COURT OF APPEAL FOR ONTARIO

CITATION: 3716724 Canada Inc. v. Carleton Condominium Corporation No. 375, 2016 ONCA 650
DATE: 20160830
DOCKET: C61559

Hoy A.C.J.O., Brown and Huscroft JJ.A.

BETWEEN

3716724 Canada Inc.

Applicant (Respondent)

and

Carleton Condominium Corporation No. 375

Respondent (Appellant)

Christy Allen, for the appellant

Nadia J. Authier, for the respondent

Heard: July 22, 2016

On appeal from the order of Justice M. Gregory Ellies of the Superior Court of Justice, dated October 15, 2015, with reasons reported at 2015 ONSC 6626, 63 R.P.R. (5th) 57, and at 2016 ONSC 1296, 63 R.P.R. (5th) 73.

Hoy A.C.J.O.:

[1] This appeal considers the oppression remedy in the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Act*").

[2] The respondent, 3716724 Canada Inc., owns a number of commercial parking spots in a mixed-use condominium. It rented them out on a monthly basis.

It wanted to start renting out the spots on an hourly basis instead to increase its profits. The respondent asked the appellant, Carleton Condominium Corporation No. 375, to approve changes to the common elements required to make that shift. The board of directors of the appellant (the "Board") was worried about the security implications of the changes requested because they would make it easier for trespassers to enter the building. Ultimately, it refused to approve the changes unless the respondent hired a full-time security guard who would monitor its operation.

[3] The respondent commenced this application, arguing that the Board had unfairly disregarded its interests contrary to s. 135 of the *Act*. The application judge agreed with the respondent, ordered that the respondent be allowed to make the changes, and dispensed with the need for a vote of the unit owners.

[4] The appellant argues that the application judge erred (i) by considering evidence not properly before him; (ii) in finding that the appellant unfairly disregarded the interests of the respondent; and (iii) in dispensing with the need for a vote of the unit owners.

[5] I would give effect to the first two arguments and allow the appeal. It is not necessary to address the argument that the remedy granted by the application judge was not appropriate.

[6] To explain my conclusion, I will first set out the legal and factual background for this appeal. Then I will summarize the reasons of the application judge and conclude by providing my reasons for allowing the appeal.

1. LEGAL BACKGROUND: OPERATION AND MANAGEMENT OF CONDOMINIUMS

[7] The *Act* provides the legal framework for the establishment and management of condominiums in Ontario.

[8] A condominium is a form of property ownership which combines individual property interests, exclusively owned by individual "unit owners", and common elements that are jointly owned by all unit owners as tenants in common: *Re 511666 Ontario Ltd. et al. and Confederation Life Insurance Co.* (1985), 50 O.R. (2d) 181 (H.C.J.), at pp. 189-190.

[9] Property becomes a condominium and starts being subject to the *Act* upon registration of a declaration and description: s. 2(3). Registration of the declaration will also create a condominium corporation, which is a corporation without share capital whose members are the unit owners: ss. 2(3) and 5(1).

[10] Section 27(1) of the *Act* provides that a board of directors shall manage the affairs of the corporation. Part of a board's obligation is to oversee and manage the common elements of the condominium. The corporation is deemed to be the occupier of the common elements and may be found liable as such. Therefore, the

corporation, and by extension the board, has a legal obligation to manage the common elements: *MTCC No. 985 v. Vanduzer*, 2010 ONSC 900, at para. 28.

[11] An owner wishing to make an "addition, alteration or improvement" to the common elements must, among other things, obtain the approval of the board: s. 98. In addition, if the board chooses to treat a proposed change as "substantial" then it must also be voted on and approved by unit owners who own at least two thirds of the units of the corporation: ss. 97(4) and (6).

2. FACTUAL BACKGROUND

[12] The condominium at issue is a mixed-use condominium building, containing both residential and commercial units, located in the ByWard Market area in Ottawa, Ontario. This condominium and the appellant were constituted by a declaration registered on April 23, 1987.

[13] The respondent owns a number of commercial parking spots in the condominium. It rented out the parking spots on monthly basis since it purchased them. However, renting the parking spots on a monthly basis was no longer profitable according to the respondent, and it wanted to convert its business to a "pay and display" hourly parking operation. The declaration creating the appellant specifically permits the use of the parking spots for a commercial hourly parking business:

> All Parking Units owned or leased by the Owner of Unit 27, Level 1 and located on Level A of the Parking Garage

> may be used for a commercial parking business for the leasing of individual parking spaces for such period of time as the Owner, its assigns, tenants or sub-tenants of such Parking Units may in its sole discretion determine provided that not less than 30 such Parking Units are made available at all times for hourly or daily parking.

