

Court of Queen's Bench of Alberta

Citation: Liu v Calgary Chinatown Development Foundation, 2017 ABQB 149

Date: 20170303
Docket: 1401 13225
Registry: Calgary

2017 ABQB 149 (CanLII)

Between:

**Kwan Ying Liu, Thoai Phong Lam, Yin Ping Tam
Yuk Chun Chung, Tak Hing Tang and Pik Han Law**

Appellants

- and -

Calgary Chinatown Development Foundation

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice A.D. Macleod**

Appeal from the Decision by Master K.R. Laycock
Dated the 07th day of July, 2015

[1] The six Appellants are tenants of a condominium development in Chinatown, a vibrant part of downtown Calgary. They are central to an ongoing dispute between the Bowside Manor Tenants' Advocacy Group ("TAG") and the Respondent, the Calgary Chinatown Development Foundation ("CCDF"). The dispute centers on the residential leases held by the six Appellants and the rent they are being charged by CCDF. This dispute was originally brought before the Residential Tenancy Dispute Resolution Service ("RTDRS") in the fall of 2014 but was then

referred by it to the Alberta Court of Queen's Bench in December of that year. The dispute was ultimately heard by Master Laycock in June 2015. The Master dismissed the application with costs and his judgment is appealed.

[2] Essentially, TAG seeks this Court's assistance in enforcing, on behalf of the six Appellant tenants, an agreement between CCDF and the Canada Mortgage and Housing Corporation ("CMHC") which was made pursuant to the *National Housing Act*, RSC 1985, c N-11. CCDF, the landlord, resists on various grounds including that the tenants are not privy to the contract between it and CMHC and the claims are barred by the *Limitations Act*, RSA 2000, c L-12.

[3] The standard of review in this appeal is one of correctness: *Bahcheli v Yorkton Securities Inc*, 2012 ABCA 166.

Background

[4] CCDF is a non-profit Alberta Society incorporated on May 6, 1976 and involved in the planning and construction of the residential and commercial development known as Bowside Manor in Calgary, Alberta. There are residential tenancies in the building, a few commercial tenancy units, and an underground parkade. Construction of the building was completed in the late 1970's and CCDF has operated and managed the building since it opened. The board of CCDF is made up of volunteers from the Calgary chinese community. The building sits on three parcels of land, two of which are leased to CCDF and the third is owned by CCDF.

[5] The financing of the building was accomplished in large part by a CMHC mortgage.

[6] CCDF received a subsidy from CMHC so that CCDF could offer, in some residential units, below-market rent geared to the income of the tenants. In addition to the mortgage document, CCDF entered into an Operating Agreement with CMHC dated March 12, 1979, which included the following terms:

2. Rental/Occupancy

...

(2) Accommodation in the project shall be leased at rental rates according to the income of the tenant, as set forth in Schedule "A" attached up to the maximum rent. Where fully serviced accommodation is not provided the rent is to be reduced by an amount approved by the Corporation which represents the cost of services not provided as set forth in clause 1(11) above.

...

(5) The Borrower shall obtain evidence of the income of the lessees at the time of initial occupancy and annually thereafter and adjust the amount of rent to be paid by the lessee in accordance with the change in income. Individual leases will make provision for this requirement. Verification by the auditor shall be provided in his report to the effect that a rent-to-income ratio has been applied, that income reviews and confirmation of incomes have been undertaken and necessary rent adjustments have been made.

(6) The amount of rent to be paid by the lessee shall not be increased more frequently than annually. However, the amount of rent paid may be reduced at any time upon receipt of concrete evidence that the income of the lessee has decreased since the last annual income review. The lease rent shall be reinstated when the income of the lessee increases to its original amount. Individual leases will make provision for this requirement. The actual policy regarding the above shall be determined by the non-profit corporation/cooperative association with the concurrence of the Corporation.

3. Leasing of House Unit

...

(3) Each lease will make provisions for the annual verification of income and rent to be charged according to the rent-to-income scale.

4. Federal Assistance

...

(4) Should the federal assistance paid in any fiscal year exceed the actual assistance required as established by the Corporation upon receipt of the Annual Project Data Report and financial statements of the Borrower, the excess will be refunded within thirty days of the Corporation by the Borrower subject to the provisions of paragraphs (6) and (7) of this clause.

