CITATION: Davis v. Peel Condominium Corporation No. 22, 2013 ONSC 3367
COURT FILE NO.: CV-13-473390
DATE: 20130607

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ANDREA DAVIS, Plaintiff/Applicant

AND:

PEEL CONDOMINIUM CORPORATION NO. 22, Defendant/Respondent

BEFORE: Stinson J.

COUNSEL: *Andrea C. Lusk*, for the plaintiff/applicant

Antoni Casalinuovo, for the defendant

HEARD: June 4, 2013

ENDORSEMENT

[1] This is an application to review the ruling of a chairperson in allowing proxy votes to be cast at a condominium corporation meeting and to annul the results of the meeting. The applicant, Andrea Davis, is the owner of a residential condominium unit at Peel Condominium Corporation No. 22 ("PCC 22"). The application is brought under ss. 134 and 135 of the *Condominium Act, 1998*, S.O. 1998 c. 19 (the "*Act*"). Under those provisions the court has a broad ameliorative authority to grant relief which is "fair and equitable in the circumstances": s. 134(3)(c). The court is also empowered to make any order which is deemed proper: s. 135(3).

[2] Under s. 34(1) of the *Act*, a member of the board of directors of a condominium corporation may be removed before the expiration of the director's term by a vote of owners at a meeting where more than 50 percent of all unit owners vote in favour of the removal of the director. Pursuant to s. 46 of the *Act*, a group of owners may, in compliance with that section, requisition a meeting of owners in order to carry out a vote under s. 34. This application concerns what transpired at such a meeting of the owners of PCC 22. The outcome of that meeting was the removal, by a vote of the majority of the owners, of the remaining members of the board of directors, followed by an election to replace them. The applicant asserts that the conduct of the meeting did not comply with the *Act* and that the affairs of the corporation were conducted in a manner that is unfair and prejudicial to her. She therefore asks for relief under ss. 134 and/or 135 of the *Act*.

[3] At the heart of the applicant's complaint is the assertion that chair of the meeting improperly received and accorded voting rights to a number of proxies submitted by certain unit

owners, over the objections of others present at the meeting. Specifically, the complaint is that voting rights were accorded to those unit owners in violation of s. 49(1) of the *Act*. That section provides as follows:

> 49.(1) An owner is not entitled to vote at a meeting if any contributions payable in respect of the owner's unit have been in arrears for 30 days or more at the time of the meeting.

[4] The applicant asserts that the chair of the meeting improperly permitted proxies to be voted despite the fact that the records of PCC 22 indicated that the respective unit owners were in arrears and thus disqualified from voting under s. 49(1). She therefore asserts that there were 12 ineligible votes, which had the result of affecting the outcome of the election; without the admission of the 12 ineligible votes, the requisition to remove the directors would have failed.

[5] During the registration process at the meeting on October 9, 2012, PCC 22's then-lawyer, Ben Rutherford ("Rutherford") was in attendance. He and representatives of the then-property manager of PCC 22, DPC Management ("DPC") reviewed the registered proxies. Based on their review, they concluded that 12 of the proxies submitted had been submitted by unit holders who were in arrears for more than 30 days, and therefore ineligible to vote. All 12 of these proxies favoured the removal of the board.

[6] Also presented at the meeting were two lawyers from Elia Associates, Patricia Elia ("Elia") and Ashley Windberg. Elia Associates had been retained to represent the requisitionist group. Nine of the 12 proxies ruled ineligible were clients of Elia Associates.

[7] When the formal portion of the meeting was convened, Elia objected to Rutherford chairing the meeting on the ground that the person who had designated as him to act as chair was not eligible to be a director. Rutherford agreed with the objection. The unit owners then present voted in favour of Elia chairing the meeting by a show of hands. She proceeded to do so.

