Court of King's Bench of Alberta

Citation: Kuhn v Condominium Corporation No. 0627537 (o/a Glennifer Lake Resort Phase 7) 2024 ABKB 199

Date: 20240411
Docket: 2110 00505
Registry: Red Deer

Between:

Darren Kuhn and Joanne Kuhn

Applicants

- and -

Condominium Corporation No. 062 7537 (o/a Glennifer Lake Resort Phase 7)

Respondents

Memorandum of Decision
of the
Honourable Applications Judge M.R. Park

Introduction:

[1] These proceedings were commenced by Darren Kuhn and Joanne Kuhn (collectively the "**Kuhns**") by way of Originating Application filed on April 14, 2021. The Kuhns seek an order and declaration that:

a) All charges listed on the Kuhns' condominium owner's ledger and as reflected in the estoppel certificate(s) prepared by the Respondent in respect of the Lot (as hereinafter defined), including all special assessments for the purchase of shares in a private Alberta corporation, legal costs and interest thereon be declared null and void and such amounts were never owing or payable by the Kuhns.

b) The July 19, 2019 special assessment to fund an investment in the purchase of shares in a private Alberta corporation (the "**Special Levy**") is in conflict with the *Condominium Property Act*, R.S.A. 2000, c. 22 (the "**CPA**") for being *ultra vires*

of the Respondent's statutory powers and, accordingly, is void and of no force or effect.

c) Any provisions of the Respondent's bylaws that purport to assign responsibility for any of the Respondent's general operating costs, including regular legal expenses, are void for being in conflict with the CPA and are therefore of no force or effect.

d) The Respondent has engaged in "improper conduct", as that term is defined at s. 67 (1) (a) of the CPA.

e) As required, a declaration that the Kuhns are an "interested party" as defined at s. 67 (1) (b) of the CPA.

f) Judgment and costs.

Background:

a. The RDFC Share Purchase:

[2] The Respondent, Condominium Corporation No. 062 7537 (o/a Glennifer Lake Resort Phase 7) (the "**Corporation**") is a condominium corporation constituted under the CPA.

[3] The Corporation was created in connection with the seventh and final phase of the Glennifer Lake Resort and Country Club (the "**Resort**"). Each of the phases comprising the Resort were constituted by their own condominium corporation (individually a "**Condo Corporation**" and collectively the "**Condo Corporations**").

[4] The Resort is comprised of some 751 individual units, all or substantially all of which are bare land units.

[5] At times material to these proceedings, the Kuhns owned a unit (the "**Lot**") within the seventh phase of the Resort ("**Phase 7**"). They sold that unit to a third-party purchaser in March, 2021. They remain the owners of a unit developed as part of the third phase of the Resort ("**Phase 3**").

[6] There are significant amenities attached to the Resort, including a golf course, a marina, pools, tennis courts and a restaurant (the "**Amenities**").

[7] Further, the Resort has substantial utility services attached to it, including water, water treatment, waste and sewer water (the "**Services**").

[8] The manner in which the Resort was developed posed certain challenges to the Condo Corporations, in that the Amenities and Services were initially owned by the Resort's developer, Resort Development Funding Corporation ("**RDFC**"). Critically, in addition to holding these "hard

assets", RDFC held the permits necessary for the proper legal functioning of those assets (the "**Permits**").

[9] When substantial completion of the Resort was achieved, RDFC sought to divest itself of the Amenities, the Services and the Permits (collectively the "**Assets**"). It advised the Condo Corporations of its intentions in that regard and essentially offered them a right of first refusal. RDFC expressed that if the Condo Corporations could not or would not complete a purchase of the Assets, it intended to market the same for sale to the general public, leading to the potential acquisition of the Assets by a third-party having no connection with or accountability to the Condo Corporations.

[10] The Condo Corporations were therefore faced with the dilemma of how to respond to RDFC's planned divestiture. Given the obvious potential ramifications associated with a third-party sale, standing by and doing nothing was not an option. A committee (the "**Acquisition Committee**") was therefore struck to examine possible acquisition scenarios and to provide a recommendation in that regard.

[11] The purchase structure developed and proposed by the Acquisition Committee involved the purchase by the Condo Corporations of all the issued and outstanding RDFC shares. A share acquisition was thought preferable to an asset purchase because it would ensure a seamless transfer of the Assets and, in particular, the Permits which, again, were necessary for the proper functioning of the Resort.

