Court of Queen's Bench of Alberta

Citation: 1016637 Alberta Ltd. v. Condominium Corporation No. 891 0469, 2008 ABQB 735

Date: 20081127
Docket: 0601 07003
Registry: Calgary

Between:

1016637 Alberta Ltd., Aziz Ebrahim and Nusrat Ebrahim

Respondents/Appellants

- and -

Condominium Corporation No. 891 0469

Applicant/Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Sal J. LoVecchio

Introduction

[1] This is an appeal from the written decision of Master R.B. Waller Q.C. dated March 14, 2008. In his decision, the learned Master gave Court approval to a Special Resolution of Condominium Corporation No. 891 0469. It's purpose was to amend the provisions of the Condo Plan (which dealt with common property) for a large condominium project located in northwest Calgary. The Special Resolution was effective December 31, 2005.

[2] While the Application to the Court to approve the Special Resolution pitted two factions of condominium owners against each other, the decision impacts all owners of units in the complex and in particular owners who acquired units after the events occurred.

[3] For the reasons which follow, the written decision of the learned Master is affirmed.

The Facts

[4] The basic facts leading up to the Application for Court approval of the Special Resolution are not in dispute.

[5] In the late 1990s, the Appellant 1016637, together with its principals Aziz Ebrahim Mavani and his wife Nusrat Ebrahim (they being the other Appellants) owned 90% of the units in this 266 unit condominium complex.

[6] In September, 2000, Section 9(2)(b) of the ***Condominium Property Act***[1] was amended. Following this amendment, the exterior doors and windows in a condominium complex were deemed to be part of the common property unless otherwise stipulated in the condominium plan for a condominium complex.

[7] In August 2002, Condo Corp. amended the Condo Plan for this complex so that the external windows and doors ceased to be part of the common property. At the time the Special Resolution to effect his change was passed and approved, the Appellants effectively controlled Condo Corp.

[8] In June of 2005, Media West Development Ltd. acquired 231 of the units in the condominium complex. They were acquired primarily from the Appellants. As a result of this sale, the Appellants either ownership or co-ownership of units was reduced to 17.

[9] On March 13, 2006, Condo Corp. adopted a Special Resolution authorizing another amendment of the Condo Plan., whereby the windows and doors would again be part of the common property. At that time, Media West owned 86.98% of the units and, as such, substantially controlled Condo Corp. This control situation was not unlike the prior situation except for one small fact, the controlling player had changed.

[10] It is the subsequent approval of this Special Resolution by the Court which is in issue in this Appeal.

[11] By way of additional background, following the Media West acquisition, a study was commissioned to determine the cost of the then necessary maintenance and repairs required to the complex due to a lack of attention in the past. Following a discussion of the necessary maintenance and repairs at the September 15, 2005 Annual General Meeting of Condo Corp. (which meeting was attended by the Appellant Aziz Ebrahim), on September 20, 2005 the Board of Directors advised the unit owners of the need for a special assessment in the range of $2,660,000.

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[1] RSA 2000, C-22.

[12] Ultimately, a special assessment was assessed against the unit holders on a "per unit" basis or $266 per unit factor. No owner was assessed any more or any less than any other owner, on a per unit basis, for the construction and repair work and the assessment was payable by the owners in installments.

[13] All of the unit holders, with the exception of the Appellants, have paid in full all assessed amounts. It is currently estimated that the Appellants collectively owe in excess of $700,000 for their portion of the special assessment and it should perhaps not be lost in the overall consideration of this Appeal that the Appellants are seeking to use alleged procedural deficiencies in respect of others to potentially avoid what are presently their personal obligations.

The Standard of Review

[14] On an appeal from a decision of a Master in Chambers to a Justice in Chambers the standard of review is one of correctness. That being said, some recent decisions of our Court have suggested that some deference ought to be accorded to a Master, particularly when such decisions are discretionary in nature.

The Statutory Framework

[15] Section 71 of the Regulations under the Act sets out the procedure which must be followed to amend a condominium plan. Briefly it runs as follows.

[16] A Special Resolution must be approved by the owners in the appropriate manner and it is then to be registered. However, a Special Resolution amending a condominium plan may not be registered unless it has also been approved by the Court.[2] This approval is obtained by way of an application to the Court.[3]

[17] When a condominium corporation applies for an order approving an amendment, the corporation must, unless otherwise directed by the Court, give notice of the application to the owners of the units and each holder of an encumbrance registered against title to the complex.[4]

[18] Finally, the Court, if it is satisfied that the interests of the persons to whom notice of the application is given will not be unfairly prejudiced, may make an order approving the amendment to the condominium plan.[5]

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[2] See Regulation 71(1)(f) under the Act.