Indeed, years before, the parking spots had been used in a commercial hourly parking business, albeit with a parking attendant on site.

[14] To convert its business into an hourly parking operation, the respondent requires a number of changes to the condominium's common elements, including (i) installing a garage loop detector on the garage ramp that would cause the garage door to open as a vehicle approached; and (ii) changing the hardware on an exterior door which would provide free access to a stairwell leading to the garage.

[15] The respondent sought the Board's approval to make the changes in May 2012.

[16] From the very beginning, the Board made clear that it was concerned that some of the changes would make the condominium less safe. The condominium is located in a high-crime area with a significant transient population. The parties recognized that some of the changes requested by the respondent would increase the risk of trespassers gaining access to the garage, which has security implications for both unit owners and anyone using the parking spots.

[17] The Board asked the respondent to obtain a security audit at its own expense when the respondent made its request.

[18] At a meeting held on August 15, 2012, the Board refused to approve the requested changes, citing security concerns. It also voted to treat the changes as "substantial" under s. 97(6) of the *Act*.

[19] The respondent hired Paradigm Private Investigation Services ("Paradigm") to conduct the security audit which the appellant had requested several months before. In its report, submitted to the respondent on May 13, 2013, Paradigm advised that

> consideration [should] be given to the use of additional security personnel and in our respectful submission we believe that this can be accomplished by the addition of one extra security officer whose primary duties would be to maintain enforcement, security, and a visible deterrent for anyone considering loitering or engaging in illicit activities on the property.

[20] The Board advised the respondent that Paradigm's report confirmed its concerns and that it would not approve the requested changes unless the respondent agreed to provide either (i) a parking booth at the parking lot entrance with a full-time attendant; or (ii) a full-time security officer who would patrol the area with the parking spots.

[21] The respondent was willing to hire a security guard but only if it was no longer required to make contributions to the security fees portion of the common

elements expenses or if the appellant was willing to share the costs of the additional guard. The Board refused this proposal and noted that it did not have the legal authority to exempt the respondent from its obligation to pay common elements expenses.

[22] Ultimately, the respondent suggested that it was willing to undertake a number of measures at its expense to attenuate the increased risk. However, it was unwilling to hire a full-time dedicated security guard. In the Board's view, the measures proposed by the respondent were insufficient. It continued to insist that the respondent hire a security guard before it would approve the requested changes.

[23] In response, the respondent brought this application in May 2014, alleging that the appellant's refusal to approve the requested changes was unfairly prejudicial and unfairly disregarded its interests, contrary to s. 135 of the *Act*. An owner, a declarant or a mortgagee of a unit may make an application under s. 135(2). It provides as follows:

> On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[24] The parties subsequently asked Paradigm to prepare an updated assessment report without commenting on the addition of a security guard on the premises. In that updated assessment, Paradigm qualified its original advice:

> While physical surveillance such as uniformed Security Officers can be one of the best examples of a deterrent that can be considered for any property, by no means is it the only option available to property management. Security considerations must be relative to existing budgets and sometimes simple physical changes, as mentioned previously in this report can be equally effective tools for security and safety. [Emphasis in original.]

[25] Following receipt of the second Paradigm report, the appellant arranged for its own security assessment by David A. Black, a certified protection professional. His report (the "Black report") opines as follows:

> On site security guards, dedicated to any pay and display parking areas are critical in reducing the level of risk for both the high priority and medium level risks associated with the Pay and Display as identified above. The proprietary guards already on site work alone and would leave other duties unattended should they have to be responsible for public parking.

3. THE APPLICATION JUDGE'S DECISION

[26] As noted, the respondent brought an application for (i) a declaration under s. 135 of the *Act* that the appellant's refusal to permit the respondent to make the desired changes was unfairly prejudicial and unfairly disregarded the respondent's interests; and (ii) an order prohibiting the impugned conduct. The respondent had

also brought a last-minute claim seeking damages, but that issue was deferred to a later date.

[27] The application judge dealt with the application in two stages. First, he determined whether the appellant's conduct had infringed s. 135 of the *Act*: *3716724 Canada Inc. v. Carleton Condominium No. 375*, 2015 ONSC 6626, 63 R.P.R. (5th) 57.

[28] The application judge concluded that the changes requested by the appellants constituted additions, alterations or improvements to the common elements and, therefore, needed the Board's approval under s. 98 of the *Act*. The respondent has not cross-appealed that finding.

