

2013 CarswellOnt 12904, 2013 ONSC 5719

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Dhillon Group Investments Ltd. v. Peel Standard **Condominium Corp.** No. 919

Dhillon Group Investments Ltd., Applicant and Peel Standard **Condominium Corporation** No. 919, 2226828
Ontario Inc. and Rajiv Kumar Johri, Respondents

Ontario Superior Court of Justice

Firestone J.

Heard: June 19, 2013

Judgment: September 16, 2013

Docket: CV-13-476094

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Antonin Pribetic, for Respondents, 2226828 Ontario Inc. and Rajiv Kumar Johri

Subject: Property

Real property

Cases considered by Firestone J.:

Apartments International Inc. v. Metropolitan Toronto Condominium Corp. No. 1170 (2002), 2002 CarswellOnt 3321 (Ont. S.C.J.) — considered

Apartments International Inc. v. Metropolitan Toronto Condominium Corp. No. 1170 (2003), 2003 CarswellOnt 1298, 170 O.A.C. 197 (Ont. C.A.) — referred to

Halton Condominium Corp. No. 59 v. Howard (2009), 2009 CarswellOnt 5074 (Ont. S.C.J.) — considered

McKinstry v. York Condominium Corp. No. 472 (2003), 15 R.P.R. (4th) 181, 68 O.R. (3d) 557, 2003 CarswellOnt 4948 (Ont. S.C.J.) — referred to

Muskoka Condominium Corp. No. 39 v. Kreuzweiser (2010), 2010 ONSC 2463, 2010 CarswellOnt 2504 (Ont. S.C.J.) — considered

Peel Condominium Corp. No. 283 v. Genik (2007), 2007 CarswellOnt 4113 (Ont. S.C.J.) — referred to

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 7(5) — considered

s. 17(3) — considered

s. 119(1) — considered

s. 132 — considered

s. 134(1) — considered

s. 134(2) — considered

s. 176 — considered

Firestone J.:

1 The Applicant, Dhillon Group Investments Ltd. ("Dhillon"), brings this Application against the Respondents, Peel Standard **Condominium Corporation** No. 919 ("PSCC 919"), 2226828 Ontario Inc. ("222"), and Rajiv Kumar Johri ("Johri") for the following relief:

1. A declaration that:

i. the following portion of PSCC 919's declaration, the last sentence of article 4.1(g) thereof ("the Disputed Portion of the Declaration"), is inconsistent with s. 17(3) of the *Condominium Act, 1998*, S.O. 1998, c. 19, and unenforceable:

It shall not be the responsibility of the **Condominium Corporation** to enforce Restrictive Covenants herein contained, and the **Condominium Corporation** shall not be added to any such claim as a defendant or third party defendant for failing to enforce such Restrictive Covenant.

ii. PSCC 919's declaration is therefore amended pursuant to s. 7(5) of the Act by deleting the Disputed Portion of the Declaration, together with the appropriate order;

iii. the use of 222's unit for the purposes of an accounting office including preparing, processing, and filing tax returns, tax planning, financial planning, or any of them, contravenes article 4.1(g) of PSCC 919's declaration; and

iv. that PSCC 919 breached its statutory duty to enforce the declaration by not taking steps to stop 222 from using or permitting the use of its unit for the purposes of an accounting office including preparing, processing, and filing tax returns, tax planning, financial planning, or any other services offered and carried out in an accounting office.

2. An order that:

- i. 222 and Johri cease using or permitting the use of its unit, for the purposes of an accounting office including preparing, processing, and filing tax returns, financial planning, and tax planning, or for any other services offered or carried out in an accounting office.

The Parties

2 Dhillon is the registered owner of Unit 28, Level 1 in PSCC 919. Dhillon operates an accounting office from that unit. Its principal is Satinder Dhillon, a Certified General Accountant ("CGA").

3 222 is the registered owner of Unit 1, Level 1 in PSCC 919. Its primary business is dry cleaning. Its secondary business is financial planning and consulting services including tax return preparation.

4 Johri is the sole director, president, and secretary of 222. Johri is a Certified Public Accountant ("CPA") and Certified Management Accountant ("CMA").

5 PSCC 919 is a non-profit **condominium corporation** responsible for the management and administration of a high-rise condominium project comprised of 29 commercial units.

