CITATION: 90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corporation No. 815, 2015 ONSC 336
COURT FILE NO.: 13-59021
DATE: 2015/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
90 George Street Ltd. Appellant	Michael S. Hebert, for the Appellant
– and –	
Ottawa-Carleton Standard Condominium Corporation No. 815 Respondent	Christopher Rootham, for the Respondent
	HEARD: November 12, 2014 (in Ottawa)

REASONS FOR DECISION ON APPEAL

On appeal from the Interim Award of the Honourable James B. Chadwick, Q.C., Arbitrator, dated September 10, 2013, and from the Award as to Costs, Disbursements and Interest of the Honourable James B. Chadwick, Q.C., Arbitrator, dated October 21, 2013.

JUSTICE PATRICK SMITH

Overview and Factual Background

[1] The Appellant (90 George Street Ltd.) is the declarant of the Respondent, the Ottawa-Carleton Standard Condominium Corporation No. 815.

[2] The Respondent and its unit owners (Ottawa-Carleton Standard Condominium Corporation No. 815) are the owners of a 16-floor residential condominium containing 104 units. The Appellant owns a three-floor commercial podium, situated beneath the residential condominium.

[3] The *Condominium Act, 1998*, S.O. 1998, c.19 [*Condominium Act*], provides that declarants control condominiums until construction of the project is completed, the building is partially or fully occupied and a condominium corporation is created. At that point control and

responsibility for the condominium passes to the Board of Directors of the condominium corporation.

[4] The Respondent condominium corporation was created on June 18, 2009, upon the Appellant's registration of the description and declaration.

[5] The *Condominium Act* requires a declarant to prepare "a disclosure statement" for every purchaser of a unit (s. 72). A disclosure statement must include a copy of the budget statement for the one-year period immediately following the registration of the declaration (*Condominium Act*, s. 72(3)).

[6] A budget statement is comprised of a number of elements, including a statement of the common expenses of the corporation. The statement must include the proposed amount of each expense along with the particulars of the type, frequency, and level of services to be provided (*Condominium Act*, s. 72(6)).

[7] One of the purposes of the disclosure statement is to enable individuals contemplating the purchase of a condominium unit to have a full understanding of their rights and obligations on unit purchase but more importantly, what the costs of owning it will be.

[8] The Appellant prepared several draft first-year budgets prior to the registration of the declaration on June 18, 2009. The final first-year budget showed total condominium operating expenses of $756,912.00.

[9] The Respondent's first operational year was from June 18, 2009 to June 17, 2009.

[10] Audited financial statements, dated February 23, 2012, for the first operational year revealed a shortfall of $125,659.00 between the actual operating expenses and the first-year budget. A $10,000.00 insurance deductible had been included in the shortfall. At some point it was determined that the deductible was reimbursed to the Respondent. As a result the Respondent's shortfall claim was reduced to $115,659.00.

[11] The Respondent notified the Appellant of the shortfall. The Appellant disputed the shortfall.

[12] Section 132(3) of the *Condominium Act* requires that budget statement disagreements proceed to mediation and, if unresolved, then on to arbitration.

[13] Mediation failed to resolve the dispute. Thereafter, the Respondent proceeded to arbitration.

[14] The parties mutually selected a retired Superior Court Justice – the Honourable James Chadwick Q.C. – as the arbitrator (the "Arbitrator").

[15] The arbitration took place over four days: June 4-5, 2013, and August 14-15, 2013.

Statement of the Issues

[16] The Appellant appeals both the decision of the arbitrator and also the subsequent awards of pre-judgment interest and costs.

[17] The issues on appeal before this Court are as follows:

- What is the appropriate standard of review of the Arbitrator's decisions?
- Did the Arbitrator make a reviewable error in his interpretation of s. 75 of the *Condominium Act*?
- Did the Arbitrator make a reviewable error in the award of the pre-judgment interest rate?
- Did the Arbitrator make a reviewable error in his award of the costs of the arbitration?

The Issue of Leave

[18] Section 45(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 [*Arbitration Act*], provides that a party may only appeal an award of an Arbitrator to the Superior Court on a question of law, with leave.

[19] Leave was granted by the Order of Justice M. Labrosse, dated April 29, 2013.