[29] Then the application judge turned to s. 135 of the *Act*. He did not explicitly refer to the applicable two-part test, namely that the claimant must establish (i) a breach of their reasonable expectations; and (ii) that the impugned conduct amounts to "oppression", "unfair prejudice", or "unfair disregard": *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation*, 2011 ONCA 667, 285 O.A.C. 372, at para. 6. However, neither party argues that the application judge failed to identify the correct test and, when his reasons are read as a whole, it is clear that he considered this two-part test.

[30] The application judge easily found, at para. 32, that the respondent's "plan to operate a short-term parking facility in the condominium [was] a reasonable

expectation." According to the application judge, the real issue was whether "the Board's decision not to permit the [respondent] to do so disregards that expectation unfairly."

[31] Citing *Niedermeier v. York Condominium Corp., No. 50* (2006), 45 R.P.R. (4th) 182 (S.C.), he accepted that to unfairly disregard the interests of a complainant means to "ignore or treat the interests of the complainant as being of no importance". Some prejudice or disregard is acceptable, provided that it is not unfair. This statement of the law is not at issue on this appeal.

[32] The application judge "had no doubt" that the Board's concerns were reasonable. However, he concluded, at para. 37, the appellant was not being reasonable by insisting on a full-time security guard.

[33] While acknowledging that a dedicated, full-time security guard would be the best option, the application judge found that "based upon the evidence" it was not a viable option. And, he further noted, it was not the only option as the respondent had "put forward a combination of other proposals that significantly [lowered] the safety risks to a point at which…insisting [on] a full-time security guard becomes unreasonable": para. 39. Given the application judge's conclusion that the measures proposed by the respondent should have been sufficient for the Board, he decided that insisting that the respondent hire a "prohibitively expensive" full-time security guard unfairly disregarded its interests.

[34] The application judge rejected the respondent's argument that designating the proposed changes as "substantial" demonstrated bad faith on the part of the appellant. The respondent did not cross-appeal that finding.

[35] The application judge, after receiving further submissions, addressed the issue of remedy: *3716724 Canada Inc. v. Carleton Condominium No. 375*, 2016 ONSC 1296, 63 R.P.R. (5th) 73. As the Board had elected to treat the proposed changes as substantial, and given that the application judge had decided not to interfere with that decision, ordinarily a vote of the unit owners would be required. However, the application judge ordered that the respondent should be permitted to make the changes without having the unit owners vote on them, notwithstanding the requirements of ss. 98(1)(c) and 97(4) of the *Act*.

4. ISSUES ON APPEAL

[36] As noted, I do not find it necessary to address all of the issues raised by the appellant. I will be addressing the following two issues:

I. Did the application judge rely on evidence not properly before him?

II. Did the application judge err in concluding that the appellant unfairly disregarded the respondent's interests?

5. DID THE APPLICATION JUDGE RELY ON EVIDENCE NOT PROPERLY BEFORE HIM?

[37] The appellant's first argument is that the application judge's decision relied on evidence that he should not have considered. It argues that the financial information the application judge relied on could only be found in the supplementary affidavit of Steve Heafey, sworn October 2, 2015 (the "Heafey Affidavit"). That affidavit was related to the respondent's claim for damages, which the parties agreed would be adjourned to a later day. The appellant also moves to admit fresh evidence in support of its position.

[38] In my view, the fresh evidence should be admitted and the appeal should be allowed on this ground.

5.1. Fresh Evidence

[39] The proposed fresh evidence is an affidavit of Melinda Andrews, sworn June 29, 2016. This evidence establishes the following:

- The respondent served the appellant with an amended notice of application and the Heafey Affidavit on October 2, 2015. These materials incorporated a claim for the respondent's lost profits.
- Counsel for the appellant communicated that she would be asking for an adjournment, as she did not have enough time to respond to the Heafey Affidavit or conduct examinations. As a result, the parties agreed to bifurcate the issues.
- Counsel for the respondent filled an Application Conformation form on October 9, 2015, which did not include the Heafey

> Affidavit or the Amended Notice of Application among the documents that the presiding judge would be referred to.

[40] The respondent concedes that the application judge was advised at the hearing that the parties had agreed to defer the issue of damages and that he should accordingly not consider the Heafey Affidavit.

[41] As noted by this court in *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 41, "where the proposed fresh evidence raises issues [about] the validity of the process of the hearing, the interests of justice require its admission." Therefore, I would grant the appellant's motion and admit the fresh evidence.

5.2. Application Judge Relied on Evidence not Properly Before Him

[42] The application judge's findings that a full-time security guard was not a viable option and would be "prohibitively expensive" underpin his ultimate conclusion that the appellant unfairly disregarded the interests of the respondent.

