Court of King’s Bench of Alberta

Citation: 10060 Jasper Avenue Building Limited v Scotia Place Tower III Inc, 2024 ABKB 568

Date: 20240926
Docket: 1903 13304
Registry: Edmonton

2024 ABKB 568 (CanLII)

Between:

10060 Jasper Avenue Building Limited and WR Equities Inc

Plaintiffs/
Defendants by Counterclaim

\- and -

Scotia Place Tower III Inc

Defendant/
Plaintiff by Counterclaim

Memorandum of Decision
of
Applications Judge B.W. Summers

Introduction

[1] In a Special Chambers hearing the parties brought cross applications: the Plaintiffs seek summary judgment and the Defendant seeks summary dismissal. The parties agree that this case should be determined summarily. There are essentially no facts in dispute and there are no questions of law. The issue is one solely of contractual interpretation.

Facts

The Parties and the Complex

[2] The parties are owners of properties making up the complex previously called “Scotia Place” and now called “Rice Howard Place” (“Complex”). The Complex consists of: (a) three towers--Tower I is 27 floors; Tower II is 24 floors; and Tower III is six floors; (b) an

underground parkade which services all of the towers; and (c) three levels of amenities and retail space (called “the Podium”).

[3] The Plaintiffs are collectively the owners of lands on which Towers I and II are primarily located. The Defendant owns lands on which Tower III is primarily located[1]. The Podium is on the lands owned by the Plaintiffs and the Defendant.

[4] Certain building systems and components are for the entire Complex.

[5] The exterior of Towers I and II are primarily glass. The south and east sides of Tower III are glass.

[6] The legal relationship between the parties is governed by two contracts dated October 31, 1988: called the Owners Agreement and Management Agreement (collectively “Agreements”). If there is any discrepancy between the two, the terms of the Management Agreement are to prevail.

[7] The parties to this lawsuit are successors in interest who have replaced the original parties to the Agreements. They have assumed the rights and obligations of the respective original parties to the Agreements.

[8] The original parties under the Agreements were Pensionfund Properties Limited (“Pensionfund”), The Bank of Nova Scotia Properties Inc (“Bank”) and National Trust Company (“National”). The Plaintiffs first acquired the interest of the Pensionfund and later the interest of the Bank. The Defendant acquired the interest of National.

[9] Under the Agreements, Pensionfund was appointed as Manager of the retail portion of the Complex. Pensionfund was entitled to delegate any or all of its obligations to a “Property Advisor”. Morguard Investments Limited (“Morguard”) is and always has been the “Property Advisor” with respect to the Complex.

The Project

[10] The exterior glass panels for the Complex experienced a significant number of failures over the years and even more so as the Complex aged. In or about 2015 Morguard recommended that all of the exterior glass panels be replaced because the panels had reached their life expectancy, the cost of replacing failed panels was increasing, these panels were no longer being manufactured and replacement panels would be mismatched.

[11] In or about 2015 and 2016 Morguard put forward a proposal to the owners to replace all of the exterior panels and the glazing in the atrium and to improve all three street entrances for the Complex (“Project”). At that time there were three owners: the Plaintiffs, the Bank and the Defendant.

[12] On March 4, 2016 Morguard issued a Notice of Meeting to consider the Project pursuant to the Owners Agreement. Initially the date of the meeting was March 17, 2016 but at the request of the representative of the Defendant it was rescheduled for March 24, 2016 (“March Owners Meeting”).

[13] The Defendant responded by issuing a notice to the other owners and Morguard stating:

[1] In documents cited in this memorandum, the Defendant is called “Tower III”.

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(a) The proposed renovations do not meet the requirements of a Permitted Alteration and will adversely affect the Physical Appearance of Tower III;

(b) The proposed renovations are not Expressly Permitted or Required pursuant to the Owners Agreement in relation to Tower III;

(c) Tower III would like to discuss acquiring some or all of the salvaged panels; and

(d) This notice should be added to the agenda of the March Owners Meeting.

[14] At the March Owners Meeting the Plaintiffs and the Bank voted in favour of the Project and the Defendant voted against. Some discussion occurred regarding the Defendant's dissent, but no resolution was passed in relation to that part of the discussion.

[15] On May 3, 2016 a written resolution was sent to the Defendant proposing modifications to the Project including:

(a) Excluding Tower III from replacing exterior panels;

(b) Tower III would not have to pay its proportionate share of the entrance renovations and reglazing the atrium;

(c) Tower III would have a right of first refusal with respect to the panels removed provided that Tower III enter into a contract with a contractor to remove the panels as well as pay the costs to store, maintain, remove and replace any failed panels on Tower III.

("Modification Proposal")

[16] The Modification Proposal was not accepted by the Defendant.

