Court of Queen's Bench of Alberta

Citation: 1597130 Alberta Ltd v Condominium Corporation No. 1023241, 2016 ABQB 195

Date: 20160404
Docket: 1303 03946
Registry: Edmonton

Between:

1597130 Alberta Ltd

Applicant

- and -

Condominium Corporation No 1023241

Respondent

Reasons for Judgment
of
L.A. Smart, Master in Chambers

Introduction

[1] 1597130 Alberta Ltd [the "Administrator", or the "Applicant"] applies for an order declaring that a Special Resolution passed by a vote of the owners of Condominium Corporation No. 1023241 is valid. Two sets of individual unit holders [the "Individual Unit Holders"] contend that the Special Resolution was not properly passed according to the *Condominium Property Act*, RSA 2000, c 22 ["CPA", or the "Act"]. The primary issue in this case is the manner in which persons entitled to vote are to be counted.

Facts

[2] Condominium Plan No. 1023241 consists of 24 units. Unit 1 is 4232 unit factors and is described in the Condominium Plan as "assigned to developer for future re-division". Unit 2 is one unit factor being essentially the common property surrounding the existing building. The remaining 5767 unit factors are distributed among Units 3-24, which are residential units contained in an already constructed building but occupancy is not permitted [the "Residential Units"]. The Administrator owns 18 of the 24 units, including Units 1 and 2. It was not the developer but is the successor to the mortgagee which acquired title through foreclosure. The remaining 6 units are individually owned by the Individual Unit Holders.

[3] Since the Administrator was appointed in 2013, it has supervised remedial construction to complete the Residential Units and acquire occupancy permits. The Order appointing the Administrator sets out that the Condominium Corporation must indemnify the Administrator for all expenses that it incurs in arranging that construction. When it was first appointed, the Administrator estimated the costs to complete construction would be approximately $300,000. In June of 2014 it had incurred over $800,000 in construction costs, and estimated a further $400,000 was required to complete the project. As of July 2015, the Administrator estimates the total costs of remediation will be over $2.8 million.

[4] In July of 2015, the Administrator applied for an Order directing that the costs of this construction be distributed proportionately among only the Residential Unit holders. The Administrator argued that Units 1 and 2 (the bare lot units) should not have to pay a portion of the construction cost based on unit factor because those lots did not receive any benefit from the construction.

[5] I denied the Administrator's request in reasons dated November 3rd, 2015, holding that the CPA, did not allow the Administrator to levy contributions on unit owners on a bases other than by unit factor unless the bylaws so provided (which they did not). However, I authorized the Administrator to convene a meeting of the owners to consider alternatives, and perhaps to pass a special resolution to amend the bylaws accordingly.

[6] The Administrator then proposed a special resolution [the "Special Resolution"] which stated, *inter alia*:

> That in calculating the proportionate share of the assessment payable in respect of the residential units of the Corporation, the proportionate shares shall be calculated based on the unit factors attributable to each residential unit of the Corporation (Units 3 through 24 inclusive), in proportion to the 5767 total unit factors of the residential units, and without regard to the 4233 total unit factors attributable to non-residential units in the Corporation, namely Units 1 and 2.

[7] Each owner was sent the proposed Special Resolution and the applicable voting response and proxy forms. The Administrator assigned proxies for 17 of its 18 units. The results of the vote were as follows:

	Owner(s)	Unit #'s	Unit Factor	Vote
1	Administrator	1-10, 13, 14, 16, 18, 21-24	8549	For

2	Maimun Ahmed Coconut Grove Investments Inc	11, 12	492	Against
3	Jeneen Socholotiuk Jay Marchant	15	258	Against
4	David MacDonald Marlene MacDonald	17	230	For
5	Martian Giesbrecht Annaliese Giesbrecht	19	224	Against
6	Gamila Elzein Leila Elzein	20	247	Against

[8] Therefore 8779 unit factors (87.8%) voted in favour of the Special Resolution, and 1221 against (12.2%).

