In the Court of Appeal of Alberta

Citation: Ferchoff v Condominium Corporation No. 1412788, 2025 ABCA 227

Date: 20250623
Docket: 2501-0043AC
Registry: Calgary

Between:

**Gordon Ferchoff, GE'O Builder's Group Inc.,
and Budget Investments & Research Ltd.**

Appellants

- and -

**Condominium Corporation No. 1412788, Raphael Jimenez, Brenda Gagnon,
Tom Ftichar, Chantelle Ftichar, and Bruce Berkan**

Respondents

The Court:

**The Honourable Justice Michelle Crighton
The Honourable Justice Anne Kirker
The Honourable Justice William T. de Wit**

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice A.G. Kuntz
Dated the 17th day of January 2025
Filed the 24th day of January 2025
(Docket: 2301-06950)

Memorandum of Judgment

The Court:

Introduction

[1] This case involves Condominium Corporation No. 1412788 (CC) and whether the respondents, members of the CC board of directors and owners of some of the CC units, could charge condo fees, or a special levy, on the appellants, the developers and builders of the CC and also owners of units. The condo fees in question are for units of bare land and parking stalls.

[2] The chambers justice was asked to interpret By-Law 47 of the CC By-Laws to determine if the condo fees or levy were contrary to the By-Laws.

[3] By-Law 47(i) sets out that during the initial stages of development and before 90% of the units were sold or occupied by the developer, no common expenses could be levied against the developer. The chambers justice considered the meaning of "occupied" and found that 90% of the units had been sold or occupied and that present and retroactive condo fees were payable. The appellants argue that the chambers justice erred in her interpretation of "occupied", used inadmissible affidavit evidence in her interpretation of the By-Laws and ignored the appellants' estoppel argument.

Facts

[4] The CC was established in 2014 and was to be developed in a multi-phase project involving five phases or units. The appellants, Budget Investments and Research Ltd. (Budget) and Ge'o Builders Group Inc. (Geo) are owners of the original five units, some of which have had buildings constructed upon them and some which have not.

[5] Unit 1 is bare land owned by Geo and rented to an unrelated business, Cochrane Rentals, on which machinery is parked and stored.

[6] Unit 2 is owned by Budget and in 2014 was redivided into units 16-23, which are within a constructed building and occupied except for unit 23, which is a mechanical room and a common property unit. Unit 2 also includes 10 parking stalls, listed as units 6-15, seven of the parking units are paved and have power outlets. (It appears these parking stalls are available to rent or purchase but are not rented or are used by people at the CC).

[7] Unit 3 was originally owned by Budget but was sold and subdivided into units 24-31 and are not in issue.

[8] Unit 4 is bare land owned by Budget that has been rented to Cochrane Rentals and used as a storage yard.

[9] Unit 5 is bare land owned by Budget and has not been leased or rented.

[10] The appellants have never paid condominium fees with respect to units 1, 4 and 5 or the parking stalls in the redivided units 6-15.

[11] In 2022 the appellants were in negotiations to sell some of their units and requested that the CC issue an estoppel certificate to allow for the sale. The CC refused to provide the estoppel certificate on the basis that the appellants owed $97,923.14 in condominium fees retroactive to 2020. The amount of fees may be less but the amount owing is not in issue on this appeal.

[12] The appellants denied owing any condo fees and took the position that the CC's request for such fees was in contravention of By-Law 47 of the CC By-laws and that retroactive fees could not be assessed.

[13] The CC board recharacterized the retroactive condo fees as a special levy at a meeting on May 19, 2023, but the appellants maintain that the special levy is also contrary to By-Law 47.

[14] On June 6, 2023, the CC emailed the appellants the approved budget for April 1, 2023 to March 31, 2024, which included condo fees for the disputed units and the parking stalls and a Special Levy for the period of April 1, 2022 to March 31, 2023 in the amount of approximately $22,000.