[17] On July 18, 2016 Morguard notified the Defendant that as the Project had been adopted at the March Owners Meeting it would proceed.

[18] The Project proceeded but the Defendant refused access for work on Tower III.

[19] Morguard sent invoices to the Defendant for its proportionate share of the Project (4.9%): an invoice in the amount of $188,690.98 dated July 14, 2017 for the 2016 Project Costs; and an invoice in the amount of $885,949.85 dated December 21, 2018 for the 2018 Project Costs ("Project Cost Invoices").

[20] The Defendant failed to pay the Project Cost Invoices and issued "Notices of Objection" which sought to invoke the "Expert Decision Making Process" under the Agreements.

[21] This action was commenced by the Plaintiffs against the Defendant on June 26, 2019. The Plaintiffs applied to stay this, their own action, in favour of arbitration under the Expert Decision Making Process. The Defendant opposed that application preferring a court determination in this action. I denied the Plaintiffs' application in a decision reported at **2023 ABKB 23**. One of the grounds for that decision was that the case appeared to be one where summary adjudication may be appropriate.

Interpretation of the Agreements

[22] Whether the Defendant is required to pay for part of the Project depends upon interpretation of the Agreements.

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[23] The Plaintiffs say that the Project was an “unbudgeted” “capital project” (as that latter term is used in section 4.04 of the Management Agreement) which was approved by the necessary majority of Owners at the March Owners Meeting pursuant to section 6.05 of the Owners Agreement and the Defendant is required to pay its proportionate share of the cost (ie the Project Cost Invoices).

[24] The Defendant agrees that the Project is a capital project (within the meaning of that term as used in Section 4.04 of the Management Agreement) but there is nothing within the Agreements that requires an owner to pay for capital “upgrades” of another owner. The Defendant also says that although the operational costs of repair and maintenance of exterior windows was a shared expense under Schedule E to the Owners Agreement (which is also called the “Operating Cost Allocation Agreement”), the Project is not an operating cost but a capital cost with respect to property of the respective Owners.

[25] Since the parties agree that the Project is a “capital project” within the meaning of Section 4.04 of the Management Agreement, I will start there. The pertinent portion of that section states:

> 4.04 Fees for Special Projects
>
> Additional fees will be payable to the Manager in respect of certain special “Projects” as hereinafter described undertaken with the specific approval of the Owner or Owners responsible for the cost of such Project....The fees for such Projects will be charged to the Owners and allocated among them on the basis outlined in the Operating Cost Allocation Agreement, and will in part depend on whether the project is to be a joint responsibility of the Owners or the responsibility of any individual Owner as set forth in the Operating Cost Allocation Agreement. The following are the general classes of Project which may be undertaken:
>
> > (a) Capital Projects
> >
> > A capital project is one which will add to the value of the Complex. Generally, the benefit derived from the project will increase the gross revenue potential or decrease the operating expenses of the Complex. Capital projects include upgrading of existing space and replacement of major components to the building.

[26] The Operating Cost Allocation Agreement (hereinafter “Schedule E”) states, in part:

> Until changed in accordance with the Owners Agreement, Operating Costs will be allocated among the Owners as follows:
>
> ...
>
> 8) STRUCTURAL MAINTENANCE, REPAIR AND REPLACEMENT

Entire Complex	Pensionfund	88.2
	Bank	6.9
	National	4.9

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> This category includes the fabric of the building (exterior curtain glass wall and granite panels (including re-caulking), roof, doors, windows, floors, ceiling, etc.); locks and keys, window replacement, door repairs etc.; and repainting the outside of the Complex and the interior of the Common Facilities.

[27] The Plaintiffs say that the intent of the parties, as reflected in the Agreements, was to connect the cost of "Special Projects" to Schedule E. Schedule E consists of five pages listing 18 categories of expenses with respect to the Complex and assigns a percentage of responsibility to each owner in that category. Most categories assigned to Pensionfund the lion's share of expenses, usually 80% or more (as they owned the lands where Towers I and II were primarily located). Some categories of expenses assigned 100% to an Owner (such as electricity and elevator maintenance in respective properties).