[12] The share purchase was to be structured such that each unit owner would effectively own, on an indirect basis, an equal interest in RDFC through the condominium corporation of which they were a member. The idea was that each Condo Corporation would hold shares in RDFC in a number directly proportionate to the number of units in each Condo Corporation relative to the total number of units in the Resort.

[13] The share structure of RDFC was such that a direct acquisition of shares by the Condo Corporations was not possible when bearing in mind the objective of proportionate ownership. Accordingly, it was proposed that the Condo Corporations incorporate a subsidiary company ("**Sub Co**."). Each Condo Corporation would hold a proportionate interest in Sub Co. and Sub Co. would acquire the RDFC shares. There was to be an amalgamation of Sub Co. and RDFC following completion of the share purchase.

[14] The recommendations made by the Acquisition Committee were adopted by an advisory board made up of officers of each Condo Corporation. In order for the recommendations to be implemented and the share purchase completed as proposed, a special resolution needed to be passed by each Condo Corporation. Such resolutions were in fact passed in each case and the share acquisition went ahead as contemplated, funded by special levies (including the Special Levy) issued to each owner of a lot within the Resort. That share purchase will be referred to in these reasons as the "**RDFC Share Purchase**".

b. The Legal Chargebacks:

[15] The Lot is a bare land unit. The Kuhns wished to build on the Lot and had plans prepared in that regard (the "**Lot Plans**").

[16] Apparently, the Lot Plans did not conform to either the Corporation's bylaws or Red Deer County's bylaws. Nonetheless, the Corporation attempted to help push the Lot Plans through for approval at the municipal level. Unfortunately, those efforts were unsuccessful and the Kuhns could not proceed with development as proposed.

[17] It seems the Kuhns believed the Corporation acted improperly and without authority in connection with the Lot Plans and, in October, 2018, they advised the Corporation that they were seeking legal advice or representation. Ultimately, nothing appears to have come of this purported "threat" to commence proceedings.

[18] By way of correspondence dated June 29, 2020, the Corporation advised unit owners that its board had initiated a comprehensive review of the Corporation's existing bylaws and was recommending 21 amendments to those bylaws, including an amendment to permit for electronic voting. According to the Corporation's letter, the proposed amendments were "legally reviewed by the law firm Cassels Brock & Blackwell for clarity, enforceability and compliance with the Alberta Condominium Act".

[19] By way of email sent to Corporation board members on September 17, 2020 (the "**September Email**"), Mrs. Kuhn essentially requested a copy of the Cassels Brock & Blackwell LLP legal opinion referred to in the Corporation's June 29, 2020 letter.

[20] On October 1, 2020, Craig Goodall, who was then the President of the Corporation's board of directors, wrote to Mrs. Kuhn in reply to the September Email (the "**October Email**"). In his response, Mr. Goodall referenced the Kuhn's October, 2018 communication to the Corporations's board (as particularized at paragraph 17 above) and advised as follows:

> "The instruction we have received is to have no contact with you until the lawyer you have retained confirms the status of this legal action which you have initiated. We require receipt of written confirmation that no legal action has been commenced and remains active from this specific law firm, at your sole expense, before any communication will be considered. This written confirmation is to be delivered in paper format in a stamped and sealed envelope to the corporations mailing address."

[21] Following their receipt of this email correspondence, the Kuhns retained legal counsel, who began to communicate with counsel to the Corporation. The Corporation says it incurred legal costs related to that communication in the amount of $6,347.78, which it has passed along to the Kuhns (the "**Legal Chargebacks**"). The Corporation says it is entitled to recover those costs from the Kuhns pursuant to Article 46.1 of its bylaws (the "**Chargeback Provision**"), which provides as follows:

> **46. EXTRAORDINARY COSTS**
>
> 46.1 Any legal, engineering, accounting, or other professional fees or costs ("Extraordinary Costs") that are incurred by the Corporation **as a result of the actions, or a request, of an**

> **individual Unit Owner** shall be the sole responsibility of the said Unit Owner. All such Extraordinary Costs are payable immediately upon presentation to the Owner of an invoice for same. All such Extraordinary Costs shall be deemed to be Owner's Contributions, as defined in these By-laws, and shall be collectible as such. [emphasis added].