The Arbitration Award

[20] On September 15, 2013, the Arbitrator released his Interim Award (dated September 10, 2013).

[21] The Arbitrator found in favour of the Respondent and awarded the Respondent damages in the amount of $115,669.00 plus interest at the rate prescribed in the condominium corporation's bylaw number 1 (article 11.5) calculated from April 23, 2012, including interest calculated at a rate of three percent (3%) over the prime rate compounded monthly. Bylaw 1 provides that this interest rate applies to unpaid common element costs.

[22] In arriving at his award, the Arbitrator found that he was statutorily prohibited from considering the issues raised by the Appellant by way of defence and set off. Further, he found that s. 75(1) of the *Condominium Act* made a declarant "fully liable" for any first-year shortfall, whether the expenditures are covered in the declarant's budget or not, that he was restricted to an analysis of the total of the expenditures set out in the audited first-year statement, and that the Appellant was not entitled to an item-by-item evaluation of the expenses or to challenge them as being excessive or improper.

[23] Two of the largest expense items in dispute related to the cost of security and superintendent/concierge services.

[24] The estimates in the first-year budget were $196,227.00 for security and $30,867.00 for a concierge. The actual claimed first-year expenditures were $248,684.00 for security and $92,552.00 for a superintendent and a concierge combined.

[25] On October 24, 2013, the Arbitrator released his decision on costs and awarded:

- costs on a substantial indemnity basis in favour of the Respondent in the amount of $90,400.00, including HST, plus disbursements fixed at $34,534.08; and,
- interest calculated to September 10, 2013, in favour of the Respondent, in the amount of $9,985.41, as well as further interest until the amount of the interim award, costs, disbursements and interests were paid.

What is the Standard of Review?

Position of the Parties

[26] The Appellant argued that that the appropriate standard of review of an Arbitrator's decision is correctness, and that the Supreme Court's recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] is distinguishable as this appeal does not arise from a commercial arbitration.

[27] In the alternative, the Appellant argued that regardless of the applicable standard, correctness or reasonableness, the Arbitrator's decision should be set aside as neither standard was met.

[28] The position of the Respondent is that the Supreme Court's recent decision in *Sattva* is applicable, and as such the appropriate standard of review is reasonableness, a standard that the award has met.

[29] Neither party cited an Ontario appellate decision as authority establishing the appropriate standard of review of an Arbitrator's decision in the context of an arbitral award held pursuant to the *Condominium Act*.

The Supreme Court Decision in *Sattva*

[30] In *Sattva,* a decision involving a complex dispute about contractual interpretation, the Supreme Court held that the appropriate standard of review for commercial arbitration decisions is reasonableness.

[31] The Supreme Court noted that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], was not entirely applicable to the commercial arbitration context.

[32] At para. 104 of *Sattva* the Court wrote that "appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to meet the objectives of

commercial arbitration and is different from judicial review of a decision of a statutory tribunal." The Court pointed to the following distinctions:

- for the most part, parties choose to engage in commercial arbitration as opposed to being statutorily bound to proceed to arbitration; and,

- in commercial arbitration, unlike statutory tribunals, the parties to arbitration select the number and identity of the arbitrators.

[33] However, the Supreme Court did not entirely disregard the *Dunsmuir* framework and post-*Dunsmuir* jurisprudence in relation to identifying the appropriate standard of review for commercial arbitration decisions. The Court wrote:

> [105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.
>
> [106] *Dunsmuir* and post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30).

[34] At the time of writing this decision, only one Ontario trial decision had applied *Sattva* in the arbitral context.

[35] In *Ottawa (City) v. Coliseum Inc.*, 2014 ONSC 3838, Mackinnon J., in the context of contractual interpretation and the *Arbitration Act*, followed the Supreme Court's reasoning in *Sattva*, and held that the applicable standard of review from the arbitration award was reasonableness (at para. 44). However, this case can be distinguished because it did not involve an arbitration conducted pursuant to the *Condominium Act*.

Pre-*Sattva*

[36] Prior to the Supreme Court's decision in *Sattva* the Ontario Court of Appeal had held that the appropriate standard of review on questions of law from arbitral decisions was correctness.