Issues for Determination

6 The issues for determination on this Application are as follows:

1. Whether Johri and 222's use of its unit constitutes use as an "Accounting Office" thereby contravening article 4.1(g) of PSCC 919's declaration.
2. Whether the Disputed Portion of Declaration conflicts with the provisions of the *Condominium Act, 1998* and is therefore unenforceable.

Factual Background

7 Dhillon purchased a unit in PSCC 919 on the basis of having exclusive use of the unit as an "Accounting Office" under article 4.1(g) of the declaration. Dhillon took possession on or about November 1, 2010. Following renovations, Satinder Dhillon began operating an accounting practice in the unit on or about February 12, 2011.

8 Initially, 222 and Johri operated a dry cleaning business, Classic Dry Cleaners, out of its unit. While Dhillon was using its unit as an accounting office, 222 and Johri renovated part of their unit. They began preparing, processing, and filing tax returns and also provided financial planning and tax planning from their unit.

The Declaration

9 Article 4.1(g) of PSCC 919's declaration states in part as follows:

The occupation and use of the units shall be in accordance with the following restrictions and stipulations:

- (g)... During such time that a Unit (or combined Units) in buildings A, B/C, D, E and F is being used primarily for one of the purposes listed below, no other Unit in Buildings A, B/C, D, E and F may be

used for such purpose: Beauty Salon, Immigration Office, Pizza Restaurant/Delivery, Submarine Sandwich Shop, Grocery Store, Travel Agency, Convenience Store including tobacco and lottery, the sale of hamburgers as a principal use or main menu item, Coffee Shop, one of each type of ethnic restaurant, Dry Cleaner, Cellular Phone and Audio/Video Computer Store, Accounting Office, Home Life Experts, Optical Store, including the sale of ophthalmic products, eye glasses, contact lenses and all related products, Meat Shop, Jewelry Store, Carpet Store, Family-style Restaurant serving wings and ribs.

Each Owner will undertake and agree to comply fully with all such restrictions affecting the uses of the Units and will agree to be liable for all damages incurred by the Declarant and/or **Condominium Corporation** as a result of any non-compliance with any such restrictions by the Unit Owner or by any person for whom the Unit Owner is responsible.

In the event a Unit Owner or its Tenant ceases to carry on business of one of the purposes listed above for a period of sixty (60) days, such Unit Owner will be deemed to have surrendered its use of the Restrictive Covenant and the **Condominium Corporation** shall have the right to reassign such servile/purpose to another Unit.

If an Owner of a Unit making use of a Restrictive Covenant as permitted by the declaration finds that another Unit Owner is in breach of the terms of such Restrictive Covenant, only the Unit Owner having the exclusive use shall be entitled to enforce such Restrictive Covenant against the offending Unit Owner, at its sole cost and expense. It shall not be the responsibility of the **Condominium Corporation** to enforce the Restrictive Covenants herein contained, and the **Condominium Corporation** shall not be added to any such claim as a defendant or third party defendant for failing to enforce such Restrictive Covenant.

Analysis

1. Whether Johri and 222's use of its unit constitute use as an "Accounting Office" thereby contravening article 4.1(g) of PSCC 919's declaration?

10 Dhillon is a CGA and provides the following services:

- financial planning
- tax planning
- tax preparation
- tax compliance
- tax filing

11 It is clear from the evidence before me that Dhillon's unit is "being used primarily for" the purpose of an "Accounting Office." Therefore, the restrictive covenant in article 4.1(g) of the PSCC 919's Declaration applies.

12 The next question is whether 222 and Johri are also using their unit for "such purpose," namely, an "Accounting Office," under article 4.1(g).

13 Johri is a CMA (an Ontario designation) and a CPA (a U.S. designation). Johri confirmed that he provides the following services:

- financial planning and consulting
- tax preparation and filing
- securing loans, insurance, and mortgages

Johri states that he does not provide the following services:

- bookkeeping
- advising on the preparation of financial statements
- auditing

14 Johri claims that tax return preparation and filing comprise a "very small portion" of his business. However, the advertisement marked as Exhibit 1 to his Affidavit, sworn April 3, 2013, focuses on tax preparation and filing for individuals and corporations. The ad further states that Johri holds a CPA and CMA and that he is a "former tax auditor."