Decision of the Chambers Justice

[15] The chambers justice stated that the correct interpretation of By-Law 47 was a matter of contractual interpretation and did not require that she assess conflicting affidavit evidence. She also stated the CC board's past conduct did not aid in the interpretation By-Law 47 because there was nothing ambiguous in the By-Laws that would require consideration of prior conduct.

[16] The relevant provisions in By-Law 47(b) are:

> At least fifteen (15) days prior to the end of each fiscal year the Corporation shall deliver or mail to each Owner at the municipal address of his Unit:
>
> (i) A copy of the budget for the ensuing fiscal year; and
>
> (ii) A notice of assessment for the Owner's contribution toward the Common Expenses of the Corporation for said ensuing fiscal year. Said assessment shall be made to the Owners in proportion to the Unit Factors for their respective Units EXCEPT, in the sole discretion of the Board, acting reasonably:
>
> > (A) any expenses which should be paid on a per Unit basis to be fair and equitable may be so charged; or

> (B) any expenses that relate directly and solely to the maintenance, improvement, operation, repair, replacement or restoration of all or part of the Common Property or Managed Property or of any one or more Units and not all the Units may be charged and shall be paid solely by the recipient Unit Owners of such maintenance, improvement, operation, repair, replacement or restoration, as the Board may determine;

[17] The relevant provisions of By-Law 47(i) are:

> (i) Notwithstanding anything to the contrary hereinbefore contained, during the initial stages of development and before 90% of the Units have been occupied or sold by the Developer of the Project, the following provisions will apply:
>
> (i) the Corporation/Developer will cause to be prepared an interim statement of anticipated Common Expenses, or occupancy fees, excluding the replacement reserve fund, which may be revised and sent to the Owners every three (3) months;
>
> (ii) the Owner or occupier of a Unit shall pay to the Corporation on the first day of each month, commencing on the first day of the month next following receipt by the Owner or occupier of a Notice of Estimated Monthly Assessment, the amount of the estimated monthly assessment or occupancy fees towards Common Expenses for which the Unit is responsible; and
>
> (iii) No assessment of Common Expenses shall be levied against the Developer as Owner of a unit until completion of construction of the building in which the Unit is located, and it is used and occupied for its intended purpose by the Developer as Owner of the Unit or a tenant of the Developer Owner of the Unit;

[18] After reviewing By-Law 47, the chambers justice concluded the exception accorded to the developer, that they need not pay common expense fees (condo fees) for units, did not apply after the developer occupied or sold 90% of the units in the CC. If 90% of the units were occupied or sold, condo fees could be levied against the developer pursuant to By-Law 47(b). She also found that By-Law 47(i)(iii) stated that fees could only be levied against a developer if a building was constructed on the unit, but this was only if less that 90% of the units had been sold or occupied.

[19] The chambers justice found that "occupied" in By-Law 47(i) meant something less than a unit having a building that was occupied or owned. She referred to By-Law 47(j) which provides that condo fees can accrue towards a developer prior to the completion of the construction of a building. Therefore "occupied" must mean something other than a unit with an occupied building.

[20] The chambers justice also referred to section 47(1)(7)(c) of the *Condominium Property Act*, RSA 2000, c C-22, which refers to "occupier" of common property as including bare land units, as further confirmation that occupation can be less than a constructed building.

[21] The chambers justice concluded that the word "occupied" simply meant that it was being used. She noted the appellants had been renting units 1 and 4 to Cochrane Rentals for over five years for a fee and concluded that units 1 and 4 were occupied. She also concluded that the parking stalls, units 6-15, were also occupied as they had been developed for a particular use, had been offered to the public and were being utilized for their purpose even if they had not yet been rented. She also found the mechanical room, unit 23, was occupied. She found that unit 5, the bare land, was not occupied.

[22] The chambers justice found there were 31 units on the registered condominium and redivision plans and that was the correct number of units. She rejected the appellants' claim of 45 units because of future units attributable to units 4 and 5. She also rejected the appellants' assertion that not all of the parking stalls were occupied.