...

(8) The borrower is required to submit an audited statement of final capital costs within six months of the interest adjustment date of the loan. Any necessary adjustments to the level of federal assistance will be made upon receipt of this audited statement.

...

7. Care Facilities

(1) The federal assistance will be restricted to the shelter component only of accommodation with care facilities.

(2) The Borrower shall provide adequate evidence that provincial or other per diem rates or grants will be available for the operating costs of the non-shelter components and that together with the federal assistance the project as a whole will operate on a break even basis.

...

10. Annual Review

- (1) Three months following the end of the borrower's fiscal year the borrower shall submit to the Corporation a Project Data Report- Schedule "E" attached supported by audited financial statements and a project budget for the next fiscal year, as appropriate. Where applicable, the audited financial statements are to separate the revenue and expenses for the shelter and non-shelter components of the project.
- (2) The Corporation shall review and adjust, if necessary, the economic rents annually on the basis of the data provided in (1) above.
- (3) Where applicable, the annual project data report will only reflect data related to the shelter component of the project.

...

12. Books, Accounts and Audit

- (1) The Borrower shall maintain books, records and accounts in a form satisfactory to the Corporation, and shall permit the Corporation to inspect such books, records and accounts by a representative of the Corporation at any time.
- (2) For the purpose of verifying revenue or expenditures and of obtaining statistical or other information on the operation of the project, the Borrower will permit the Corporation to have access to the project and to its books and records.
- (3) The Borrower will for statistical purposes, supply such information as is required by the Corporation.
- (4) The duties of the borrower's auditor will include:
 - a) Preparations of a statement of profit and loss including details of all revenue and expenses;
 - b) Preparation of the balance sheet;
 - c) A statement indicating whether or not verification of the incomes of the occupants and the rent calculations as required by Clause 2(5) have been undertaken. This assessment by the auditor may be undertaken on a test basis.
 - d) Preparations of the Annual Project Data Report.
 - e) Auditor's statement.

...

18. Default

The Corporation shall have the rights, in the event of the Borrower failing to maintain the low rental character of the project or otherwise committing a breach of this agreement, to declare the unpaid principal of any CMHC direct loan mortgage on the project due and payable forthwith or to discontinue all federal assistance on all NHA Loans or to avail itself of any recourse reserved in any CMHC direct loan mortgage document as though the text of this undertaking was reproduced in full therein which rights are in addition to any other rights to restrain any breach of or to enforce this agreement.

[7] All six of the Appellants are long term tenants who signed a residential lease in the 1990's and the first years of 2000. None of the six residential tenancy agreements before me contain clauses reflecting the substance of sections 3(3), 2(5), and 2(6) of the Operating Agreement despite the agreement that those clauses be inserted in the residential tenancy agreements. There was no explanation as to the omission and CMHC appears not to have raised it, notwithstanding that CMHC monitored the operation and the record is replete with evidence that CMHC adopted a supervisory role under the terms of the Operating Agreement.

[8] It would appear that CMHC was regularly consulted on matters of rent and CCDF provided annual reports and other financial statements, which included reports of the landlord's compliance with the terms of the Operating Agreement. While the record perhaps does not contain each and every report, communication, or financial statement submitted to CMHC by CCDF, there are many examples and it seems that CCDF was performing the reporting function as required by the Operating Agreement to the satisfaction of CMHC.

[9] In August 2007, CMHC and CCDF entered into an agreement to adjust the maximum federal assistance and in 2009 the parties entered into a Contribution Agreement under which CCDF received approximately \$250,000 and which included terms requiring it to remain a non-profit society and to provide subsidized housing for a period of ten years from that time. The final payment on the CMHC mortgage was made in May of 2015 and under its terms the Operating Agreement came to an end.

[10] A number of issues were raised by the Appellants, three of which attracted the most concern:

a. Minimum Rent

[11] This term does not appear in the Operating Agreement but "minimum rent" is clearly a factor which is used to calculate the rent payable in the subsidized units remaining in Bowside Manor, of which there are 34.