[37] In *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)*, 2012 ONCA 592, 112 O.R. (3d) 354 [*Wawanesa Mutual*], the issue in dispute was the proper interpretation of a provision of the *Insurance Act*. *Wawanesa* appealed the decision of an arbitrator to the Superior Court of Justice. The Superior Court of Justice dismissed the appeal. On the question of standard of review, the Court of Appeal noted that the issue before the court raised a question of law, and that the standard of review was correctness.

[38] In *Omers Realty Corp. v. Sears Canada Inc.* (2006), 211 O.A.C. 179 (Ont. C.A.), an arbitrator ruled that a landlord could recover its shortfall from eligible tenants under the *Municipal Act*, R.S.O., c. M.45, as amended by S.O. 1998, c. 3, s. 30. The Court of Appeal held that the arbitration panel erred in determining that the landlord exercised a power of statutory decision (*ibid.*, para. 27). Instead, the issue before the arbitration board was one of statutory interpretation (*ibid.*, para. 28). As such, the function of the board was to interpret the legislation and determine whether the landlord's actions were in compliance with the legislative requirement (*ibid.*). The Court wrote that the board was required to be correct in its interpretation (*ibid.*). As a result, any appeal from the board's determination raised a question of law to be reviewed on the correctness standard (*ibid.*).

Analysis

[39] In my view, arbitration pursuant to the *Condominium Act* is distinguishable and very different from the arbitration of a commercial dispute.

[40] In a commercial arbitration, the parties are presumed to possess commercial knowledge and to have equal bargaining power. This presumption does not necessarily apply in a case where a dispute arises between the developer/owner/declarant and a condominium corporation where an imbalance of expertise and bargaining power may frequently exist.

[41] This imbalance is reflected in the statutory purpose of the *Condominium Act*. The Ontario Court of Appeal has noted that the purpose the *Condominium Act* is to provide consumer protection, as well as predictability and certainty to those purchasing a condominium, enabling them to make informed financial decisions (*Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930*, 2010 ONCA 751, 102 O.R. (3d) 737 at paras. 49, 51 [*Lexington*]; *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, 2014 ONCA 724, 46 R.P.R. (5th) 1).

[42] While a condominium corporation is a legal "corporation," this alone is not sufficient to deem it a commercial entity with expertise in the area of commercial or condominium law.

[43] The Boards of Directors of a condominium corporation are generally comprised of unit holders who may have very little or no expertise in condominium law and commercial

transactions. On the other hand, developers of condominium projects who eventually become declarants usually have expertise in commercial matters and condominium law.

[44] For the above reasons I find that the Supreme Court's decision in *Sattva* is distinguishable from the case at bar and that the standard of review of an arbitration award rendered pursuant to the *Condominium Act* is correctness.

[45] In the case before the Court, the arbitrator was required to be correct in his interpretation of s. 75 of the *Condominium Act* and in his awards of pre-judgment interest and costs, and the awards must be reviewed on this basis.

Did the Arbitrator Make a Reviewable Error in Interpreting Section 75 of the *Condominium Act*?

The Arbitrator's Decision

[46] The central argument of the Appellant is that the evidence before the Arbitrator demonstrated that a large portion of the claim related to items not contemplated by the first-year budget, were excessive and unreasonable and should not have been included in the condominium first-year expense budget.

[47] The Arbitrator concluded that s. 75 of the *Condominium Act* contemplated a straightforward mathematical calculation based upon the condominium corporation's first-year deficit requiring a declarant to pay the condominium corporation the difference between the first-year budget and the actual first-year audited financial statements.

[48] Further, he held that the limited "set-offs" were specifically spelled out in s. 75 of the *Condominium Act*, that he was restricted by the wording of the legislation and that he was not permitted to conduct a line-by-line inquiry into whether any of the first-year expenditures that comprised the claim were actually provided for or contemplated in the first-year budget or were reasonable.

[49] In his Interim Award, the Arbitrator held that, in the event he had made a reviewable error in his interpretation of s. 75 of the *Condominium Act* he nevertheless rejected the Appellant's evidence and argument that the expenses were unreasonable.

[50] With respect to the argument that the security and superintendent/concierge expenses were excessive, the Arbitrator noted that the Appellant's President sat on the board of directors for over a year and failed to complain about the expenses and was "opposed to any reduction in services."