Issues:

[22] The issues to be resolved on this application are as follows:

a) Are the Kuhns an "interested party" within the meaning of section 67 (1) (b) of the CPA?

b) Did the Special Levy and RDFC Share Purchase constitute a prohibited investment under the governing legislation?

c) Did the Corporation have the authority to claim the Legal Chargebacks?

Analysis:

a. Are the Kuhns an "interested party" within the meaning of s. 67 (1) (b) of the CPA?

[23] Section 67 of the CPA allows an "interested party" to bring an application for relief in circumstances in which "improper conduct" is alleged to have occurred.

[24] "Improper conduct" is defined by the CPA to include: (1) non-compliance with the CPA, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner, (2) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party and (3) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party.

[25] Under the CPA, an "interested party" is defined as: (1) an owner, (2) a corporation, (3) a member of a board, (4) a registered mortgagee or (5) any other person who has a registered interest in a unit.

[26] The Kuhns have brought this motion under section 67. The Corporation says they lack the requisite standing to do so, as they were not unit owners at the time the Originating Application was filed.

[27] The Corporation's concern is that the Kuhns no longer have any skin in the game. With respect to the declaratory relief sought, they seek significant disruption of the rights of current owners within Phase 7, who it should be noted overwhelmingly approved of the Special Levy and RDFC Share Purchase, while having little stake in the outcome of their application, save for reimbursement of the contribution they made as a result of the Special Levy, which was relatively minor.

[28] While I recognize and acknowledge the Corporation's concern, the Kuhns were unit owners at the time the impugned conduct occurred. In my view, that brings them within the definition of "interested party" in the sense contemplated by the CPA.

[29] In my view, it is of significance to note that the Kuhns remain owners of a unit within the Resort, albeit in a different phase. From my perspective, this eliminates, or at least significantly mitigates, the accountability concern.

[30] Connected to that, were I to dismiss this application on the basis of standing, the Kuhns might still have the ability to bring an action for the declaratory relief against the Phase 3 Corporation. It is desirable to avoid this potential multiplicity of proceedings.

b. Was the RDFC Share Purchase a prohibited investment under the governing legislation?

[31] The Kuhns argue that the Special Levy was an assessment to fund an investment in the purchase of shares in a private Alberta corporation. That levy is said to be in conflict with the CPA as being *ultra vires* of the Corporation's statutory powers, with the result that it is null and void.

[32] Section 43 of the CPA provides that subject to section 37 (3) and the provisions of the Regulation, a condominium corporation may invest funds not immediately required by it and only in accordance with the regulation to the CPA (the "**Regulation**").

[33] Section 31.1 of the Regulation provides that the investments which may be made by a condominium corporation are those set out at Schedule 2 to the Regulation. Those investments include:

a) securities of the Government of Canada, the government of any province or territory of Canada, any municipal corporation in any province or territory of Canada, the Government of the United Kingdom or the Government of the United States of America;

b) securities the payment of the principal and interest of which is guaranteed by the Government of Canada, the government of a province or territory of Canada, a municipal corporation in any province or territory of Canada, the Government of the United Kingdom or the Government of the United States of America;

c) debentures issued by a school division, drainage district, hospital district or health region under the Regional Health Authorities Act in Alberta that are secured by or payable out of rates or taxes;

d) bonds, debentures or other evidences of indebtedness of a body corporate that are secured by the assignment to a body corporate of payments that the Government of Canada or the government of a province or territory of Canada has agreed to make, if the payments are sufficient

i. to meet the interest on all the bonds, debentures or other evidences of indebtedness outstanding as it falls due, and

ii. to meet the principal amount of all the bonds, debentures or other evidences of indebtedness on maturity;

e) bonds, debentures or other evidences of indebtedness

i. of a body corporate incorporated under the laws of Canada or of a province or territory of Canada that has earned and paid

A. a dividend in each of the 5 years immediately preceding the date of investment at least equal to the specified annual rate on all of its preferred shares, or

B. a dividend in each year of a period of 5 years ended less than one year before the date of investment on its common shares of at least 4% of the average value at which the shares were carried in the capital stock account of the body corporate during the year in which the dividend was paid, and

ii. that are fully secured by a first mortgage, charge or hypothec to a body corporate on any, or on any combination, of the following assets:

A. improved real estate;

B. the plant or equipment of a body corporate that is used in the transaction of its business;

C. bonds, debentures or other evidences of indebtedness or shares of a class or classes authorized by this section;

f) bonds, debentures or other evidences of indebtedness issued by a body corporate incorporated in Canada if at the date of the investment or loan the preferred shares or common shares of that body corporate are authorized investments under clause (i) or (j)

g) guaranteed investment certificates or receipts of a trust corporation;

h) bonds, debentures, notes or deposit receipts of a loan corporation, trust corporation or credit union;

i) preferred shares of any body corporate incorporated under the laws of Canada or of a province or territory of Canada that has earned and paid:

i. a dividend in each of the 5 years immediately preceding the date of investment at least equal to the specified annual rate on all of its preferred shares, or

ii. a dividend in each year of a period of 5 years ended less than one year before the date of investment on its common shares of at least 4% of the average value at which the shares were carried in the capital stock account of the body corporate during the year in which the dividend was paid;

j) fully paid common shares of a body corporate incorporated in Canada or the United States of America that during a period of 5 years that ended less than one year before the date of investment has either

   i. paid a dividend in each of those years on its common shares, or

   ii. had earnings in each of those years available for the payment of a dividend on its common shares,

   of at least 4% of the average value at which the shares were carried in the capital stock account of the body corporate during the year in which the dividend was paid or in which the body corporate had earnings available for the payment of dividends, as the case may be;

k) notes or deposit receipts of banks;

l) securities issued or guaranteed by the International Bank for Reconstruction and Development established by the Agreement for an International Bank for Reconstruction and Development, approved by the Bretton Woods and Related Agreements Act (Canada), but only if the bonds, debentures or other securities are payable in the currency of Canada, the United Kingdom, any member of the British Commonwealth or the United States of America;

m) securities issued or guaranteed by Inter-American Development Bank or by Asian Development Bank, but only if the bonds, debentures or other securities are payable in the currency of Canada or the United States of America;

n) first mortgages, charges or hypothecs on improved real estate in Canada, but only if

   i. the loan does not exceed 75% of the value of the property at the time of the loan as established by a report as to the value of the property made by a person whom the corporation reasonably believed to be a competent valuator, instructed and employed independently of any owner of the property, or

   ii. the loan is an insured loan under the *National Housing Act*, 1954 (Canada) SC 1953-54 c23.

[34] Where an investment by a condominium corporation involves the acquisition of shares in a body corporate, the Regulation prohibits the condominium corporation from taking a controlling interest in that body corporate.

[35] In addition to the investments specifically identified in Schedule 2, a condominium corporation may invest funds in any other securities that the Court of King's Bench on application in any particular case approves as fit and proper.

[36] My takeaway from the above is that the sorts of investments authorized by the CPA and the Regulation are those that involve placing capital on hand into a low-risk venture **with the aim of securing income or profit**. For example, funds held by a condominium corporation in reserve

could be invested in a GIC, with the objective of increasing the value of the reserve fund through the accumulation of interest.

[37] Given that, I do not see how the Special Levy and subsequent RDFC Share Purchase could properly be viewed as an "investment", prohibited or otherwise. Those measures were not undertaken with the view of making a buck. They were aimed at securing control of the Assets, which are integral to the proper and legal functioning of the Resort and which form a considerable part of the value proposition bargained for by Resort unit owners when acquiring their respective units.

[38] The issue I was asked to decide on this application was whether the Special Levy and RDFC Share Purchase constituted a prohibited investment under the governing legislation. I find that they did not. This portion of the Kuhns' application is therefore dismissed.

c. Did the Corporation have the authority to claim the Legal Chargebacks?

[39] The Legal Chargebacks were precipitated by the September Email. That email was nothing more than a request for information. The Corporation was required to provide that information to Mrs. Kuhn pursuant to certain provisions of the CPA and the Regulation, to which Mrs. Kuhn referred in her email.

[40] Rather than simply furnishing the information it was statutorily obligated to provide, the Corporation's board elected to send what I perceive to be a hostile and aggressive email purporting to put a condition on the performance of the Corporation's statutory duty, which condition related to a matter that was wholly irrelevant to the subject of the information request.

[41] After receiving the October Email, the Kuhns, in my view quite reasonably, retained legal counsel and costs on both sides began to mount from there.