[28] The Plaintiffs say that the Project was unbudgeted. They say that a resolution was passed by a majority of the Owners at the March Owners Meeting in accordance with Section 6.05 of the Owners Agreement. The relevant parts of that section state:

> 6.05 Quorum and Decisions
>
> Two Representatives, one of whom is a Representative of Pensionfund and one of whom is a Representative of the Bank or National, shall constitute a quorum for the making of decisions at any meeting of the Representatives. Decisions of the Representatives shall require the affirmative vote of at least one Representative of each of two Owners (one of which is Pensionfund), subject to the provisions of Section 6.06 and the following provisions:
>
> (a) Except as provided in section 6.05(e), no decision of the Representatives will be made materially and adversely affecting the Lands or Improvements (or rights related thereto) of any Owner who expressly dissents from such decision unless such decision is expressly permitted or required hereunder notwithstanding the dissent of any Owner....
>
> (b) No decision of the Representatives shall prevent any Owner from altering the Improvements on its Lands so long as the course of action is a Permitted Alteration or otherwise expressly permitted or required hereunder notwithstanding the decision of the Owners;
>
> ...
>
> (d) If a decision does not directly and material affect the Lands or Improvements of the other two Owners nor result in any cost to either of them, any Owner may unilaterally make and implement, at its sole cost, a decision relating to the Complex.
>
> (e) If the Representatives of an Owner other than Pensionfund dissent from a decision involving an enhancement to the complex where the Bank's proportionate share involves less than $30,000 and National's proportionate share involves less than $10,000 or involving an Operating Cost, any Owner may refer the matter to an expert in accordance with Article Ten. If the expert determines that the expenditure is reasonable, each Owner shall contribute its proportionate share in accordance with Article Four; and

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(f) If any Owner proposes an enhancement to the Complex, the decision of each Owner to approve the expenditure shall be made solely on the estimated economic impact of the expenditure on the Complex as a whole and not on the economic impact of the expenditure on the Owner's interest in the Complex.

[29] As noted, the Plaintiffs and the Bank voted in favour of the Project resolution. The requirement of a majority, including the Pensionfund (Plaintiffs as successor), was met.

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[30] The Plaintiffs refer to the following sections of the Management Agreement to support their argument that unbudgeted capital expenses are to be voted upon:

> 3.02(3) Notwithstanding the provisions of sections 3.01, 3.02(1) and 3.02(2), the Manager shall not take any of the following actions for any Owner with respect to the Complex or such Owner's portion of the Complex without the prior written approval of such Owner:
>
> ...
>
> (e) except as provided in section 3.09, agree to incur any capital expenditure not specifically set out in the then current budget approved by the Owners...
>
> If approval of the Owners is required for any purpose under this Agreement, it may be given only as provided in section 6.07 of the Owners Agreement.
>
> ...
>
> 3.09 No funds held by the Manager for the account of the Owners or any of them (whether or not in separate accounts maintained for each Owner in accordance with section 3.07) shall be disbursed except in accordance with the following provisions:
>
> (i) the Manager shall be entitled to pay out of such funds all expenditures to third parties properly chargeable to the Owners or any of them hereunder, on behalf of such Owners, provided that at least one of the following applies to each expenditure:
>
> > (b) such expenditure is an unbudgeted expenditure of less than $5000 (but which together with all other unbudgeted expenditures in the year will not exceed 5% of the total amount of the budget for such fiscal year) or which has received the approval of the Owners or the Owner on whose behalf it is paid.
>
> 6.07 Approval of Owners
>
> Approvals of the Owners required or permitted to be given hereunder may only be given by decision of the Owners at a meeting of the Representatives or by instrument in writing pursuant to Section 6.06.
>
> (emphasis in the foregoing sections is provided by the Plaintiffs)

[31] The Defendant says that Schedule E has no application to a capital expenditure; that it applies to operating costs only. Since the Project was a capital expense other parts of the Agreements will determine who is responsible for the costs. In particular, the Defendant relies upon the first sentence in Section 5.03 of the Management Agreement. That entire Section states:

5.03 Allocation of Expenses

Each Owner shall be responsible for the payment of expenses identified specifically to such Owner. As to those expenses which are to be borne by the Owners but which have been incurred jointly by more than one Owner or with respect to other properties and cannot be identified specifically to one or more of such Owners or properties, the Manager shall allocate such expenses among the Owners and the properties in a reasonable manner and in accordance with the Operating Cost Allocation Agreement where applicable, and shall from time to time report such allocation to the Owners but at least annually.

[32] The glass panels were replaced on Towers I and II, but not III. In that sense, the Project can be said to be for the expense of the Plaintiffs only (as argued by the Defendant). However, under the Project the glass panels were to be replaced for the entire Complex, including Tower III and it was only due to the Defendant blocking access to Tower III that this work did not get completed.

[33] I do not think the Court should determine the nature of the expense based upon the fact that the Defendant prevented access to its property for the work to be done. If access had been allowed and work had been done on Tower III, the expense would be one that could not be "identified specifically to one or more of such Owners or properties" and the Manager would be required to allocate expenses "among the Owners and properties in a reasonable manner and in accordance with the Operating Cost Allocation Agreement...".