[51] The Appellant also argued that some of the expenses were for repairs that should have been covered by warranties. The Arbitrator rejected that argument, stating that the Appellant failed to lead any evidence of the warranties and its only witness supporting this theory never read the warranties and "had very little involvement with these matters."

[52] As noted above, two of the largest expense items in dispute related to security expenses and superintendent/concierge services. The estimates in the first-year budget were $196,227.00 for security and $30,867.00 for a concierge/doorman. The actual claimed first-year expenditures were $248,684.00 for security and $92,552.00 for a superintendent and a concierge combined.

[53] The Appellant led evidence of Board member Terrence Guilbault, that security costs were higher during the first few months of operation because people were moving into the building and that a request had been made to reduce both security and superintendent costs by the condominium.

[54] The Arbitrator rejected the evidence of Mr. Guilbault having made an initial determination that he could not conduct a line-by-line analysis of various expenses.

[55] The Arbitrator found that s. 75(1) made a declarant fully liable for any first-year shortfall, and that he could not consider issues raised by the declarant by way of defence and set-off, noting that, where a declarant believes that a condominium corporation has made unreasonable expenditures, it may seek a remedy by way of an oppression claim under s. 135 of the *Condominium Act*.

[56] After discussing relevant jurisprudence the Arbitrator concluded: "[e]ven if I am wrong in my interpretation of s. 75 of the *Act*, the proper determination of the short fall is the bottom line, not an item by item evaluation." (para. 37)

[57] Notwithstanding this comment it is important to note that the Arbitrator did proceed to conduct an evaluation of the Appellant's two main arguments regarding the propriety of the security and superintendent/concierge expenses contained in the shortfall amount.

Position of the Parties

[58] The Appellant argues that the Arbitrator erred and was incorrect in his interpretation of s. 75(1). The Appellant submits that, while s. 75(1) provides that a declarant is accountable for the any deficit between its budget and a condominium corporation's first-year budget statement, when the requirements of s. 72(6) are considered, s. 75 must be interpreted to mean that the deficit must relate to items that are properly identified as common expenses. Accordingly, an analysis of the expenses and deficit is proper and appropriate.

[59] The Respondent argues that the Arbitrator did not err and was correct with respect to the interpretation of s. 75. The Respondent submits that the meaning of s. 75(1) is clear – a declarant is responsible for the difference between the first-year budget and the actual first-year financial statement.

[60] The Respondent submits that the policy behind s. 75 is to protect purchasers of condominium units by preventing a developer from producing an unreasonably low budget statement and misleading purchasers to believe that monthly expenses will be lower than actual expenses. As such, an arbitrator has no discretion under the *Condominium Act* to analyze, deduct or set off expenses in either the declarant's budget or the condominium's first-year expense

statement nor is there discretion to assess the reasonableness of an expense save and except as provided for in s. 75(4).

[61] In light of the Arbitrator's factual conclusions and, in the event that he was incorrect regarding his interpretation of s. 75, the Respondent maintains that the result of the arbitration would have been the same regardless of the interpretation of s. 75 of the *Condominium Act*.

Did the Arbitrator Correctly Interpret Section 75 of the *Condominium Act*?

Principles of Interpretation

[62] The Supreme Court in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, set out, at paras. 29-30, that:

> ... Major J.'s statement ... is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that courts need to resort to external interpretative aids" (emphasis added), to which I would add, "including other principles of interpretation.
>
> For this reason, ambiguity cannot reside in the mere fact that several courts – or, for that matter, several doctrinal writers – have come to differing conclusions on the interpretation of a given provision...It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning."

[63] At page 87 of his text *Construction of Statutes*, 2d ed., (Toronto: Butterworths, 1983) E.A. Driedger explains:

> [T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[64] The Court of Appeal, at para. 34 of *Wawanesa Mutual*, sets out the following three-step purposive approach to statutory interpretation:

- a court must examine the words of the provision in their ordinary and grammatical sense;
- a court must consider the entire context that the provision is located within; and,
- a court must consider whether the proposed interpretation produces a just and reasonable result.

[65] The phrase "entire context" includes "the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue" (*Wawanesa Mutual*, at para. 35).

[66] A "just and reasonable result" promotes "applications of the Act that advance its purpose and avoids applications that are foolish and pointless" (*ibid.*).