[8] After being appointed chair, Elia examined the 12 proxies which were said to have been submitted by unit owners who were caught by s. 49(1) of the *Act*. She proceeded to rule on the question whether the proxies were or were not eligible to be counted towards the removal votes, based on whether the unit owners were, in fact, in arrears. She did so having asked unit owners who allegedly were in arrears to stand and state whether or not they felt PCC 22's records were accurate. Six unit owners spoke and advised the following:

(a) payments made by unit owners to PCC 22 were not credited to their accounts;

(b) despite the fact that some unit owners had made payments for all arrears prior to the commencement of the requisition meeting, they were still being denied the right to vote;

(c) DPC could not explain or provide evidence as to why some unit owners were allegedly in arrears;

(d) notice was not provided to unit owners that they were in arrears; and

(e) DPC had updated the records for PCC 22 only a few days prior to the meeting, and on that basis was asserting the existence of arrears that had not been apparent before that time.

[9] Upon reviewing all of the proxies that were alleged to be invalid, as chair of the meeting, Elia made a decision that they should be included in the vote that evening because the records presented to her by the management company appeared inaccurate. According to her evidence, she made her decision based on the following:

(a) DPC had been updating records on October 8, 2012 for arrears that could not be explained and which were not 30 days old;

(b) several of the unit owners were never advised that they were allegedly in arrears and DPC was unable to explain what the unit owners were in arrears for; and

(c) one unit owner who allegedly was in arrears produced banking records of her own that evening, based upon which Elia concluded that all her expenses had been paid for.

According to her evidence, Elia made the determination that all proxies should be counted towards the vote as there was no clear evidence that any unit owner should lose their right to vote, because she could not determine if the conditions stated in s. 49 preventing a unit owner from voting were satisfied.

[10] I should also note that several of the unit owners who were allegedly in arrears and who anticipated this issue, took steps to pay the amounts in advance or at the registration desk. The applicant argued that they did not pay in advance of the meeting as required by s. 49(2). I am not persuaded that the meeting had commenced prior to those persons tendering their alleged arrears, and I therefore do not accept the applicant's submission on this point.

[11] PCC 22 is comprised of 104 units. As a result, in order for a director to be removed pursuant to s. 33(1) an affirmative vote of 53 in favour of removal was the minimum required in respect of any director. The results of the vote were as follows:

Name	**For**	**Against**
Pavkovic	61	27
Oliveric	60	29
Raszbuyk	62	26
Jimblat	60	30

[12] The position of the applicant is that Elia improperly allowed 12 ineligible votes to be cast. She argues that this affects the validity and lawfulness of the results of the election because, without the admission of the 12 allegedly ineligible votes, the resolution to remove the directors would have failed.

[13] The applicant further argues that Elia's rulings as chair of the meeting should not be permitted to stand because she was retained by the requisitionists and therefore was duty bound to support their agenda to remove the existing board. The applicant argues that Elia's rulings are therefore tainted and in any event, resulted in ineligible votes being cast in the face of non-compliance with s. 49(1).

[14] I agree with the submission of the applicant that, if there are "ballots in the box that should not have been there", and the impugned proxies are declared invalid and their number exceeds the margin of victory, those votes might well have affected the result of the election and the result should be voided: *O'Brien v. Hamel*, [1990] O.J. No. 859. The question thus becomes whether there were, indeed, "ballots in the box that should not have been there."

[15] The applicant submitted that because PCC 22's lawyer and manager had found the impugned proxies to be ineligible because the unit owners were in arrears, that was the end of the question whether those unit owners were on the wrong side of s. 49(1). I disagree. Although pursuant to s. 49(2) voting rights can be restored to someone who may have been in arrears more than 30 days and who pays those arrears before the meeting begins, that does not answer the question of who makes the decision whether a unit owner is, in fact, caught by s. 49(1) in the first place. Nothing in the statute confers the authority to make that decision upon the manager or the lawyer for the corporation. While, as a matter of procedural efficiency, the lawyer and the manager may assist in the meeting registration process, that does not confer authority upon them to make final determinations. Where there is a challenge to the preliminary determination that a proxy is ineligible (or, for that matter, is considered to be eligible), in the absence of any other specified mechanism, that decision should be made by the chair of the meeting.

[16] Indeed, the by-laws of PCC 22 expressly recognize that this function is to be performed by the chair of the meeting. Section 9 of By-law 1 provides as follows:

> 9 Conduct of meetings
>
> (a) At the commencement of any general meeting, a chairman of the meeting shall be elected;
>
> (b) the order of business at any general meeting shall be:
>
> (i) election of chairman of the meeting if president is absent;
>
> (ii) calling of the roll and certifying the proxies;
>
> (iii) proof of notice of meeting or waiver of notice; ...