The Issue

[9] The Administrator now seeks a declaration that the Special Resolution was validly passed according to s 1(1)(x)(ii) of the CPA. That provision states:

> 1(1) In this Act,
>
> ...
>
> (x) "special resolution" means a resolution'
>
> ...
>
> (ii) 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 this Act or the bylaws and representing not less than 75% of the total unit factors for all the units;

[10] The Individual Unit Holders contend that s 1(1)(x)(ii) was not satisfied. They submit that while 75% of the unit factors were voted in favour of the Special Resolution, it was not agreed to by more than 75% of all of the "persons...entitled to exercise the powers of voting."

[11] They argue that each of the owners (or sets of owners) listed in the table above constitute the "persons entitled to exercise the powers of voting", for a total of six "persons." As only two of the six voted in favour of the Special Resolution, it did not satisfy s 1(1)(x)(ii) of the CPA.

[12] The Administrator, on the other hand, argues that the Special Resolution passed with the requisite majorities. It submits that as there are 24 units, there should be 24 persons entitled to

vote. As the Administrator owns 18 units, those 18 votes alone met the 75% threshold. It further contends that the interpretation of s 1(1)(x) requiring two majorities significantly impedes effective voting and has the potential to create stalemates, frustrating the operation of condominium corporations. In the alternative, the Administrator argues that the Special Resolution passes even on a strict interpretation of the provision because each of its 18 votes, assigned to proxies, was technically exercised by a different "person entitled to vote".

[13] If they are wrong, some of the Individual Unit Holders submit that passing the bylaw would constitute improper conduct in violation of s 67 of the CPA.

[14] As the improper conduct analysis is dependent upon a finding that the Special Resolution was valid, I will undertake that analysis first. The primary issue in that regard is whether the special resolution passed with a majority of at least "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 CPA] or the bylaws." Central to this determination is both an interpretation of the phrase "persons entitled to exercise the powers of voting," as well as a consideration of how those people are counted.

Analysis

[15] The words of an Act "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature": ***Re Rizzo & Rizzo Shoes Ltd***, [1998] 1 SCR 27 at 41; ***Condominium Plan No. 8222909 v Francis***, 2003 ABCA 234 at para 25 ["***Francis***"].

[16] There are also a number of presumptions that apply when interpreting any statute:

(1) The legislature is a competent and careful user of language and skillful crafter;

(2) Legislatures use simple, straightforward and concise language;

(3) The legislature avoids superfluous or meaningless words and does not repeat itself or speak in vain; and

(4) The legislature uses language carefully and consistently so that the same words have the same meaning and different words have different meanings: ***R v Shell Canada Ltd***, 2000 ABQB 459 at para 26.

[17] S 1(1)(x)(ii) expressly requires a special resolution to be passed by **both** a majority of at least 75% of the persons entitled to vote [the "First Majority"] **and** representing 75% of the unit factors [the "Second Majority"]. Sections 26 and 27 set out who are the persons entitled to exercise the powers of voting; namely, owners and mortgagees. Owner is defined in the CPA as a person who is registered as the owner of the fee simple or leasehold estate in a unit: s 1(1)(s) CPA. The Administrator argues that, because it owns 18 units, it is "18 persons" entitled to vote.

[18] Certainly it is common, and some might say desirable, to give an owner one vote per unit, analogous to shareholders of a corporation having one vote for each share they own. Indeed, condominium statutes in other jurisdictions contain provisions which expressly give owners one vote per unit. For example, in the British Columbia *Strata Property Act*, SBC 1998, c 43, "each strata lot has one vote" at an annual or special general meeting: s 53. In the Ontario *Condominium Act, 1998*, SO 1998, c 19, "[a]ll voting by owners shall be on the basis of one vote per unit": s 51(2). In Newfoundland and Labrador, "[a]ll voting by owners shall be on the basis of one vote per unit and voting may be done by proxy": *Condominium Act, 2009,* SNL 2009, c

29.1, s 21(1). Proposed amendments to the CPA provide explicitly that "an owner has the right to vote with respect to each unit owned and, where required, the right to vote the unit factors for each unit owned": *Condominium Property Amendment Act, 2014*, SA 2014, c 10 (not yet in force) s 17.

[19] However, as those amendments are not yet in force, the current language of the CPA governs. In my view, that language falls short of providing owners one vote per unit. The legislature must be taken to have intentionally chosen the phrase "persons...entitled to exercise the powers of voting" rather than "owner."

