

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2022 SKQB 15

Date: 2022 01 18
Docket: QBG 1441 of 2020
Judicial Centre: Saskatoon

BETWEEN:

PRAIRIE HEIGHTS CONDOMINIUM CORPORATION

Plaintiff

- and -

SOUTHSHORE GROUP OF PROPERTIES INC. and
CORNERSTONE CREDIT UNION FINANCIAL GROUP
LIMITED

Defendants

Counsel:

Randall M. Sandbeck, Q.C. and Logan J. Salm
Daniel B. Alcorn

for the plaintiff
for the defendant, Southshore
Group of Properties Inc.

FIAT
January 18, 2022

CROOKS J.

Background

[1] There is a lengthy history to this property which was summarized in *Holliday v Prairie Heights Condominium Corporation*, 2021 SKQB 171 [*Holliday*], where Justice Elson succinctly sets out the background at paragraphs 1 to 5:

[1] The seven storey, 44-unit condominium building, known as “Prairie Heights” [Building], has seen better days.

[2] On May 6, 2021 the Saskatoon Fire Department [SFD] ordered the closure of the Building, located at 1416 20th Street West in Saskatoon, after a history of problems over the past two years. These problems have included constant vandalism, squatting, illicit drug use and violence, including at least one homicide. The most recent and culminating event was a water leak that has developed in a number of units, eventually pooling in the bottom of the elevator shaft.

[3] At the time of this writing, the Court has received no information as to when, or under what circumstances, the SFD will permit the Building to reopen.

[4] To compound matters, the Director of Community Operations [Director] for the Province of Saskatchewan sought and obtained from this Court a community safety order [CSO] directing the closure of more than half the units in the Building. The CSO was issued pursuant to *The Safer Communities and Neighbourhoods Act*, SS 2004, c S-0.1. While the CSO has legal force, the SFD's closure order presently mutes its practical effect. That circumstance will change when the SFD order is removed or substantively varied.

[5] The condominium units in the Building are ostensibly managed by the respondent, Prairie Heights Condominium Corporation [PHCC] and the PHCC board [Board]. That said, for all practical purposes, PHCC has ceased any meaningful existence. The Court was told that the Board has not met since February 2021. All but one member of the Board has resigned, leaving it without the minimum number of Board members required by its bylaws to carry on.

[2] By order of Elson J. in *Holliday*, Clayton Barry [Administrator] was appointed administrator of the property.

[3] Southshore Group of Properties Inc. [Southshore] is a corporation that owns 13 units within the Prairie Heights Condominium [Building]. The evidence of Larry Bozek, President of Southshore, avers that these units were generally rented out through a verbal agreement. The units have never been occupied by any party with any connection to Southshore. Mr. Bozek's evidence is that at the time the statement of claim in this matter was issued, being December 2, 2020, all of the units were either rented to individuals under residential tenancy agreements or were intended to be rented out.

[4] The evidence of the Administrator confirms the City of Saskatoon Fire

Department ordered the closure of the Building due to mounting safety issues on May 6, 2021. Further, on May 10, 2021, the Saskatchewan Health Authority issued a closure order for the common areas in the Building due to unsanitary conditions. The Administrator avers that the units owned by Southshore have had remediation orders issued.

[5] As noted at paragraph 4 of *Holliday*, a community safety order [CSO] has been issued. This CSO, issued May 7, 2021, in QBG 491 of 2021, closed more than half the units in the Building. This included the 13 units owned by Southshore. All residents of these units were required to vacate within seven days, and any tenancy agreements in effect were terminated at that time.

[6] The Administrator's evidence, in his affidavit deposed September 15, 2021, summarized the current status of the Building at that date:

22. The PHCC Condo is currently vacant and is secured with industrial fencing. Barricades have been installed over all exterior access points. Each unit is barricaded with plywood sheets secured to the door frame.

[7] Through the Administrator, Prairie Heights Condominium Corporation [PHCC] commenced a foreclosure proceeding against Southshore. Underlying the foreclosure proceeding is PHCC's allegation that Southshore has not paid condominium fees, special assessment fees, lien costs and interest calculated on the unpaid fees as and when required by PHCC. As a result, PHCC has registered various interests against titles to Southshore's condominium units pursuant to a lien registered through s. 63 of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [CPA]. PHCC seeks to foreclose on the units owned by Southshore.

[8] In commencing the foreclosure proceedings, PHCC's statement of claim specifically sets out their position that leave to commence this action was not required under *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001 [LCAA]. Southshore

brought the within application alleging that PHCC is required to request leave under the *LCAA* in order to commence foreclosure proceedings and, having failed to do so, requests the court declare the action a nullity.