[17] Based on the foregoing, it is apparent that in acting as she did in ruling on the disputed proxies, Elia was merely performing the function expressly assigned to her as chair of the meeting.

[18] I am not prepared to accept the submission of the applicant that Elia acted in bad faith in making rulings that she did. As the Supreme Court of Canada stated in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (at 35) "persons are assumed to act in good faith unless proven

otherwise". It is for the applicant to establish to the satisfaction of the court that what Elia did was contrary to the best interest of the corporation. As the Supreme Court also noted in that case the fact that a chair of a meeting has an interest in the outcome of a decision does not impugn the integrity of the process. The By-law of PCC 22 does not specify that the corporate meetings are to be chaired by a neutral third party. If the unit owners wish to insert such a requirement, they may amend the By-law. I therefore reject the suggestion that, merely because Elia was retained by a specific interested group of unit holders, she was ineligible to chair the meeting and make the rulings that she did.

[19] I further reject the suggestion that, in the circumstances of her retainer, Elia acted in bad faith. In my view, the record does not support that conclusion. Rather, she sought to give effect to the rights of all unit holders, based upon the facts as she perceived them, and in so doing acted in accordance with the best interest of the corporation. Viewed another way, could it be said that a refusal by her to consider the objections of unit owners who believed they had been wrongly prevented from voting would have been consistent with the best interest of the corporation? I think not.

[20] Based upon the foregoing analysis, I conclude that Elia acted appropriately, discharged the functions that were assigned to her and reached conclusions that she was entitled to reach. Having determined that the records of PCC 22 relating to alleged arrears owed by unit owners were not reliable, she determined that the unit owners who had granted the proxies were not ineligible to vote under s. 49(1). I hold that there was no non-compliance with the *Act*, that the meeting was regularly and properly conducted and that the vote to remove the directors was proper and binding. I therefore see no basis for granting relief under s. 134 of the *Act*.

[21] I am conscious of the further submission of the applicant under s. 135(2) of the *Act* that the conduct of the corporation was oppressive or unfairly prejudicial to the applicant or unfairly disregarded the interests of the applicant. For the reasons that follow, I reject this submission, as well.

[22] The evidence before me establishes that the accuracy of the financial records of PCC 22 relating to alleged arrears of unit holders as at October 9, 2012 was, at best, questionable. It was, in part, on this basis that Elia made the rulings that she did. Subsequent to the meeting, DPC has been terminated as the property manager of PCC 22, and new management has attempted to obtain from DPC the necessary financial information and documents to reconstruct the records of the corporation (and, indeed, has gone so far as to initiate court proceedings to obtain same). In particular, an effort has been made to reconstruct the arrears list as at September 30, 2012 and October 30, 2012, as accurately as possible. There is no sign of the September 30, 2012 arrears list that was purportedly used by PCC 22's lawyer and manager at the October 9, 2012 meeting. The only available one is as of August 30, 2012.

[23] In any proceeding in which a party makes assertions of fact in support of a legal remedy, that party bears the burden of proof of presenting evidence to the court that will satisfy the trier of fact of the existence of facts that support the granting of the remedy. In the present case, the burden is on the applicant to present evidence that establishes that the conduct of the corporation met the test in s. 135(2) of the *Act*.

[24] With a view to ascertaining whether that test was met, I invited submissions from counsel regarding the evidence surrounding the validity or invalidity of the proxies in dispute. I did so despite my ruling that Elia was entitled to make the rulings that she did, at the time of the meeting. However, given the potential uncertainty and confusion whether certain of the unit owners were or were not caught by s. 49(1) as of October 9, 2012, it is conceivable that some of Elia's rulings might have been incorrect in light of the insufficiency or inaccuracy of the information upon which they were based.

