at 499. Applying that principle, the Legislature is presumed to have not intended to interfere with Magnus' right to sue for a breach of a term in the purchase agreement. For the reasons already stated regarding the right of co-owners to sue, there is nothing in the Alberta 1980 Act to suggest that the presumption has been rebutted.

[41] Further, I find that the wording of section 72 of the Alberta 1980 Act demonstrates a clear legislative intent that condo unit owners would retain their rights to sue in either contract or tort. The relevant components of that statutory provision read as follows.

> **72(2)** A remedy that a purchaser of a unit has under this Act is in addition to any other rights or remedies that he has.

> **72(3)** A purchase agreement may be enforced by a purchaser notwithstanding that the developer failed to comply with this Act.

[42] In my view, there would be no need for the provisions in section 72 of the Alberta 1980 Act if a purchaser was categorically excluded from suing for breach of contract under the purchase agreement. In this case, Magnus was a purchaser and CFC was a developer, and section 72(2) of the Alberta 1980 Act is explicit in terms of the continuation of the contractual rights of Magnus, in addition to the other remedies available under the Alberta 1980 Act.

[43] In my view, the Legislature clearly contemplated that these parties would enter into purchase agreements. Further, through the terminology used in the Alberta 1980 Act, the Legislature expressed its intent that such agreements would be enforceable at law.

[44] The analysis above mirrors many of the points raised in ***Hamilton v Ball***, 2006 BCCA 243. The ***Hamilton*** case considered BC legislation that was equivalent to the Alberta 1980 Act.

[45] The issue in ***Hamilton*** was whether a condo unit owner could sue a third party for injury to the common property without involving the condo corporation as a plaintiff: ***Hamilton*** at para 1. The BC equivalent to sections 20 and 25 in the Alberta 1980 Act was section 171, and it reads as follows:

> 171(1) The strata corporation may sue as representative of all owners, except any who are being sued, about any matter affecting the strata corporation, including any of the following matters:
>
> ...
>
> (b) the common property or common assets; ….

[46] The Court in ***Hamilton*** accepted the appellant unit owner's arguments that (a) unless a right of action is expressly taken away by legislation, it continues to exist; (b) co-owners have a cause of action for damages in respect of their property interests, with or without the participation of the other co-owners; and (c) section 171 of the BC legislation neither takes away the unit owners' common law right to sue for damage to their property nor does it vest that right exclusively in the condo corporation: ***Hamilton*** at paras 20, 21, & 23.

[47] Mason argues that the Alberta legislation differs significantly from the BC legislation. He asserts that the BC legislation requires owner approval before commencement of a lawsuit by the condo corporation. In contrast, he asserts that the Alberta 1980 Act is less prescriptive, and leaves more governance matters for the condo unit owners to determine for themselves through their condo board.

[48] To bolster his argument, he asserts that the Alberta 1980 Act sets out general roles and relationships. In contrast, he asserts the BC legislation provides a more comprehensive standardized code of governance.

[49] The flaw in Mason's argument is that if the overall approach of the Alberta 1980 Act is laissez-faire, presumably how and when to commence litigation in the name of the corporation and whether or not an individual unit owner can exercise their common law rights of action individually or through the mechanism of the condo corporation would be matters left to be determined by individual condo boards. That cannot be. In any event, I do not agree that the differences in legislative approaches highlighted by Mason are meaningfully different so as to make the reasoning in ***Hamilton*** not applicable to the issue before me.

[50] Finally, Mason argues that the Magnus Claim could not succeed even under the authority of ***1420041 Ontario Inc v 1 King West Inc***, 2012 ONCA 249 (CanLII) ("***King West***"). In ***King West*** the Ontario Court of Appeal held that a condo owner could sue for specific performance of a contractual term regarding common property closely related to the condo owner's individual unit. In that case, the plaintiff had purchased eight condo units from the developer while the complex was under construction. The plaintiff contracted for four of the units, which were to be made suitable for use as the plaintiff's head office.