[3] See Regulation 71(2) under the Act.

[4] See Regulation 71(3) under the Act.

[5] See Regulation 71(5) under the Act.

The Issues on this Appeal

[19] Three issues were raised by the Appellants in this appeal. They are (and I quote from the Appellants Brief):

> (1) Should the Court dispense with service on the Owners and the Mortgagee's?
>
> (2) Is the Special Resolution passed December 31, 2005 valid?
>
> (3) The Court should not allow a waiver of notice to the Owners of the Amendments (sic) who are prejudiced by the amendment.

Discussion and Analysis

[20] Issues (1) and (3) are related. As the starting point in the process is a special resolution, I intend to deal with Issue (2) first.

[21] The Appellants argue that the Special Resolution is improper as it was enacted without proper notice.

[22] As the learned Master correctly pointed out, the Applicant does not seek to amend the By-Laws but seeks to amend the Condo Plan. As just noted, the procedure for amending a condominium plan is outlined in Regulation 71. The first step is passage of a special resolution.

[23] The Act defines a special resolution as either (1) a resolution passed at a properly convened meeting of a corporation or (2) a resolution agreed to in writing by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by the Act or the bylaws and representing not less than 75% of the total unit factors.

[24] It has not been suggested that a properly convened meeting was held. If anything, it is conceded that no such meeting took place.

[25] Section (1)(x)(ii) specifically permits resolutions without meetings provided they are in writing and the threshold majority signs. On December 31, 2005, representatives of Media West executed in writing a "Special Resolution" (see Golade Cross - Ex. D-3). At that time, Media West controlled 86.98% of the voting unit factors in Condo Corp. So the Special Resolution is valid and that aspect of the learned Masters decision is confirmed. I will now address Issue (1) and Issue (3) concurrently.

[26] On January 9, 2006, the Board of Directors of Condo Corp. sent a letter to all of the owners advising them of their intention to seek the amendment to the Condo Plan at issue and suggesting to the owners that any objections they might have to the amendment should be made

in writing to James E. Polley of Bonnycastle Lien Polley. Mr Polley was the lawyer for Condo Corp. at that time. That was the only notice given to any owner of a unit in the complex other than the additional notice mentioned below and that additional notice was given only to the Appellants.

[27] In reply to this letter, the Appellants issued instructions to their counsel to oppose the Application for approval and the Appellants counsel wrote to counsel for Condo Corp. to that effect. This was the only objection received by Mr. Polley. In view of this objection, the Appellants were given notice of the hearing for approval of the Special Resolution by the Court. The Appellants filed a Brief for and they appeared and made representations at that hearing.

[28] The learned Master said in his reasons that he had great difficulty in concluding that notice of the Application, as required by Regulation 71(3), was adequately given. He gave three reasons for that conclusion.

[29] First, he said it was common ground that no notice had been given to the holders of the registered encumbrances and second, the notice sent to the owners (and by that he meant the letter referred to above) did not provide enough information. Finally, from a practical perspective, he thought the time to obtain a waiver of notice (if it really was the intention of Condo Corp. to seek a waiver of notice) was logically before the notice was sent and not at the hearing.

[30] All that being said, the real issue for the Appellants is not whether or not a waiver of notice should be given. The real issue is found in paragraph 28 of the Appellants Brief for this Appeal. In that paragraph, the Appellant suggests "that the Court cannot dispense with service where the sole goal of that dispensation is so that those parties to whom notice is <u>not given</u> are not considered as part of the affected parties under s. 71(5)". [Emphasis was in the original]

[31] This submission was also contained in the Brief the Appellants filed in support of their contestation of the Application by Condo Corp. for approval of the Special Resolution by the Court.

[32] I could find nothing in the written reasons of the learned Master, in the Brief filed by Condo Corp. in support of the Application for Approval, or in the Brief filed by the Respondent in this appeal, which would suggest such a goal was ever part of Condo Corp.'s argument. Quite to the contrary, Condo Corp. justifies its position on notice on the basis that what they gave is substantially adequate so by dispensing with the formal notice requirement the Court was only taking a very small step.