[12] CMHC and CCDF were both concerned with the financial viability of the project. This is referred to in the Operating Agreement itself and in subsequent correspondence. For example, in a letter dated November 24, 1994 to CCDF, CMHC supports CCDF's proposal to increase the rent-to-income ratio from 25% to 28-30%. Ultimately CCDF chose 30%. With respect to the minimum rents which were then in place, while CMHC acknowledged that there was no provision in the Operating Agreement for CMHC approval of minimum rents, CCDF was

directed to administer minimum rents at their own discretion “in order to maintain financial viability of the project.”

[13] From that time on there is evidence of discussions between CMHC and CCDF about minimum rents and the concept appeared to become an accepted factor for use in calculating rents for subsidized units. CMHC and CCDF were not, however, always in agreement as to the amount to be used as a minimum rent.

[14] The position of the Appellants is that the use of minimum rents was contrary to the Operating Agreement or, alternatively, the minimum rent set by CCDF was too high.

b. Electricity

[15] The Appellants claim that they are being charged too much for electricity and that under the Operating Agreement they should be responsible only for their pro-rata share of the cost of electricity for the residential portion of the building.

c. The Reserve

[16] The Appellants claim that CCDF is maintaining a reserve which is too high, resulting in higher rental charges.

The Role of CMHC

[17] During the course of argument I inquired about CMHC and their position in respect to this action. I was told by counsel that CMHC preferred not to be involved and the parties had not taken any steps to name it as a party. One would normally expect all parties to the contract to be before the Court to enable it to fully adjudicate the issues in question while being satisfied that no injustice is done either to the parties or to others who are interested in the subject matter: *Alberta Treasury Branches v Ghermezian*, 2000 ABCA 228 at para 15.

[18] CMHC’s mandate was judicially considered in *Canada Mortgage and Housing Corp v Iness* (2004), 70 OR (3d) 148 (CA) at paras 5-8, leave to appeal to SCC refused, [2004] SCCA No 167:

CMHC is a federal Crown corporation that is constituted as an agent of Her Majesty in Right of Canada pursuant to s. 5(1) of the *Canada Mortgage and Housing Corporation Act*, R.S.C. 1985, c. C-7; s. 4 of the *National Housing Act*, R.S.C. 1985, c. N-11; and Part I of Schedule III and Part X of the *Financial Administration Act*, R.S.C. 1985, c. F-11.

The purposes of the *National Housing Act*, which are set out in s. 3, include: "to promote housing affordability and choice" and "to protect the availability of adequate funding for housing at low cost".

In furtherance of those purposes, Parliament authorized CMHC to make loans and contributions and to attach terms and conditions thereto. The relevant provisions of the *National Housing Act* are as follows:

95(1) [CMHC] may make loans and contributions to assist with the payment of the capital and operating costs of housing projects, and may forgive amounts owing on those loans.

(2) [CMHC] may determine the terms and conditions on which it makes a loan or contribution or forgives an amount under subsection (1), including, without limiting the generality of the foregoing,

(a) conditions with respect to the operation or occupancy of a housing project.

In the exercise of the authority conferred upon it under the *National Housing Act*, CMHC enters into operating agreements with housing co-operatives to which it provides funding.

[19] I have also had the benefit of the diligent work that Kelvin Kwok did (as part of TAG) in obtaining many of CMHC's documents under the *Access to Information Act*, RSC 1985, c A-1. This, together with CCDF's affidavits, has resulted in there being before me much of the correspondence involving CMHC and CCDF, as well as between CMHC and TAG. They include the following:

1. The letter of November 24, 1994 from CMHC to CCDF directing CCDF to administer minimum rents at their own discretion "in order to maintain financial viability of the project."
2. As early as September 19, 1983, CMHC wrote to CCDF noting the significant decline from current year's figures due to the deterioration of the rental market in Calgary. CMHC advises CCDF as follows:

Before adjusting your current rents downward you should first of all assess the impact it would have on the viability of the project. We suggest if current rents can be maintained without having a detrimental effect on the marketability of the units then you should not adjust them. If, on the other hand you are experiencing some difficulty in marketing the units at current levels then perhaps some adjustment should be implemented, the amount of which would be left to your discretion.