[51] That head office space objective, which was underlying the ***King West*** case, required work on the common elements related to those condo units in order to make the property suitable for the plaintiff's purpose. A disagreement arose, and the plaintiff brought an action for specific performance against the developer.

[52] The relevant provision in the Ontario legislation provides as follows:

> **Action by corporation**
>
> **23** (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> > (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
> >
> > (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.

[53] In the course of addressing the issue, Blair JA framed the question before the Court as whether the word "may" in the Ontario legislation grants a condo corporation the exclusive authority to pursue an action in relation to the common elements of the condo: ***King West*** at para 13. In writing for the majority, Blair JA held that the plaintiff condo unit owner was not precluded from advancing its claim for specific performance under the terms of the purchase agreement in relation to the common elements.

[54] Some of the reasoning used by Blair JA suggests that the Court in ***King West*** agreed that the condo corporation had an exclusive right to sue in respect of common elements which admitted only of a limited exception, but some of the Court's reasoning also suggested there could be concurrent rights that were broader than the ability to sue for specific performance on the purchase agreement. For example, the Court stated a statute should not be interpreted as taking away a right of action, unless it is explicit in doing so: ***King West*** at para 30.

[55] The Court in ***King West*** also stated that "may" is permissive, as opposed to being mandatory. Further, the Court in ***King West*** was explicit that the statutory language in the Ontario legislation does not require that any action touching the common elements be brought by the condo corporation: ***King West*** at para 28. The Court also reasoned that simply because the legislature intended to afford the condo corporation a right to sue on its own behalf does not mean that it intended to deprive condo unit owners of rights of action they already had: ***King West*** at para 19.

[56] While the Court in ***King West*** often referred to a condo corporation's "exclusive" right to sue in relation to common property, it usually did so in reference to an argument that it was rejecting. The Court in that case never actually held that the condo corporation had an exclusive right to sue for damages, and it did not cite any authority or provide any reasons for that conclusion.

[57] Further, the Court in ***King West*** never explained why, after concluding that the use of "may" grants the condo corporation standing (but not exclusive standing), it continued to distinguish between a scenario where the condo unit owner pursued an action for damages as opposed to specific performance. I also note that the Court never explained why it seemed to view an action for damages as falling within the exclusive purview of the condo corporation: see, for example, ***King West*** at paras 55.

[58] Therefore, to the extent that ***King West*** suggests that a condo unit owner's action for damages (based on a breach of contract or common law duty of care regarding the common property) is precluded by the legislation, I view it as unexplained *obiter* that is inconsistent with ***King West***'s own reasoning. That being the case, I decline to follow ***King West*** on that point, at least in context of the argument advanced by Mason.

[59] Interestingly, Blair JA also stated that the plaintiff's claim was not a claim for "damage to common elements" in the parlance of section 23(1) of the Ontario legislation. Rather, the claim was to rectify the failure to construct common elements as the developer had agreed to do in the purchase agreement: ***King West*** at para 27.

[60] Given the similarities between ***King West*** and the present case, it raises the question of whether the deficiencies in the common property left by CFC even fall within "damage or injury" contemplated by section 20 of the Alberta 1980 Act. While that is an interesting question, I leave it for another day because none of the parties made submissions on that point.

V. Conclusion

[61] Given the above analysis, I find that Magnus had the right to pursue the Magnus Claims. I make this finding, in part, because I also determined that the Condo Corporation did not have the exclusive right to pursue the Magnus Claims.

Heard on the 15th day of January, 2019.
Dated at the City of Calgary, Alberta this 24h day of May, 2019.

D.B. Nixon
J.C.Q.B.A.

Appearances:

Peter W. K. Ridout of Ridout Barron
for the Plaintiffs

J. Patrick Peacock, QC of Peacock Linder Halt & Mack LLP
for the Defendants