[23] As she concluded that only unit 5 was not occupied, this meant that more than 90% of the units were sold or occupied and therefore the exception in By-Law 47(i)(iii) did not apply and the appellants were subject to condo fees pursuant to By-Law 47(b).

Grounds of Appeal

[24] The appellants claim the chambers justice erred in four ways:

1. Incorrectly relying on inadmissible evidence regarding how the By-Laws should be interpreted in concluding that if the appellants had voted "no" at the May meeting, it would not have changed the outcome of the vote.

2. Misinterpreting the meaning of the word "occupied" in the By-Laws by not considering its meaning in the condominium development context.

3. Using an overly expansive definition of "occupied" in an inconsistent manner between bare lots and parking stalls.

4. Ignoring the estoppel argument in the application.

Standard of Review

[25] Condominium by-laws are more similar to laws and regulations passed by legislative bodies than to contractual provisions. Therefore, interpretation of a by-law is a question of law and subject to the correctness standard of review: *Dunn v Condominium Corporation No 042 0105*, 2024 ABCA 38 at para 18. However the application of facts to the interpretation of by-laws is a question of mixed fact and law and the standard of review is palpable and overriding error: *Condominium Corp No 311443 v Goertz*, 2016 ABCA 362 at para 23.

Analysis

Incorrectly relying on inadmissible evidence regarding how the By-Laws should be interpreted in concluding that if the appellants had voted "no" at the May meeting, it would not have changed the outcome of the vote.

[26] At the May 19, 2023 board meeting, a vote was to be held regarding the passing of the special levy resolution. One of the board members, the appellant Gord Ferchoff, advised the board that he would not be attending, but that his vote would be "no". The other five board members voted in favour. The chambers justice found Mr. Ferchoff's no vote would not have changed the result.

[27] The appellants argue that the chambers justice erred by relying on the legal conclusions in the affidavit of Tom Ftichar to come to her conclusion. She did not. The chambers justice specifically stated at paragraph 61 of her decision that it was improper to have a lay witness testify as to the meaning of legislation or contracts and that she would accord no weight to such evidence. We take her at her word, but in any event, there is no indication she relied on any opinion in the Ftichar affidavit evidence in coming to her interpretation of the By-Laws, beyond referencing the exhibited copy of the By-Laws themselves.

[28] The appellants argue further that they had the ability to request a "poll vote" and not a "voting by show of hands" as set out in By-Laws 32 and 33. They rely on the affidavit of Ken Ferchoff to support their position. The appellants argue that a poll vote on a special resolution is based on unit factors and as the appellants hold 6558.57 of the 10,000 unit factors, Ferchoff's "no" vote would have changed the result. (See By-Law 1(q)(i) and (ii))

[29] The chambers justice referenced the exhibited copy of the By-Laws and in particular, By-Laws 16, 32 and 33. By-Law 33 stipulates that a poll vote is only available at a general meeting of unit owners, where the corporation votes **as a whole** on ordinary or special resolutions [emphasis added]. A board meeting involves only board members and By-Law 16, which precedes any reference to poll votes, provides that votes are by a simple majority. Accordingly, the board can, by board resolution, determine issues of the operating account and reserve fund and the need to levy contributions on owners as provided in By-law 5(i) and (j) and section 39(1) of the *Condominium Property Act*, which permits a board to approve a special levy. The By-law allows board members, on behalf of the CC, to raise and collect amounts from owners by way of levying assessments.

[30] The record demonstrates, the chambers justice did not rely on opinions in the Ftichar affidavit. She referenced the exhibited By-Law as she was required to do and made her determination based on her interpretation of the By-Laws. Nor did she err in her interpretation of the By-Laws and the *Condominium Property Act* to conclude that Gord Ferchoff's vote would not have changed the result of the May 19, 2023 board vote to pass the special levy resolution.

[31] We dismiss this ground of appeal.

Misinterpreting the meaning of the word "occupied" in the By-Laws by not considering its meaning in the condominium development context.