3. CMHC was receiving, reviewing and approving audited financial statements, annual project data reports and other materials. For example, there is a letter from Ms. O'Neil at CMHC to CCDF acknowledging receipt of audited financial statements, annual project data reports and other related materials for CCDF's fiscal year ended December 31, 2010. She goes on to say "that CMHC has now completed their review and are pleased to advise that the information is accepted as submitted. A summary of our review is attached." There is a similar letter from CMHC to CCDF dated July 19, 2013 and July 28, 2014.
4. There is a letter from CMHC to CCDF dated September 27, 2013 (originally sent in May 2012) advising CCDF of recent changes at CMHC. As a result of the March 2012 federal budget, CMHC had undertaken a review of its operations and government funded programs. As a result, the supervision of many of the projects, including Bowside Manor, was going to be less hands on.

5. On September 2, 2014, CMHC wrote to counsel for CCDF about the ongoing dispute between CCDF and TAG. The letter includes the following:

In this regard, the differences of opinion in relation to operational and administrative matters are as between the tenants and its board of directors. In certain circumstances, operational matters may raise compliance issues under the Operating Agreement, but at this time and based on a review of information provided to date, CMHC has not raised concerns regarding the administration of Bowside Manor.

6. With respect to the reserve, in 2013 CCDF commissioned a Capital Replacement Funds Study from Read Jones Christoffersen Ltd. This was reviewed by CMHC who replied on April 10, 2014 approving the Capital Replacement Plan. The letter did require adjustments and provided directions for follow up, but it clearly indicates an active monitoring function on the part of CMHC.

[20] In the fall of 2013, the board of CCDF determined it necessary to increase rents and advised CMHC. There are a series of emails and correspondence indicating that Ms. O’Neil at CMHC thought that the minimum rents being charged were above the industry standard of \$300 and recommended that they use the industry standard of \$300 as a minimum rent. While CMHC’s recommendation was communicated to the tenants, it would appear that this recommendation was, to the knowledge of CMHC, never implemented.

[21] According to the affidavit of Kelvin Kwok, a number of concerns were raised by TAG directly with CMHC. Mr. Kwok had been thorough in his requests under the federal access to information legislation and had marshalled some arguments in favour of lower rent. This culminated in a meeting between TAG and CMHC on June 16, 2016 in Calgary. During this meeting, according to the notes that Mr. Kwok attached as part of Exhibit “K” to his Affidavit, a number of issues were discussed between representatives of TAG and representatives of CMHC including:

- (a) Why certain provisions of the Operating Agreement, which were required to be in the residential tenancies agreements, were not in those agreements?
- (b) Did CMHC allow CCDF to charge a minimum rent greater than 30% of a tenant’s household income while retaining huge operating surpluses in the last decade?
- (c) Why did CCDF charge so much for domestic electricity?
- (d) Why does CMHC allow CCDF to transfer the amount of money it does to its replacement reserve fund?
- (e) A number of questions were asked about the rent charged to commercial tenants contrary to the Operating Agreement.

[22] In other words, the discussion covered all of the issues that have been raised in connection with this action. In each case, CMHC responded that it felt that CCDF had acted appropriately and CMHC had no concerns that it was not acting in compliance with the Operating Agreement. Moreover, CMHC felt that the tenants of Bowside Manor had received at least as much benefit in terms of subsidized rent as CCDF had received in government assistance.

[23] Obviously, TAG disagreed with the positions taken by CMHC and they have pursued this action.

[24] The question as to which position should be preferred as to between the Appellants and CMHC is a question for this Court's consideration only if it finds that terms of the Operating Agreement are:

- (a) implied into each of the residential tenancy agreements, or
- (b) found to be enforceable by the Appellants.

Implying Terms

[25] The Appellants argue that this Court should imply the terms which were left out of the residential tenancy agreements because the Operating Agreement mandates their inclusion in those agreements. However, the residential tenancy agreements stand on their own. They are workable and there is no compelling reason to imply terms to give them commercial efficacy: *Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc*, 2013 ABCA 200.

Enforcing Operating Agreement by the Appellants

[26] It is strongly argued that this Court should permit the Appellants to enforce the Operating Agreement such that the rent-to-income ratio applies rather than the minimum rents. They also argued before me that CCDF's reserve fund is too large which has resulted in a lesser subsidy to which the Appellants are entitled. Finally, they argue that the electricity charges are nearly double what they should be under the Operating Agreement.

[27] There has long been a judicial debate in this country as to when the doctrine privity of contract can be ignored and when benefits negotiated between A and B for the benefit of C, can be directly enforced by C. The two leading cases in this country are *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3 SCR 108 and *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299.