[25] Counsel for the applicant prepared a very helpful summary of the disputed proxies and related information. In all, it listed some 16 unit owners whose proxies or removal votes were questioned by the applicant. Having reviewed the evidence relating to each of these 16, I reach the following findings:

No.	Unit	Issue and conclusion
1.	807	Evidence establishes that any potential arrears were paid at the registration desk prior to the meeting commencing.
2.	901	Evidence establishes that any potential arrears were paid at the registration desk prior to the meeting commencing.
3.	1207	Evidence establishes that any potential arrears were paid at the registration desk prior to the meeting commencing.
4.	1004	A bank draft for arrears was obtained by the unit holder several dates prior to the meeting and the evidence indicates that it was tendered on the corporation prior to the meeting.
5.	2005	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in arrears and caught by s. 49(1).
6.	401	The respondent concedes that this unit holder was in arrears more than 30 days as of October 9, 2012.
7.	701	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in arrears and caught by s. 49(1).
8.	906	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in arrears and caught by s. 49(1).
9.	907	The respondent concedes that this unit holder was in arrears more than 30 days as of October 9, 2012.
10.	1001	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in

		arrears and caught by s. 49(1).
11.	1003	The evidence based on the most recent reconciliation is that this unit owner owed no arrears as of October 9, 2012.
12.	1101	The respondent concedes that this unit holder was in arrears more than 30 days as of October 9, 2012.
13.	303	The evidence based on the most recent reconciliation fails to establish that this unit owner was in arrears more than 30 days as of October 9, 2012.
14.	304	The evidence based on the most recent reconciliation fails to establish that this unit owner was in arrears more than 30 days as of October 9, 2012.
15.	PH-1	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in arrears and caught by s. 49(1).
16.	PH-7	The most current evidence available indicates that this unit was in a credit balance as of September 30, 2012 and therefore was not in arrears and caught by s. 49(1).

[26] An additional submission made on behalf of the applicant was that the individuals who signed the proxies in relation to units 1004 and PH-7 were not the registered owners and accordingly, those proxies should be disregarded. The evidence tendered by the applicant does not establish that irregularity, however, and I am therefore not prepared to conclude that those proxies were ineligible.

[27] Based on the foregoing review, of the 16 disputed proxies, the evidence before me establishes that, at most, three were improperly accepted. This means that, at most, the outcome of the vote to remove directors on October 9, 2012 could have been affected by no more than three votes. In other words, there were no more than three "ballots in the box that should not have been there". Given that the margin of victory in favour of the resolutions to remove directors was between 7 and 9 (i.e. 62 minus 53 = 9, 60 minus 53 = 7), the outcome would not have changed had the three improper votes not been cast. As such, the removal vote would still have resulted in the board being removed at the meeting.

[28] I have gone through the foregoing analysis because, in my view, it negatives the suggestion of the applicant that the conduct of the corporation or any of the other unit owners was oppressive, unfairly prejudicial to or unfairly disregarded the interest of the applicant. Based on the best evidence currently available, there were sufficient valid votes cast in favour of the removal of members of the board to safely conclude that the outcome was proper and warranted and the applicant has nothing about which to complain. The *Act* expressly provides for the removal of the board by a majority of the unit owners. The requisitionists were entitled to call the meeting, solicit the proxies and cast them as they did. That is precisely what occurred here. I am therefore unable to find anything on the record before me to support the conclusion that this

process somehow was oppressive, unfairly prejudicial to or unfairly disregarded the interest of the applicant.

[29] For these reasons, I conclude that the applicant has failed to make out a case for the relief sought. The application must therefore be dismissed.

[30] In relation to costs, if the parties are unable to reach agreement, I direct as follows:

(a) The respondent shall serve its bill of costs on the applicant, accompanied by written submissions within 15 days of the release of these reasons.

(b) The applicant shall serve her response to the respondent within 15 days thereafter. I expressly invite her to submit the bill of costs she would have submitted had she been the successful party on the application.

(c) The respondent shall serve its reply, if any, within ten days thereafter.

(d) In all cases, the written submissions shall be limited to three pages, plus bills of costs.

(e) I direct that counsel for the respondent shall collect copies of all parties' submissions and arrange to have that package delivered to me in care of Judges' Administration, Room 170 at 361 University as soon as the final exchange of materials has been completed. To be clear, no materials should be submitted individually; rather, counsel for the respondent will assemble a single package for delivery as described above.

Stinson J.

Date: June 7, 2013