[43] The "evidence" relied upon by the application judge in making these findings was contained in the untested Heafey Affidavit, which the parties had advised the application judge not to consider. The only evidence regarding the economics of the respondent's business that was properly before the application judge, and that was before the Board when it made its decision, was that (i) renting the parking spots on a monthly basis was no longer profitable for the respondent; and (ii) a short-term parking operation would be far more profitable. Without the Heafey

Affidavit, the application judge could not have arrived at the conclusions that underpin his decision.

[44] Therefore, I agree with the appellant that the application judge's decision turned on evidence not properly before him and, on that basis, cannot stand.

6. DID THE APPLICATION JUDGE ERR IN CONCLUDING THAT THE APPELLANT UNFAIRLY DISREGARDED THE RESPONDENT'S INTERESTS?

[45] Even if the evidence contained in the Heafey Affidavit was properly before the court, the appellant argues that the application judge erred in finding in favour of the respondent. It argues that he erred by assessing the Board's decision on a subjective basis and substituting his judgment for that of the Board, which had been exercised following a fair process and having regard to reasonable safety concerns.

[46] I agree with this submission.

6.1. Board's Decision is owed Deference

[47] The jurisprudence has occasionally recognized that decisions rendered by boards of condominium corporations should be shown some deference: see, for example, *London Condominium Corporation No. 13 v. Awaraji*, 2007 ONCA 154, 221 O.A.C. 240, at para. 6. However, the topic has not been addressed in great detail.

[48] The issue has been canvassed extensively in the corporate law context. In reviewing decisions rendered by the directors and officers of for-profit corporations, Canadian courts have been guided by the "business judgment rule". This rule recognizes the autonomy and integrity of corporations, and the fact that directors and officers are in a far better position to make decisions affecting their corporations than a court reviewing a matter after the fact: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2004), 250 D.L.R. (4th) 526 (Ont. C.A.), at para. 6; see also *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.), at p. 320. Therefore, where the rule applies, a court will not second-guess a decision rendered by a board as long as it acted fairly and reasonably: *Maple Leaf Foods Inc. v. Schneider Corp.* (1999), 42 O.R. (3d) 177 (C.A.), at p. 191.

[49] This rule has been reinforced in numerous decisions over the years. Significantly, in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the leading case on the oppression remedy, the Supreme Court of Canada explained that a court reviewing a board's decision must show some deference, at paras. 40 and 111-112:

> The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.

...

> [The oppression remedy] claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of corporate stakeholders in a fair manner that reflected the best interests of the corporation.
>
> ...
>
> Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one. [Citations omitted.]

[50] While the business judgment rule was developed in the context of for-profit businesses, it has been applied to not-for-profit corporations as well: see, for example, *Hadjor v. Homes First Society*, 2010 ONSC 1589, 70 B.L.R. (4th) 101, at paras. 47-52. And courts in other jurisdictions have applied the rule when reviewing decisions rendered by condominium boards: see, for example, *Yusin v. Saddle Lakes Home Owners Ass'n*, 73 A.D.3d 1168 (N.Y. App. Div. 2010); and *Black v. Fox Hills N. Cmty. Ass'n*, 599 A.2d 1228 (Md. Ct. Spec. App. 1992).

[51] Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. For instance, in this case the security concerns arose in part as a result of the condominium's location, and the

Board members' knowledge of that area is clearly an advantage that they enjoy over any court subsequently reviewing their decision.

[52] The *Act* provides that the directors are the ones responsible for managing the affairs of a condominium corporation: s. 27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 37(1). Like their counterparts in corporate statutes, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.

[53] Therefore, to summarize, the first question for a court reviewing a condominium board's decision is whether the directors acted honestly and in good faith and exercised the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. If they did, then the board's balancing of the interests of a complainant under s. 135 of the *Act* against competing concerns should be accorded deference. The question in such circumstances is not whether a reviewing court would have reached the same decision as the board. Rather, it is whether the board reached a decision that was within a range of reasonable choices. If it did, then it cannot be said to have unfairly disregarded the interests of a complainant.

6.2. The Board's Decision was Reasonable

[54] Here, the appellant acted honestly and in good faith. The application judge rejected the respondent's assertion that the Board demonstrated a lack of good faith by deeming the changes substantial. Beyond that rejected challenge, the respondent has not impugned either the competence of the Board or the process leading up to its decision. The Board was transparent as to the nature of its concerns. It requested that the respondent obtain a security audit and considered that audit when it was produced. The record reveals that the Board considered the respondent's request and communications on a number of occasions.

[55] Therefore, in this case, the real question was whether the Board reached a decision that was within a range of reasonable choices. Respectfully, the application judge did not focus on that question. In my view, he found in favour of the respondent because he disagreed with the balance between competing interests struck by the Board.