[28] The Supreme Court has held that third party beneficiaries may enforce benefits conferred upon them in a contract to which they are not a party if:

- (a) the parties to the contract intended to extend the benefit in question to the third parties seeking to rely on the contractual provision; and
- (b) the activity performed by the third parties seeking to rely on the provision is the very activity contemplated as coming within the scope of the contract in general, or the provisions in particular, as determined by reference to the intention of the parties.

On its face, the two-prongs of the test are met here.

[29] Courts have imposed limits on the application of the exception. One of those is that it not be used as a sword; it may only be used as a shield. That reasoning is rather awkward here because while on one hand the Appellants are the aggressors in the litigation, on the other hand what they seek to do is to prevent CCDF from charging higher rent.

[30] However, the appellate courts in our country are reluctant to disregard the doctrine of privity and they have made it clear that the exception should only be applied to avoid injustice: *London Drugs* at 446.

[31] The Appellants argue that this is a clear case where the benefits were intended to extend to the tenants who were renting subsidized accommodation in Bowside Manor. While that may be so, argues CCDF, the Operating Agreement does not provide for enforcement by the tenants and the remedy for failing to comply with the agreement is exercisable only by the parties to it.

[32] At first blush, the Appellants have a strong argument that they should receive the benefit which was negotiated for them by CMHC. But upon a close examination of the facts of this case, the application of the doctrine of privity does not result in an injustice. I say this for the following reasons:

1. The Operating Agreement contemplates separate enforceable residential tenancy agreements which were indeed entered into. There is no evidence before me that the Appellants relied on the terms of the Operating Agreement prior to entering into their individual residential tenancy agreements. The Appellants did, however, rely on CMHC to perform its duty to monitor CCDF's activities and ensure that CCDF was offering subsidized housing.
2. CMHC has a large number of projects across the country and actively monitors them. If individual tenants could enforce those agreements it would be inimical to CMHC's adopting uniform policies of management across the country. It is clear that CMHC established policies for overseeing these projects and to allow the tenants to litigate these issues would be counterproductive.
3. The policies adopted by CMHC sometimes affected the interpretation of the Operating Agreements. A good example is the concept of minimum rent. While that concept does not appear in the Operating Agreement, CMHC had an overriding concern about the financial viability of their subsidized housing projects. There was the introduction of the minimum rent and the acceptance of that idea by CMHC who ultimately determined that CCDF should administer minimum rents at their own discretion in order to maintain the financial viability of the project. Accordingly, even if I were inclined to accede to the Appellants' arguments, I could do nothing other than to enforce the Operating Agreement as CMHC interprets it. The record before me, however, makes it clear that CMHC does not consider CCDF to be in noncompliance with the Operating Agreement. In my view, this is fatal to the Appellants' case. Given the dynamic relationship between CMHC and its borrower, it cannot be said that the Appellants were ever the beneficiary of a contractual right that had crystalized into a defined benefit to the tenants. Much was left to the discretion of CCDF. CMHC clearly wanted to preserve flexibility in the management of these projects, to among other things, preserve their financial viability.

[33] Accordingly, it is my view that this is not a case where the doctrine of privity should be ignored and the Appellants cannot, in my view, enforce the terms of the Operating Agreement against CCDF. It is unnecessary for me to consider the limitation issues.

[34] In conclusion, I agree with the result reached by the Master and the appeal is therefore dismissed.

[35] As to costs CCDF wanted to defer that question until after my decision. The Master granted enhanced costs against the tenants. I will hear the parties on costs but I feel compelled to say that I did not consider the arguments made by the tenants to be unmeritorious. Counsel for the Appellants has provided his services *pro bono* which is very much to his credit. It is my view that the Courts should be accessible to arguments such as the ones that have been put forward on behalf of the tenants. If counsel cannot agree on costs they may address me by correspondence.

Heard on the 8th day of November 2016 and 20th day of January, 2017.

Dated at the City of Calgary, Alberta this 3rd day of March, 2017.

A.D. Macleod
J.C.Q.B.A.

Appearances:

Mr. David Khan
for the Appellants

Mr. Jeffrey L. Smith, Q.C.
Mr. Richard E. Harrison
for the Respondent