[9] There were initially two applications before the court. The first is PHCC's application to strike Southshore's statement of defence. In their statement of defence, Southshore disputes the validity of the condo fees, denies there are any arrears due and alleges that PHCC has mismanaged the Building. By agreement of the parties, that application was adjourned *sine die*, returnable on seven days' notice pending the outcome of the within application.

[10] The second application, and the subject of this decision, is to have PHCC's action declared a nullity based on their failure to seek leave to commence the foreclosure proceeding. Southshore takes the position that the action is a nullity as it was commenced without obtaining leave pursuant to ss. 5 and 8 of the *LCAA*.

[11] Relevant provisions of the *LCAA* provide:

3 This Act does not apply to a mortgage or agreement for the sale of land if, at the time of application for leave to commence an action or at the time of application for an order, the land that is subject to the mortgage or agreement for the sale of land is used solely for commercial purposes.

...

5(1) No action shall be commenced except by leave of the court granted on an application pursuant to section 8.

(2) An action that is commenced without obtaining leave pursuant to section 8 is a nullity. [Emphasis added]

[12] PHCC's position is that Southshore uses the 13 units solely for commercial purposes and is therefore excluded from the application of the *LCAA* pursuant to s. 3. As a result, their position is that leave is not required to commence an action for foreclosure.

[13] Southshore’s position is that the 13 units were used or intended to be used as residences by their tenants and, as such, the land is not used solely for a commercial purpose but also has a residential purpose. They invite the court to determine that leave is therefore required and the action is a nullity pursuant to s. 5 of the *LCAA*.

Issue

[14] The sole issue in this application is:

1. Are the units owned by Southshore used solely for commercial purposes?

[15] Determining this issue will confirm whether the *LCAA* applies to this foreclosure. If the *LCAA* does not apply, leave is not required to commence the action, and it will proceed as commenced. However, if the *LCAA* is applicable, leave is required, and the foreclosure proceedings must be re-commenced with PHCC being required to seek leave of the court to do so.

Legal Framework

[16] In *Canterbury Lofts Condominium Corporation v Dureau*, 2016 SKQB 410 [*Canterbury Lofts*], Kalmakoff J. (as he then was) considered the interplay of the *CPA* and the *LCAA*. While *Canterbury Lofts* was determined under the former version of the *LCAA*, *The Land Contracts (Actions) Act*, RSS 1978, c L-3 (rep) [*1978 LCAA*], the practical result remains that a lien registered under s. 63 of the *CPA* creates a charge on the condominium unit securing payment of money which may then be enforced in the same manner as a mortgage. While *Canterbury Lofts* was decided under the *1978 LCAA*, the relevant definition of “action” remains largely consistent under the current *LCAA*. Neither party disputes that the *LCAA* applies to the action under s. 63 of the *CPA* and that a lien for unpaid condominium fees is enforced in the same manner as a “mortgage” under the *LCAA*.

[17] In *Canterbury Lofts*, Justice Kalmakoff discussed the principles of statutory interpretation at paragraphs 12 to 14:

[12] This application turns on questions of statutory interpretation. The cardinal principle of statutory interpretation is that the words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament or the Legislature: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27.

[13] Determining the plain and ordinary meaning of legislative language is not always a straightforward exercise. In *Ballantyne v Saskatchewan Government Insurance*, 2015 SKCA 38, 457 Sask R 254, Justice Ryan-Froslic said this, at para. 20, regarding the ordinary meaning of legislative text:

20 In *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 28-29, Ruth Sullivan sets out three propositions that apply when interpreting the plain meaning of a statutory provision:

1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

[14] When a Legislature uses a term with a well-understood legal meaning, it is presumed that the Legislature intended to incorporate that legal meaning into the statute. Words that have a clear legal meaning should be interpreted as having that meaning unless the Legislature clearly indicates otherwise. Any departure from that legal meaning must be clear, either by express language, or by necessary implication from the statute: *R v D.L.W.*, 2016 SCC 22, [2016] 1 SCR 402.

[18] Justice Kalmakoff determined in *Canterbury Lofts* that leave was required to commence a foreclosure action in order for a condominium corporation to foreclose. However, the underlying ownership and residency of the single unit in that

case are substantially different from the facts of this case. Further, the 1978 LCAA was subsequently amended to include the exception to the LCAA for land used solely for commercial purposes.

[19] Also relevant is s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2, which states:

2-10(1) The words of an Act and regulations authorized pursuant to an Act are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of the Legislature.

(2) Every Act and regulation is to be construed as being remedial and is to be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

Are the units owned by Southshore used solely for commercial purposes?