[56] The evidence indicated that the condominium is located in a high-crime area and the application judge accepted that the Board's concerns were reasonable. Both the first Paradigm report and the Black Report suggested that a security guard should be hired if the changes the respondent requested were made. The application judge agreed that this was the best option.

[57] While I do not disagree with the application judge's finding that the respondent had a reasonable expectation that it would be able to operate a short-term parking facility in the condominium, it is important to note the impact of the Board's decision on that expectation. The Board did not prohibit the appellant from engaging in this business or changing its business model. The Board merely put in place certain preconditions for approving changes to the condominium's common elements in order to address the increased security risk that would be caused by the changes that the respondent wanted to make.

[58] The Board considered the respondent's desire to increase its profits, and balanced that interest against the competing security interests of other unit owners. It also considered the security implications for persons using the parking spots. The term "balancing" in these circumstances is used only as a metaphor because the Board was not balancing "like against like", but competing interests of different natures- the economic interests of the respondent and the personal security interests of others. A condominium board sometimes will be faced with different interests that cannot be reduced to a common unit of measurement, yet still must attempt to balance them.

[59] In this case, the Board's decision had the effect of rendering the respondent's proposal less profitable. But that does not mean that the Board unfairly disregarded the interests of the respondent. The Board was entitled, indeed required, to consider the impact of the changes on the interests of other

unit owners. And as the deemed occupier of the common elements of the condominium, it was also entitled to consider the security implications for users of the common elements. It did not ignore or treat the interests of the respondent as being of no importance. It simply – in good faith and after a fair process – determined that legitimate and reasonable competing interests were more important. Its decision not to approve the requested changes to the common elements unless the respondent hired a security guard was within a range of reasonable choices.

[60] As I have said, the evidence in the Healey Affidavit was not properly before the application judge. Nor was it before the Board when it decided not to approve the requested changes to the common elements. However, even if it had been, I am of the view that a decision requiring a security guard as a condition of approving the changes to the common elements would have fallen within a range of reasonable alternatives. On this record, it was open to the Board to conclude that the increased security risk outweighed the respondent's commercial interests.

7. DISPOSITION

[61] I would admit the fresh evidence, allow the appeal, and dismiss the application against the appellant. I would set aside the costs below in favour of the respondent and instead order that the same amount be payable to the appellant.

And I would award the appellant its costs of the appeal, fixed at $9,500, inclusive of HST and disbursements.

Released: AUG 30 2016

ACJO

I agree. J.A.

I agree

Appendix A

Extracts from Declaration for CC 375 Registered on April 23, 1987

3.2 Occupation and Use. The occupation and use of the Units shall be in accordance with the following restrictions and stipulations:

...

(b) Commercial Units with the exception of Unit 27, Level 1 shall be occupied and used only for those commercial uses permitted (including legal nonconforming uses) by the City of Ottawa restricted area (zoning) by-laws respecting the Lands as at the date of registration of the Declaration and for no other purpose.

(c) Parking Units located on Levels B, C and D shall be used and occupied only for private motor vehicle purposes, and without restricting any wider definition of the word "motor vehicle" as may be imposed by the Board of directors, the term "motor vehicle" shall be deemed to include a personal motor vehicle, station wagon and motorcycle as customarily understood. The Owner of each Parking Unit shall keep such Unit in a clean and slightly condition. The Owner of a double Parking Unit may park two vehicles thereon. The full use and occupancy of Unit 8, Level A may be restricted to provide access to the Corporation through the Unit to the telephone room adjacent thereto. All Parking Units owned or leased by the Owner of Unit 27, Level 1 and located on Level A of the Parking Garage may be used for a commercial parking business for the leasing of individual parking spaces for such period of time as the Owner, its assigns, tenants or sub-tenants of such Parking Units may in its sole discretion determine provided that not less than 30 such Parking Units are made available at all times for hourly or daily parking. The parking rates which may be charged for such hourly or daily parking shall not exceed the rate charged from time to time by other similar commercial type parking operations in the City of Ottawa. No Parking Unit located on Levels B, C and D shall be used for commercial parking business.

(d) Unit 27, Level 1 shall be occupied and used for the operation of a commercial parking business and any incidental use thereto.

...

4.2.4 Signs.

...

(iv) The Owner of Unit 27, Level 1 may affix signs to, in or over the interior and exterior of such Unit for the purpose of advertising parking and parking rates. The Owner of Unit 27, Level 1 may place a portable sandwich board sign advertising parking hours and rates at the George Street entrance to the parking garage.