Application of Principles of Interpretation to the Case at Bar

The Ordinary and Grammatical Meaning of the Words

[67] Relevant sections of the *Condominium Act* are set out below:

> Accountability for budget statement
>
> 75. (1) The declarant is accountable to the corporation under this section for the budget statement that covers the one-year period immediately following the registration of the declaration and description.
>
> Common expenses
>
> (2) The declarant shall pay to the corporation the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount.
>
> Revenue
>
> (3) The declarant shall pay to the corporation the amount by which the total actual amount of fees, charges, rents and other revenue paid or to be paid to the corporation, during the period covered by the budget statement, for the use of any part of the common elements or assets or of any other facilities related to the property, is less than the total budgeted amount.
>
> Set-off
>
> (4) If the total actual amount of revenue described in subsection (3) exceeds the total budgeted amount, the declarant may deduct the excess from any amount payable under subsection (2).
>
> Notice of payment
>
> (5) After receiving the audited financial statements for the period covered by the budget statement, the board shall compare the actual amount of common expenses and revenue described in subsections (2) and (3) for the period covered by the budget statement with the budgeted amounts and shall, within 30 days of receiving the audited financial statements, give written notice to the declarant of

the amount that the declarant is required to pay to the corporation under this section.

Time for payment

(6) Within 30 days of receiving the notice, the declarant shall pay the corporation the amount that it is required to pay under this section. [Emphasis added.]

[68] Section 72(6) requires a budget statement include a number of elements, including

(a) a statement of the common expenses of the corporation;

(b) a statement of the proposed amount of each expense of the corporation, including the cost of the reserve fund study required for the year, the cost of the performance audit under section 44 and the cost of preparing audited financial statements if subsection 43 (7) requires the declarant to deliver them within one year following the registration of the declaration and description;

(c) particulars of the type, frequency and level of the services to be provided;

(d) a statement of the projected monthly common expense contribution for each type of unit;

(e) a statement of the portion of the common expenses to be paid into a reserve fund;

(f) a statement of the status of all pending lawsuits material to the property of which the declarant has actual knowledge and that may affect the property after the registration of a deed to the unit from the declarant to the purchaser;

(g) a statement of the amounts of all current or expected fees, charges, rents or other revenue to be paid to or by the corporation or by any of the owners for the use of the common elements or other facilities related to the property, unless a turn over meeting has been held under section 43;

(h) a statement of all services not included in the budget that the declarant provides, or expenses that the declarant pays and that might reasonably be expected to become, at any subsequent time, a common expense and the projected common expense contribution attributable to each of those services or expenses for each type of unit;

(i) a statement of the projected amounts in all reserve funds at the end of the current fiscal year;

(j) a summary of the most recent reserve fund study, if any; and

(k) all other material that the regulations made under this Act require.

[69] As set out above, s. 75(1) provides that a declarant is accountable to a condominium corporation for the first-year budget statement.

[70] Section 72(6) sets out the elements that comprise a declarant's budget statement. Most of the elements directly relate to common expenses. However, s. 72(6) also includes elements that do not directly impact the "bottom line" of the budget, such as the statement of the status of all pending lawsuits, and the summary of the most recent reserve fund study.

[71] Sections 75(2), 75(3) and 74(4) proceed to set out the specifics of how a declarant is financially accountable to a condominium corporation.

[72] Section 75(4) provides a set-off for a declarant where revenues, as described in s. 75(3), are higher than the budgeted amount, and where actual common expenses, as set out in s. 75(2), are also higher than the budgeted amount.

[73] Section 75(2) establishes that a declarant must pay a condominium corporation the amount by which the corporation's total actual amount of common expenses exceeds the declarant's total budgeted amount.

[74] An ordinary and plain grammatical reading of the words of s. 75(1) – "by which the total actual amount of common expenses...exceeds the total budgeted amount" – supports the interpretation that the section requires a declarant to be accountable to the condominium corporation for all of the elements that make up the budget statement: monetary and non-monetary.

The Entire Context within which the Provision is Located

[75] As noted above, the statutory purpose of the *Condominium Act* is consumer protection – it provides predictability and certainty for those purchasing a condominium to make informed decisions (*Lexington* at paras. 49, 51).

[76] Because there is no jurisprudence on the interpretation of s. 75 as it is currently drafted, it is helpful to consider judicial interpretation of earlier versions of the predecessor provision as part of the analysis of the context in which the section is found.