[20] Logically, once an owner or mortgagee becomes a "person...entitled to exercise the powers of voting," that person does not then become multiple persons simply because they own multiple units. That owner is still one person. He simply owns more than one unit. The Administrator is only one person entitled to exercise the powers of voting.[1]

[21] The Administrator, however, argues that this interpretation leads to an absurd result. Specifically, it argues that s 26 of the CPA dictates that an owner's voting rights are determined by the unit factors attributable to its owned unit(s). Therefore, requiring a majority on a basis other than by unit factor is inconsistent. Section 1(1)(x) appears to diminish an owner's voting rights in special resolutions such that an owner only has one vote in the First Majority, no matter how many units he or she owns. In circumstances like this case where one person owns a majority of the units, that person's voting rights for special resolutions are not determined by unit factors, as required in s 26(1).

[22] The Administrator further contends that to require two different majorities in this way further restricts the operation of the voting process; in this case making it impossible for either the Administrator or the Individual Unit Holders to pass a special resolution without the other side's agreement.

[23] I agree with the Administrator that the threshold to pass a special resolution is high. However, I disagree that the results of this interpretation are necessarily absurd. As argued by the Individual Unit Holders, s 1(1)(x) demonstrates a clear intention to protect the rights of a minority block of at least 26% of the owners. The simple fact that it might be difficult to get more than 75% of the owners to agree on a special resolution does not make the interpretation absurd but just that, difficult.

[24] Although the wording of the legislation creates somewhat of an inconsistency between s 26(1) and s 1(1)(x)(ii), I must not attempt to resolve this inconsistency by ignoring the language of the provision. Moreover, this interpretation still creates a logical result. Special resolutions are still decided *in part* by a majority of unit factors, and thus an owner's right to vote in that regard is still based on that owner's unit factors. As noted s 26 simply sets out who constitutes a person entitled to vote. Those persons are then counted for the purposes of special resolutions in accordance with s 1(1)(x)(ii).

[1] According to s 28(nn) of the *Interpretation Act*, RSA 2000, c I-8, the term "person" includes a corporation.

[25] The CPA scheme is designed to provide certainty, and thereby achieve fairness: ***Francis*** at para 32. Special resolutions are required only in certain circumstances,[2] and the legislature has logically chosen to make important changes to condominiums possible only by special resolution and further to make those special resolutions such that a minority of at least 26% of the persons entitled to vote is protected from the will of the majority.

[26] Finally, the Administrator submits that it nonetheless complied with this interpretation of the legislation as it assigned 17 of 18 of its votes to different proxies. As unit owners may exercise the powers of voting by proxy (s 26(4) CPA) each person holding a proxy is a "person entitled to exercise the powers of voting" and this Special Resolution was validly passed.

[27] Essentially it argues that by using proxies, the Administrator can turn its single vote into 18. Proxies are merely representatives or agents of principals. The Administrator is a single "person entitled to exercise the powers of voting" and may authorize a single proxy in that regard.

Conclusion

[28] I therefore find the Special Resolution did not pass as the voting response was insufficient to satisfy the threshold of s 1(1)(x)(ii) of the CPA. Given that finding it is unnecessary to undergo an analysis of improper conduct under s 67 CPA. If the parties cannot agree on costs, they may provide brief written submissions to me within the next 60 days.

Heard on the 18th day of February, 2016.
Dated at the City of Edmonton, Alberta this 4th day of April, 2016.

L.A. Smart
M.C.C.Q.B.A.

[2] Special resolutions are required: to change bylaws (s 32(3)); when the condominium corporation acquires or disposes of an interest in real property (s 37(3)); to remove funds from a capital replacement reserve fund for the purpose of making capital improvements (s 38(2)(a)); to transfer or lease common property (s 49(1)); accepting or granting restrictive covenants or easement with respect to the parcel (ss 51, 52(1)); and terminating the condominium status of a building (s 60).

Appearances:

Ronald Haggett
Kennedy Agrios LLP
for the Applicant

Patty Ko
Bishop & McKenzie LLP
for the Individua/ Unit Holders
Coconut Grove Investments Inc/Maimed Ahmed
and Jay Marchant/Jeneen Socholotuik

Damien Shepherd
Chomicki Baril Mah LLP
for the Individual Unit Holders
Martin/Anneliese Giesbrecht and
Gamila/Leila Elzein