[33] Perhaps more importantly, I could find nothing in the same materials which would then go on to suggest that once a waiver of notice was given, it was their submission that the list of interested parties for Regulation 71(5) purposes was diminished although that seems to be what concerns the Appellants. To deal with this conundrum, I intend to discuss Regulation 71(3) and Regulation 71(5) separately.

[34] Regulation 71(3) is clear and unambiguous. A notice of an application for approval must be given to the owners of the units and any holders of a registered encumbrance unless the Court orders otherwise. The regulation is silent on when the order otherwise should be obtained.

[35] I endorse the comment of the learned Master that from a practical perspective it would be desirable for that to occur in advance of the hearing. In this case, it is understandable why that did not occur as Condo Corp. was not seeking blanket relief but rather arguing substantial adequacy. No explanation appears in the materials for why notice was not given to the holders of any registered encumbrances.

[36] It is clear from the written reasons of the learned Master that he was alive to the issue that either a notice had to be given or relief from the requirement obtained. As I said earlier, he felt such relief should have been obtained in advance.

[37] There are no words in the reasons which might be read as granting a specific waiver of the notice requirement (albeit after the fact) for the holder of an encumbrance. By approving the Application, the Learned Master must be seen as having implicitly granted such a waiver. I see nothing wrong in that. While there is little doubt it would be advisable to obtain such a waiver prior to the Application, given these circumstances and the wording of the Regulation, the failure to do so in advance, should not be seen as fatal to the success of the Application.

[38] The same holds true for the owners.

[39] However, the real issue is not the adequacy of the notice (as a waiver was implicitly given) but rather what should be done with Regulation 71(5) in this case. As already stated, under this provision, the Court may approve an application "if it is satisfied that the interests of the persons to whom notice of the application is given will not be unfairly prejudiced" and the Appellants are concerned that dispensing with notice to a person mentioned in Regulation 71(3) should not have as a consequence the elimination of that person as an interested person for Regulation 71(5) purposes.

[40] I have two comments to make on that submission.

[41] First, I do not believe the words used in the regulation support that position. The words suggest the opposite and the problem is a different one. If, as the learned Master suggests should have be done, the waiver application was brought in advance, the Court in considering that application would likely consider the impact of the proposed amendment on those persons for whom a waiver of notice is sought and the appropriateness of granting a waiver would flow from that consideration. If a waiver was then granted, I fail to see why it would be necessary to revisit the "waiver" group a second time.

[42] Where, as in this case, such a preliminary step was not taken, dealing with the section is more problematic. The learned Master was concerned about the situation that was before him

and he said so. Appropriate notice of the Application had not been given and the holders of a registered encumbrance and the owners of the condominium units would potentially be affected by an approval of the Application.

[43] Both of those groups potentially had several members. What particularly troubled the learned Master was the simple fact both groups were a moving target. More specifically, given the efflux of time between the effective date of the Special Resolution and when the approval Application was heard, he believed there were undoubtedly numerous persons who were now owners or encumbrancers but were not so at the time the Special Resolution was passed.

[44] I shared the same concern, especially when it came to subsequent owners who might be required to bear the burden of the special assessments. To alleviate my concern, the original hearing on this appeal was adjourned so additional evidence could be filed on this point. It was. While it is not a clear as one might like, I am satisfied that persons who purchased units after the Special Resolution was passed were not misled on the future costs they would be required to bear. That being said, the question remains what should be done in this case as no advance consideration was given to the interests of the owners and the holders of an encumbrance so the logical basis for not considering prejudice is absent.

[45] That would mean the Court should consider prejudice to the registered encumbrancers and the owners of the condominiums. That is precisely what the Learned Master did and he came to the conclusion that given the mischief that could be caused by invalidating the steps already taken a better result for all concerned would be obtained by approving the Application.

[46] That ultimately was a balanced decision reached by the learned Master in the exercise of discretion. Given the circumstances, I would do the same thing and for the same reasons.

Costs

[47] The matter of costs was not specifically addressed at the hearing. The Respondents have been successful here and before the learned Master. Costs should follow the result and I so order. If Counsel are unable to agree on the appropriate amount for this Appeal and the Application before the learned Master, they should address the issue before me within the next thirty days.

Heard on the 15th day of June and the 4th day of November, 2008.
Dated at the City of Calgary, Alberta this 27th day of November, 2008.

Sal J. LoVecchio
J.C.Q.B.A.

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