[77] In *Benner et al. v. HLS York Developments Ltd.* (1985), 21 D.L.R. (4th) 652, (Ont. H. Ct. J.) [Benner], Carruthers J. considered s. 52 of the *Condominium Act*, R.S.O. 1980, c. 84.

[78] The relevant portions of s. 52 of the 1980 statute read as follows:

> **Disclosure statements**
>
> S. 52(6) The disclosure statement ... shall contain and fully and accurately disclose,
>
> ...

(e) a budget statement for the one year period immediately following the registration of the declaration and the description;

...

Inaccurate statement of common expenses

S. 52(8) Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts set out in the statement, for the period covered by the budget statement mentioned in clause (6)(e) the declarant shall forthwith pay to the corporation the amount of the excess except in respect of increased expenses attributable to the termination of an agreement under section 39.

[79] In interpreting s. 52(8) Carruthers J. wrote at para. 30:

... what is referred to in that subsection is, "the total amount incurred for the common expenses provided for in the budget statement" and " ... the total of the proposed amounts set out in the statement" (Underlining added). In my view, that section does not apply to the situation where a consideration is given to common expenses and the proposed amount thereof which are not set out in the budget statement.

[80] Carruthers J. found that s. 52(8) would not apply to hold a declarant liable where the common expenses incurred were not set out in the budget statement.

[81] For the purposes of comparison, the relevant portions of the two provisions read:

Past (*Condominium Act*, R.S.O. 1980, c. 84, at s. 52(8)): "Where the total amount incurred for the common expenses provided for in the budget statement exceeds the total of the proposed amounts"; and,

Current (*Condominium Act, 1998*, S.O. 1998, c.19, at s. 75(2)): "the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement ...exceeds the total budgeted amount."

[82] The key difference between the two provisions appears to be the removal of the phrase "where the total amount incurred for the common expenses provided for in the budget statement exceeds" from the current legislation. The removal of this phrase suggests a legislative intent to hold declarants fully liable for any budget shortfall in the first-year of operation between the actual expenses and the budgeted amount, regardless of whether the elements going to the total actual amount are contemplated in the budget, are reasonable, or are excessive.

A Just and Reasonable Result

[83] The *Condominium Act* contemplates the possibility of budget disagreements and provides procedures to address these particular disputes (s. 132(3)). In *Metropolitan Condominium Corp.*

No. 1143 v. Peng (2008), 67 R.P.R. (4th) 97 (Ont. S.C.), Pattillo J. wrote that the purpose of the mandatory mediation and arbitration provisions of the *Condominium Act* "is to permit, among other things, the expeditious resolution of certain disagreements ... in a simple and inexpensive manner" (at para. 14. See also *McKinstry v. York Condominium Corp. No.* 472 (2003), 68 O.R. (3d) 557 (Ont. S.C.) at para. 19).

[84] The Appellant argued that, if an arbitrator had no authority to consider the propriety and reasonableness of the budget elements included in the shortfall, that this would render the dispute mechanisms meaningless.

[85] The Respondent argues that the Arbitrator's interpretation of an arbitrator's authority protects purchasers by making developers fully liable for any shortfall in the actual total expenses or revenues of the condominium, thereby encouraging developers to provide an accurate and conservative budget for the first-year operations.

[86] In my view, the Respondent's position leads to an unjust and unreasonable result as well as an improper interpretation of the provision. The legislature would not have mandated an alternative dispute resolution process for budget statement disputes, and then removed both the ability of the declarant and authority of the arbitrator to consider the propriety and reasonableness of any elements contained in the shortfall. Additionally, the principles of fairness support this interpretation – otherwise there would be no restriction on what expenses and elements a condominium corporation could include in its first-year statement.

[87] It is my finding that a declarant is fully liable to the condominium corporation for any budget shortfall in the first-year of operation; however, a declarant's liability is not absolute. Through the mandated alternative dispute resolution process a declarant may argue, and an arbitrator may consider, the propriety and reasonableness of any elements contained in the shortfall

Conclusion Regarding Section 75 of the *Condominium Act*

[88] The standard of review is correctness and, for the reasons set out above, I find that the Arbitrator's interpretation of s. 75 of the *Condominium Act* was incorrect.