[42] As noted above, the Chargeback Provision allows the Corporation to recoup from a unit owner any legal costs incurred as a result of the actions, or a request of, that unit owner. The Kuhns argue that the Chargeback Provision conflicts with provisions of the CPA and is accordingly invalid. I need not decide that, as the evidence does not support that the charges levied against the Kuhns were of the sort recoverable under the Chargeback Provision.

[43] The Corporation issued three invoices to the Kuhns seeking reimbursement of its legal costs.

[44] The first of those invoices, numbered 3331 and dated December 20, 2020, is for $878.85 ("**Invoice 3331**"). A copy of the corresponding invoice issued to the Corporation by its legal counsel appears to have been included along with Invoice 3331. That invoice, which is dated November 18, 2020, is also in the amount of $878.85. The description of the legal services provided is lacking, being as follows: "Fees for professional services rendered up to an including October 21, 2020".

[45] The second invoice issued to the Kuhns, numbered 3339 and dated January 21, 2021, is in the amount of $1,877.93 ("**Invoice 3339**"). Again, a copy of the corresponding invoice issued by legal counsel to the Corporation appears to have been provided. That invoice, dated December 3, 2020 and in the amount of $1,877.93, contains a more fulsome description of the legal services provided, and it appears that at least some of those services may have pertained to work done in connection with the Kuhn matter. However, it also seems that some of the fees charged by counsel, and subsequently passed along to the Kuhns, may not have been directly related to work completed in connection with the Kuhn matter.

[46] The third and final invoice issued to the Kuhns, numbered 3340 and dated February 26, 2021 is in the amount of $3,591.00 ("**Invoice 3340**") and was again accompanied by a copy of the corresponding invoice issued to the Corporation by its legal counsel. The description of legal services provided is identical to the description found in the billing that accompanied Invoice 3331.

[47] Invoices 3331 and 3340 (at least the copies of those invoices that are in evidence) contain no meaningful description of the legal services provided by counsel to the Corporation. I am unable to conclude if any of those services related to the Kuhns' matter. Even if they did, for the reasons set out below, those services were not of the sort captured by the Chargeback Provision.

[48] As noted above, some of the legal work performed in connection with Invoice 3339 may have been completed in connection with the Kuhn matter. Even so, I disagree with the Corporation's contention that it would not have incurred any legal costs but for "the Kuhns' challenging of the Corporation, or if they had answered the Corporation's request regarding potential legal action on October 1, 2020".

[49] First, the Kuhns did not "challenge" the Corporation. In fact, it was the other way around. Mrs. Kuhn simply made a request for information. The information she requested was information to which she was entitled and which the Corporation was obliged to provide.

[50] Second, the Corporation did not make a "request" of Mrs. Kuhn. Rather, it made a demand of her and purported to make compliance with that demand a condition of the discharge of its statutory duty.

[51] The conduct of the Corporation in response to a request for information was wholly improper and the Kuhns decision to retain legal counsel in the face of that behavior was entirely justified. Any legal costs incurred by the Corporation were not as a result of the Kuhns' conduct and/or request(s), but as a consequence of the Corporation's own unreasonable behaviour. All such costs are the Corporation's to bear.

Conclusion:

[52] In summary:

a) The Kuhns had standing to bring this application.

b) The Special Levy and RDFC Share Purchase did not constitute a prohibited investment under the CPA and the Regulation.

c) I make no finding concerning the validity of the Chargeback Provision. Regardless of its validity, the Corporation had no right to issue the Legal Chargebacks, as the evidence before the court does not establish that the legal costs it incurred were as a result of the Kuhns' actions and/or a request made by them. In issuing the Legal Chargebacks, I find that the Corporation engaged in "improper conduct", in the sense that term is defined at section 67 of the CPA. As a remedy, the Kuhns are entitled to judgment in the amount of $6,509.42. As per the February 26, 2021 estoppel certificate, that amount appears to me to be the total of the Legal Chargebacks, plus interest. If any of the parties disagree with my calculation of the amount to be repaid, that matter can be spoken to in morning Chambers.

[53] There has been mixed success on the application. The parties will bear their own costs.

Heard on the 13th day of October, 2023.
Dated at the City of Red Deer, Alberta this 11th day of April, 2024.

M.R. Park
A.J.C.K.B.A.

Appearances:

Roberto Noce, K.C. and Michael Gibson, Miller Thomson LLP
for the Applicants

Tamara Prince, Cassels Brock & Blackwell LLP
for the Respondents