[32] The word "occupied" is not defined in the By-Laws. The appellants argues that the meaning of "occupied" had to be determined in the context of condominium development. They take the position that "occupied" means that a building had to have been constructed on the unit. They agree that the chambers justice needed to interpret By-Laws 47(i) and 47(i)(iii) but state that the chambers justice did not interpret these By-Laws harmoniously.

[33] By-Law 47(i) states:

> Nothwithstanding anything to the contrary hereinbefore contained, during the initial stages of development and before 90% of the Units have been occupied or sold by the developer of the Project, the following provisions will apply.

[34] By-Law 47(i)(iii) states:

> No assessment of Common expenses shall be levied against the Developer as Owner of a unit until completion of construction of the building in which the unit is located, and it is used and occupied for its intended purpose by the Developer as owner of the Unit or a tenant of the Developer Owner of the Unit.

[35] The arguments made before this Court are similar to those made before the chambers justice. We will not repeat the reasons given by the chambers justice for finding that a building need not have been constructed for units to be occupied. The chambers justice referred to numerous provisions in the By-Laws and relevant sections in the *Condominium Property* Act in reaching her conclusion on the meaning of "occupied" and how it operates relative to fees for a developer. The By-Laws provide that a developer should not have to pay condo fees while they are expending resources and money to construct a building and receiving no monetary return from the land under development. However, where there are no plans for further development or further "initial stages of development", and the developer is receiving or able to receive rent from property they are no longer developing. They should pay fees for expenses relating to their property.

[36] Units without buildings are defined as bare land units in section 1(1)(b) and (y)(ii) of the *Condominium Property Act*. By-Law 47(i) does not refer to units "with a building" but units "occupied". We agree with the chambers justice that one can occupy a unit of a condominium plan without there being a building on the unit. This is especially so in the circumstances of this condominium plan which is a commercial development where the appellants are renting units which include bare land for storage and other units that are parking stalls without a building.

[37] We find no error in the chambers justice's conclusion that By-Law 47(i)(iii) creates an exemption for the developer from paying condo fees unless there is an occupied building on the unit. But the exemption ends once 90% of the units are sold or occupied.

[38] We dismiss this ground of appeal.

Using an overly expansive definition of "occupied" in an inconsistent manner between bare lots and parking stalls.

[39] The appellants argue the chambers justice was inconsistent in her determination of which units were occupied. The chambers justice found the bare land units used for storage and for which the appellants were receiving rent were occupied. She found that unit 5 had a vehicle parked on it but there was no indication of anyone specific using the property and no rent was being paid, so it was not occupied. She further found that the units used for parking stalls which were being rented or leased, and others which were available for purchase, were also occupied.

[40] The appellants argue the chambers justice erred in law by applying different standards or definitions of "occupied" to different units. They state that if not obtaining rent is a factor that rendered unit 5 not occupied, then some of the parking stalls also were not occupied because vehicles parked on them without rent or a lease being paid.

[41] The chambers justice differentiated the parking stalls from unit 5 by finding that they had been developed and were being used for their intended purpose, even though some of the stalls had not been rented or purchased. She also considered that although a vehicle was parked on unit 5, there was no evidence that it was being used by anyone specific and therefore was not occupied: Decision at para 47.

[42] The circumstances were different between the parking stalls and unit 5. When interpreting the meaning of a By-Law, the chambers justice had to read the words of the entire By-Law in its "entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the CPA, the by-laws, and the intention of the drafters": *Dunn v Condominium Corporation No 042 0105* at para 18 There were no issues of fact in this case. The chambers justice had to apply the facts to the interpretation of the word "occupied" used in By-Law 47: *Condominium Corp. No 311443 v Goertz* at para 23.