[34] The Defendant describes the Project as an "enhancement" carried out on the Plaintiffs' portion of the Complex. The Defendant says that its Representative understood that the Project was primarily for aesthetic reasons based upon a comment from a representative of Morguard named Ed Hawkes.

[35] I do not accept the argument that replacing the windows was done for aesthetic reasons. I find that the evidence of Morguard's representative Darin Comrie overwhelming on this point:

(a) "(s)ince the construction of the Complex in 1982, the Complex experienced a long history of issues dealing with the repair, maintenance, and replacement of the Complex's glass curtain wall and Panels";

(b) yearly audits were performed that showed the cost of window replacement was increasing;

(c) "numerous reports were obtained by the Owners in an effort to deal with and evaluate the repair, maintenance, and replacement of the Panels...";

(d) a "2003 Due Diligence Review" of Scotia Place Building prepared by Read Jones Christoffersen...confirmed...in any event the Panels were approaching their life expectancy of approximately 20 to 30 years";

(e) "Morguard was attuned to the issues of the Panels and was continually assessing the Panels..."; and

(f) "In light of the Reports and continuing failures with the Panels, Morguard was faced with two options...replace all exterior Panels of the Complex; or take a piecemeal approach such that failed Panels be replaced with similar ones that

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> do not match the original Panels in colour. This would result in a mismatched and inconsistent appearance to the Complex".

[36] Like the Plaintiffs, the Defendant makes specific reference to Section 6.05 of the Owners Agreement which deals with decision making of the Owners. However, the Defendant argues that the Project was a unilateral decision to carry out a "Permitted Alteration" on the Plaintiffs' property under clauses (b) and (d) of Section 6.05.

[37] But the Defendant asks the Court to ignore that the decision made was not just that of the Plaintiffs, but it was a decision of the Plaintiffs and the Bank; and that it was a decision not with respect to just the Plaintiffs' property but with respect to the entire Complex, including Tower III.

[38] With respect to Section 3.02(3) of the Management Agreement stated above, the Defendant argues that the Project was an unbudgeted expense. Since the Plaintiffs do not dispute this, I need not deal with it.

[39] Referring to clause (f) of Section 6.05 of the Management Agreement (stated above), the Defendant argues that there is no evidence that the Project was in the financial interest of the Complex as a whole rather than just on the Plaintiffs' interest in the Complex. I do not agree with that argument. The evidence from Darin Comrie of Morguard as to why the windows needed replacing defeats that argument.

[40] I am certainly aware that Tower III had far fewer windows and far less window failure than Towers I and II due to their south and east exposure. But that does not derogate from the fact that all of the windows in the Complex were the same type of windows and the parties had agreed to share the expense of repairing and replacing them. Schedule E does in fact refer to replacement of windows in part 8. I do not think that it should matter that just because replacement of all of the windows had become more economical than doing it on a piecemeal basis that the Owners intended something different than as set out in Schedule E.

[41] Consider what has been paid in the past. The Defendant (and its predecessor National) has paid 4.9% of the annual cost of window repair even though most repairs were on Towers I and II. Clearly the Defendant has been paying for an improvement to the Plaintiffs' property for many years.

[42] Consider what will be paid in the future if the Defendant's argument is accepted. Subject to warranty coverage for the new windows, the Defendant will have to continue to pay 4.9% of the cost of repairs on windows on Towers I and II. Conversely, the Plaintiffs will have to continue to pay 85.1% of the repairs to Tower III (that are now over thirty years old and have no warranty), until such time as the Defendant decides to replace them. With that interpretation, the Defendant will never be incentivized to replace the windows on its tower.

[43] The Defendant argues that the Plaintiffs' interpretation of the Agreements is extremely unfair in that it is required to pay 4.9% of the cost to replace windows in Towers I and II. In my view that is no more unfair than the fact that the Defendant (and National before it) has been paying 4.9% of the cost of fixing the window failures, which were occurring on the Plaintiffs' property at a much higher rate. The unfairness complained of by the Defendant is only exacerbated by its refusal to have its own windows replaced.

[44] In my view, the interpretation to the Agreements propounded by the Defendant actually brings about a potential rewriting of the Agreements. Consequently, it is not acceptable.

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Conclusion

[45] It is appropriate that this case be decided summarily. The Plaintiffs application for summary judgment is granted. The Defendant's application for summary dismissal is dismissed.

Heard on the 20th day of August, 2024.
Dated at the City of Edmonton, Alberta this 26th day of September, 2024.
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B.W. Summers
A.J.C.K.B.A.

Appearances:

Alexandra C. Bochinski
DLA Piper (Canada) LLP
for the Plaintiffs/Defendants by Counterclaim

Matthew Turzansky
Field LLP
for the Defendant/Plaintiff by Counterclaim

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