[89] Notwithstanding my finding the Arbitrator's reasons nevertheless indicate that he considered the evidence and submissions of the Appellant regarding the propriety and reasonableness of certain expenses included in the shortfall. I do not find that any of the conclusions reached were unreasonable or unsupported by the evidence.

[90] I agree with the submissions of the Respondent that the result of the arbitration would have been the same regardless of the Arbitrator's incorrect interpretation of s. 75.

[91] Accordingly, I find no reason to set aside the arbitration award and dismiss this aspect of the appeal.

Did the Arbitrator Make a Reviewable Error in Awarding Pre-judgment Interest?

[92] The Arbitrator awarded interest at the rate prescribed in the Respondent's bylaw number 1, article 11.5 from April 23, 2012, being three percent over the prime rate compounded monthly.

[93] Article 11.5 establishes the rate applicable to arrears for common expenses owed to the condominium corporation by unit owners.

[94] The Arbitrator found that amounts owing under s. 75 should be treated as common expenses in arrears and hence attracts interest at the rate provided for in the bylaws.

[95] The Appellant's position is that the declarant was not a party to the contract/bylaws and is not contractually bound by the provisions.

[96] Further, the Appellant argues that as the declarant is not a party to the contract/ bylaws an award of compound interest would need to be founded in equity and that the limited grounds of equity were inapplicable to the case at bar. As such the Arbitrator was bound by s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, which prohibits an award of compound interest except in very limited circumstances.

[97] The Respondent responded by arguing that the Appellant/declarant wrote the bylaws and is therefore bound by them.

[98] In finding that the Appellant owed interest pursuant to the bylaws, the Arbitrator cited *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc.* (2007), 54 R.P.R. (4th) 260 (Ont. S.C.), rev'd on other grounds, 2009 ONCA 584, 255 O.A.C. 253 (Ont. C.A.) [*Metropolitan Toronto*].

[99] The trial judge in *Metropolitan Toronto* held that there was no "reasonable objection to the plaintiff's position that since the debt arises from the Declarant's failure to pay common expenses, the interest rate payable ought to be the rate specified in Bylaw No. 1" (at para 34). The issue of interest was not before the Court of Appeal.

[100] Section 57 of the *Arbitration Act* provides that ss. 127 to 130 of the *Courts of Justice Act* apply to arbitration, with necessary modifications.

[101] Section 128(4)(g) of the *Courts of Justice Act* sets out that prejudgment interest shall not be awarded under s. 128(1) "where interest is payable by a right other than under this section."

[102] The Supreme Court in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601, at paras 41-43, set out the following circumstances in which interest may be awarded other than as specifically stated in s. 128:

- equity, including an award of compound interest; and
- contract law

[103] The court in *Wentworth Condominium Corp. No. 10-102 v. Mazzon*, 1998 CarswellOnt 1373 (Ont. Gen. Div.) [*Wentworth*] noted that condominium bylaws fell under "interest payable by another right other than that conferred by section 128 and section 129 of the *Courts of Justice Act*." (para. 18). In *Wentworth* the dispute was between a condominium owner and the corporation. In that instance, there was no question that the owner was a party to a contractual agreement to submit to the condominium's bylaws.

[104] The Arbitrator's reasoning accords with the decision of the trial judge in *Metropolitan Toronto*: "I see no reason why they should not pay interest at the rate prescribed for in bylaw number 1 which had originally been prepared and declared by 90 George Street." (para. 42 of the *Interim Award*, dated September 10, 2013)

[105] I agree and find that the Arbitrator's decision was correct. Interest in the case at bar was awarded pursuant to a right other than as provided for by s. 128 and, as such, the Arbitrator was correct in his decision to award interest as provided for in the Respondent's bylaws.

[106] Therefore, the appeal with respect to the issue of interest is dismissed.

Did the Arbitrator Make a Reviewable Error in the Award of Costs?

[107] The Arbitrator awarded costs on a substantial indemnity basis and included in the award costs of the mediation as well as for the arbitration. The award of $90,400.00 inclusive of H.S.T. was slightly more than the sum claimed which was 90 percent of actual fees of $86,493.48 inclusive of H.S.T.