[43] The chambers justice considered three significant factors in determining whether the units without buildings were occupied: 1) whether the units was being rented and a fee was being collected; 2) whether the unit was being used for its intended purpose; or 3) whether it was being used by anyone specific. These factors are consistent with the need and purpose of condo fees

[44] The word "occupied" is not defined in By-Laws or in the *Condominium Property Act*. Whether a unit was occupied, in the context of the facts of this case, involved consideration and weighing of different factors. Being "occupied" did not require all factors to be present. Only unit

5 had none of these factors. Therefore, the chambers justice's weighing of the factors was not inconsistent. We see no error in the chambers justice's determination that the facts related to the parking stalls and unit 5 were different and the parking stalls were occupied while unit 5 was not.

[45] The appellants argue that the chambers justice should have considered the fact that only seven of the parking units were paved and argues that the unpaved units would not be used as a parking stall. This was not argued before the chambers justice but is being raised on appeal for the first time. The respondents submit that this is not a suitable issue to be considered for the first time on appeal as more evidence would have been called had the appellants raised this before the chambers justice.

[46] We agree with the respondents that this is not an issue that should be considered for the first time on appeal and in any event, the paving of the parking stalls is irrelevant as it does not determine whether the units could have been used for their intended purpose.

[47] We dismiss this ground of appeal.

Ignoring the estoppel argument in the application.

[48] The appellants argue that the chambers justice should have ruled that the CC was estopped from issuing condo fees and/or a special levy on units 1, 4 and 5 prior to 2025. They argue the By-Laws do not allow for any retroactive condo fees and By-Law 47(k) does not allow for retroactive fees to be labeled "omissions". The appellants take the position that prior conduct is relevant to the issue of estoppel and the chambers justice should have applied estoppel to prevent the CC from imposing retroactive fees or levies. More specifically, they argue that the CC cannot demand the appellants pay fees over a period when the CC itself did not pay fees for the same period.

[49] The chambers justice recognized that the By-Laws do not allow the imposition of retroactive fees or levies. She also noted the CC may not have complied with By-Law 47(i) and (ii) when it engaged the process under to By-Law 47(b), but she held that the prior conduct did not "impact the proper interpretation of the By-Laws": Decision at para 34. The CC's failure to pay fees was not the issue before her.

[50] The chambers justice held the appellants were liable for fees or a special levy under By-Law 47(k) which provides that "the omission by the Corporation to fix the assessments [under the By-Laws] for the next ensuring fiscal year or other period provided herein, shall not be deemed a waiver or modification" to the By-Laws "or release the Owner or Owners from their obligation to pay the assessments or special contributions...but the assessments fixed from time to time shall continue until new assessments are fixed." She found this suggests that "an updated budget and notice of assessment will not be considered retroactive if there is a previous budget and assessment in place": Decision at para 58. She also referred to By-Law 48 which allows for special assessments where they are "tied to a previous annual assessment and insufficient to meet the common expenses" and concluded that if a unit owner was given a "budget and notice of

assessment for the ensuing year there was leeway to assess fees in a more flexible basis as needs arise": Decision at para 59. She concluded the appellants liable for condo fees and/or a special levy from the point when they first received a budget and notice of assessment in accordance with By-Law 47(b) (i.e. 15 days prior to the end of the fiscal year).

[51] The appellants state that the chambers justice erred by suggesting that an omission under By-Law 47(k) could be cured by merely delivering any budget. However, the chambers justice clearly stated that there must be a budget and notice of assessment for the ensuing year and that budget and that assessment was in relation to a specific unit. In our view, the chambers justice did exactly what the appellant is requiring.

[52] The chambers justice properly interpreted the By-Laws by considering them in their entire context and their grammatical and ordinary meaning and in conjunction with the *Condominium Property Act*. She made no err in finding that the appellants were liable for condo fees and/or a special levy from the point of time when they first received a budget and notice of assessment in March 2023 and that any changes to that assessment were not retroactive fees.

[53] We dismiss this ground of appeal.

Conclusion

[54] This appeal is dismissed.

Appeal heard on June 13, 2025

Memorandum filed at Calgary, Alberta
this 23rd day of June, 2025

Authorized to sign for: Crighton J.A.

Kirker J.A.

de Wit J.A.

Appearances:

P. Robinson
for the Appellants

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for the Respondents