[20] The LCAA expressly excludes properties used solely for commercial purposes from the application of the LCAA, including the requirement to seek leave of the court prior to commencing a foreclosure action.

[21] The question then arises as to the use of the 13 units owned by Southshore in the Building. Section 3 of the LCAA is at the core of this application and is repeated for convenience:

3 This Act does not apply to a mortgage or agreement for the sale of land if, at the time of application for leave to commence an action or at the time of application for an order, the land that is subject to the mortgage or agreement for the sale of land is used solely for commercial purposes. [Emphasis added]

[22] As “commercial purposes” is not defined in the LCAA, it is subject to statutory interpretation.

[23] In considering whether the land is used “solely for commercial purposes”, PHCC suggests I look to the use of the land by the owner, Southshore. PHCC suggests

that Southshore operates a commercial rental organization and that these 13 units are used solely to generate income for Southshore. PHCC suggests the underlying purpose of the leave process in the *LCAA* remains to protect primary residences and exclude commercial properties, which includes rental property. PHCC invites the court to conclude that Southshore uses these units solely for commercial purposes and, therefore, the *LCAA* is not applicable and leave to commence foreclosure proceedings is not required.

[24] Southshore suggests that the 13 units are not used “solely for commercial purposes”, but rather they are used by tenants for residential purposes. As they have a dual commercial and residential purpose, Southshore suggests the *LCAA* remains applicable and leave is required to commence foreclosure proceedings.

[25] Both parties rely on certain passages of the text of the Law Reform Commission of Saskatchewan, “Reform of *The Land Contracts (Actions) Act*: Final Report, July 2014”, 2014 CanLIIDocs 14 [Report], and invite the court to draw conclusions in support of their respective positions.

[26] PHCC suggests the decision to use “commercial purpose” rather than “primary residence” in the *LCAA* was a practical decision based on the difficulty in classifying the use of some properties at the leave stage of foreclosure proceedings. They propose there is no such difficulty in this case.

[27] Southshore suggests that “commercial” use and “residential” use are well-understood and generally contrasted terms. In counsel’s view, the distinction between commercial and residential use of property was recognized in the *LCAA* when legislators opted not to limit the application of the *LCAA* to “primary residences”, as proposed in the Report. Southshore suggests the Report confirms that if a property may be used for other than commercial purposes, the *LCAA* process must be followed.

[28] The Report provided a number of recommendations, one of which was that the *LCAA* should not apply to properties used for solely commercial purposes at the time of default (Report, page 1). Part of that consideration involved commentary on the distinction between primary residences and properties used for commercial purposes. Ultimately, the Report concluded that no definition of land used solely for commercial purposes was required.

[29] There is no question that the express intention of the *LCAA* is to exclude properties used solely for a commercial purpose from the leave requirements of the *LCAA*. Considering the purpose of the *LCAA* is informative.

[30] In the Report, the purpose of the *LCAA* is set out as follows at page 1:

The Land Contracts (Actions) Act serves an important purpose in allowing borrowers time to sort out their lives before having an action started against them: time to bring the mortgage up to date, refinance, or sell the property before foreclosure or judicial sale or, if that is not possible, time to find alternative accommodation. ... [Emphasis added]

[31] This is consistent with the comments of Wilkinson J. in *First Nations Bank of Canada v Ledoux*, 2005 SKQB 262 at para 7, [2006] 1 WWR 190 [*Ledoux*], where she summarized the governing principles of the 1978 *LCAA* which included giving a “defaulting mortgagor time to order affairs before being caught up in the costly process of foreclosure” (*Ledoux*, para 7(6)).

[32] The Report further concludes at pages 40-41:

Narrowing the application of the *LCAA* would allow the Act to achieve its purpose of protecting home owners by allowing them time to arrange retention of their current residence or to find new accommodation, without unnecessarily providing the same protection to commercial properties. The Commission suggests that identifying and excluding properties that are used for solely commercial purposes will be more straightforward than determining whether a property is a primary residence. No definition of “solely commercial purposes” is required. If a property may be used for other than commercial

purposes, the lender would have to follow the *LCAA* process; however, any solely commercial properties should be excluded as the purpose of the *LCAA* is not to support commercial enterprise.

The exclusion of properties used solely for commercial purposes should be based on the use of the property at default. As the protection of the *LCAA* is intended to give homeowners time to sort out their living situations, if a property is only being used commercially at the time of default, the protection is not required. [Emphasis added]

[33] The Report also discusses the extended timelines that are available to homeowners through the *LCAA* in the event of foreclosure proceedings, including providing notice to the Provincial Mediation Board and permitting adjournments at the leave stage for up to eight months. This also speaks to the purpose of this legislation.