[108] The Appellant argued that the award not only exceeded the amount claimed but also that the Arbitrator erred in awarding costs completely unrelated to the arbitration, including the costs of mediation, and incorrectly applied the principle for awarding costs on a substantial indemnity basis.

[109] An Arbitrator's authority to award costs is found in s. 54 of the *Arbitration Act*, which states as follows:

> 54 (1) An arbitral tribunal may award the costs of an arbitration.
>
> (2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

[110] Section 54(5) of the *Arbitration Act* provides for costs consequences arising from an offer to settle, similar to those set out in Rule 49 of the *Rules of Civil Procedure*. It states:

> 54 (5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in

> respect of the period from the making of the offer to the making of the award.

[111] It is well settled that an award of costs is highly discretionary and entitled to deference on appeal and should only be set aside by an appellate court if there has been an error in principle or if the costs order is plainly wrong (see: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27).

Costs of the Mediation

[112] The Appellant argued that the case of *Greenlight Capital, Inc. v. Stronach* (2008), 91 O.R. (3d) 241 (Div. Ct.) [*Greenlight*] was an authority for the proposition that an award of costs prior to the commencement of a proceeding is a reversible error.

[113] A close reading of the decision however, indicates that the court in *Greenlight* held that an award for costs prior to the Notice of Application was an error principle (at para. 76).

[114] The *Condominium Act* requires parties to mediate budget disagreements before undertaking arbitration. As such, I find that the mediation process did not represent an exercise of discretion by the parties prior to commencing arbitration and for that reason costs encompassing the mediation are related to the arbitration process and are proper and appropriate and dismiss the appeal on this issue.

Costs Awarded on a Substantial Indemnity Basis

[115] The final issue argued was the Appellant's appeal of the decision of the Arbitrator to award costs on a substantial indemnity basis.

[116] Costs on a substantial indemnity basis are to be awarded in rare and exceptional cases (see: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66 [*Davies*]).

[117] The Ontario Court of Appeal in *Davies* held elevated costs should only be awarded in two circumstances: (i) those involving the operation of an offer to settle under Rule 49.10; and (ii) where there has been reprehensible, scandalous or outrageous conduct.

[118] In the reasons for the cost award, the Arbitrator stated that one basis for awarding costs on a substantial indemnity basis was because the declarant "had a statutory obligation to reimburse the Condominium Corporation for the first year's shortfall, which they refused to do, and they also put forth a claim for set-off which was without merit." (para. 8 of the *Award as to Costs, Disbursements and Interest* dated October 21, 2013)

[119] I disagree. I find that this rationale for the award of costs on a substantial indemnity basis is incorrect in view of my conclusion that the *Condominium Act* allows a declarant to challenge the propriety and reasonableness of items included in a condominium corporation's first-year audited statement.

[120] However, a secondary rationale for the Arbitrator's award of costs on a substantial indemnity scale related to the formal offers to settle made by the parties.

[121] The arbitration was held from June 4-5, 2013, and from August 14-15, 2013.

[122] The Respondent made two offers to settle that were less than what they were awarded.

[123] The Respondent's first offer was made on May 8, 2013 – prior to the commencement of the arbitration; the second was presented on July 15, 2013.

[124] Section 54(5) of the *Arbitration Act* is comparable to Rule 49.10 of the *Rules of Civil Procedure* which expressly provides for a consideration of offers to settle when deciding the appropriate scale of costs to award.

[125] The Arbitrator was correct to consider the offers to settle when deciding to award costs on a substantial indemnity basis.

[126] The award of costs on a substantial indemnity basis for the entire arbitration was correct. Both offers were for sums considerably less than awarded and the first offer pre-dated the commencement of the arbitration.

[127] The appeal is therefore dismissed with respect to this issue.

Costs of the Appeal

[128] In the event that the parties are unable to resolve the issue of costs of the appeal, they may file written submissions within 30 days. Submissions are not to exceed five pages in length.

Patrick Smith J.

Released: January 16, 2015

CITATION: 90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corporation No. 815, 2015 ONSC 336
COURT FILE NO.: 13-59021
DATE: 2015/01/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

90 George Street Ltd.

Appellant

– and –

Ottawa-Carleton Standard Condominium Corporation No. 815

Respondent

REASONS FOR DECISION ON APPEAL

P. Smith J.

Released: January 16, 2015