[34] Southshore suggests the provisions of the *LCAA* and *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 [*RTA*], be considered concurrently and the court should look to the *RTA* for context surrounding the use of the units.

[35] From the Report, I am of the view that the protections offered under the *LCAA* were intended to provide protection to the “borrowers” or “homeowners” and were not intended to consider or protect the use by tenants. The reference to searching for new accommodations, if required through the foreclosure process, is specific to homeowners and not to tenants. This suggests the relevant focus for the use of the property is on that of the borrower or homeowner, not the use by the tenant. As noted in the evidence of the Administrator, the Building is currently vacant and barricaded and is therefore of no use to any tenant.

[36] Southshore also relies heavily on the definitions and purpose of *RTA* to support their position that the units are put to residential use and are therefore not solely for a commercial purpose. They invite the court to determine that the definitions in the *RTA* and Southshore’s intention to rent out the units qualify them as “rental units” or “residential property” as the units were rented through “tenancy agreements” under the *RTA* and, therefore, the 13 units are not solely for a commercial purpose, but also for a

residential one. The proposed result is that the *LCAA* applies and leave to commence the foreclosure action is required.

[37] The purpose of the *RTA* has been previously considered by this court. In *Sanderson v Sasknative Rentals Inc.* (1999), 176 Sask R 212 (QB), Barclay J. provided the following:

[5] The purpose of the *Act* [*The Residential Tenancies Act*, RSS 1978, c R-22 (rep)] is to deal with the rights and responsibilities of landlords and tenants in residential tenancies. The *Act* also sets up an enforcement regime that is meant to avoid the usual burdens, both procedural and financial, of court proceedings. The Rentalsman Commission is charged with the responsibility to adjudicate disputes between landlords and tenants. The *Act* is designed to provide an inexpensive mechanism to resolve landlord-tenant disputes in a relatively time efficient and informal manner.

[6] The *Act* also represents a legislative recognition of the need to address a power imbalance between landlords and tenants, to secure a degree of security of tenure for tenants, and to ensure that the cost of litigation is not a bar to the vindication of the legal rights granted by the *Act*. The substantive legal matters that arise in residential tenancies are relatively narrow and straightforward. The dispute mechanism set out in the *Act* is simple and informal. The *Act* is designed to provide access to justice without the need for legal representation.

[38] I do not accept Southshore's suggestion that the definitions in the *RTA* reflect or incorporate a residential purpose under the *LCAA* where the property is solely used by the owner to generate corporate income. In my view, the *RTA* does not infer a residential purpose to these 13 units as it ignores the fundamental distinction between the purposes of the legislation and the distinct parties they are intended to protect.

[39] The purpose of the *LCAA* is directed to protect the owners of the property, not the tenants. As such, I do not find the definitions under the *RTA* persuade me that the intention of the *LCAA* incorporates the use by a tenant. Rather, the *LCAA* is focused on the use by the owner.

[40] In my view, the *LCAA* focuses on the relationship between the parties to

the “mortgage”, which includes a lien under the *CPA*. There is neither protection for nor obligation by a tenant under the *LCAA*. PHCC does not claim any relationship with a tenant, nor assert any claim against a tenant.

[41] It is not necessary to set out a global definition as to what will and will not amount to a commercial purpose under the *LCAA*. Rather, the determination of whether a property is used “solely for commercial purposes” will depend to a large extent on the specific facts in a given case. If there is uncertainty, it is advisable to pursue foreclosure under the leave requirements of the *LCAA*. However, in this case, I am satisfied there is no such ambiguity in the use of the property.

[42] A corporation renting out 13 condominium units does not meet the stated purpose of the *LCAA*: protecting homeowners by allowing them time to retain their current residence or find alternative accommodations prior to having an action commenced against them.

[43] The intention of the legislature through the *LCAA* was not to protect commercial enterprise. The evidence confirms that these 13 units were intended to be an investment vehicle and revenue stream for Southshore. They were purchased and managed as rental investment property. They were never occupied by any party with any connection to Southshore. They are used, by the owner, solely for commercial purposes.

[44] The fact that these units were rented out to tenants does not change their character for Southshore from a commercial purpose to a residential one. At all material times, based on the evidence before me, the use of these units was for a commercial purpose.

[45] Given the circumstances of this case, I am of the view that the 13 units are used for solely commercial purposes. Simply because the commercial purpose is to

derive rental income does not import a residential purpose under the *LCAA*.

[46] As the land is used solely for a commercial purpose, the *LCAA* does not apply. Therefore, leave is not required to commence foreclosure proceedings.

[47] The application to have PHCC's action declared a nullity is dismissed.

"N.D. Crooks" J.
N.D. Crooks