15 Exhibit 2 to the same Affidavit is a copy of Johri's business card. The card lists the services he provides, which include "Canada Revenue Agency Audit Assistance" and "Tax & Financial Planning." Like the ad, his business card identifies that he is a CPA, a CMA, and a "former tax auditor."

16 Johri relies on the definitions of "Accountant" and "Accounting" to support his argument that he does not use his unit as an "Accounting Office." These definitions generally define accounting as keeping and auditing financial accounts.

17 I note, however, that the brochure prepared by the Certified General Accountants of Ontario marked as Exhibit D to the Affidavit of Satinder Dhillon, sworn March 12, 2013, indicates that accounting services include "payroll administration, tax compliance, cash management, projections and bill payment, plus analysis, assessments, calculations and reviews." In addition, a CGA can assist with tax planning and preparation. This is more than keeping and auditing financial accounts.

18 The services commonly provided by an accountant are also broader than simply keeping financial accounts. In any event, article 4.1(g) uses clear language. It states "Accounting Office" not "Accountant."

19 The restrictive covenant in article 4.1(g) lists "Accounting Office" along with a number of other general services including "Beauty Salon," "Grocery Store," "Coffee Shop," and "Dry Cleaner." This, in my view, indicates that the covenant is meant to prevent more than one unit from offering the same general type of service.

20 In determining whether 222 and Johri have breached article 4.1(g), the question is whether the type of services provided by 222 and Johri are those carried on in an "Accounting Office."

21 In my view, some of the services that Johri advertises and provides, namely tax preparation and filing, fall under what is commonly considered "Accounting Services" carried on in an "Accounting Office."

22 Whether accounting services is the primary or secondary use of 222 and Johri's unit is irrelevant. Article 4.1(g) prohibits the use of any other unit as an "Accounting Office" if a unit, in this case Dhillon's, is "being used primarily for" the purpose of an "Accounting Office."

23 I, therefore, find that Johri and 222 have contravened article 4.1(g) of PSCC 919's declaration by using their unit as an Accounting Office. Under section 119(1) of the Act, unit owners are bound to comply with the **condominium corporation's** declaration. Under section 134(1) of the Act, Dhillon is entitled to seek a compliance order by way of an application.

2. Whether the Disputed Portion of the Declaration conflicts with the provisions of the Act and is therefore unenforceable?

24 Section 17(3) of the Act states as follows:

The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

25 Article 4.1(g) of PSCC 919's Declaration states that PSCC 919 is not responsible for enforcing the restrictive covenants specified therein.

26 Section 7(5) of the Act states as follows:

If any provision in a declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the declaration shall be deemed to be amended accordingly.

27 In my view, the portion of article 4.1(g) stating that PSCC 919 is not responsible for enforcing the restrictive covenants contained therein is inconsistent with section 17(3) of the Act.

28 Section 17(3) of the Act clearly states that a **condominium corporation** is to take all reasonable steps to ensure owners comply with the declaration. Notwithstanding this, article 4.1(g) as it applies to the restrictive covenants says the opposite. It states that the corporation is not responsible for enforcing the restrictive covenants and in essence the corporation does not need to take reasonable steps to ensure unit owners comply with the restrictive covenants in article 4.1(g) of the declaration. The meaning of "all reasonable steps to ensure compliance" and enforcement are in essence the same thing.

29 "Reasonable steps" may be as simple as making a formal written request to unit owners to comply with a restrictive covenant.

30 Section 17(3) of the Act positively obligates the corporation, without exception, to take reasonable steps to enforce all aspects of its declaration on unit owners. Section 7(5) of the Act further stipulates that any provision in the declaration saying otherwise shall be deemed to be amended accordingly.

31 In *Apartments International Inc. v. Metropolitan Toronto Condominium Corp. No. 1170* [2002 CarswellOnt 3321 (Ont. S.C.J.)], 2002 CanLII 14780, aff'd [2003 CarswellOnt 1298 (Ont. C.A.)], 2003 CanLII 17646, the court stated in part as follows at para. 31:

[U]nder the *Condominium Act*, the Directors of MTCC No. 1170 have a legal duty to enforce the **con-**

dominium corporation's declaration and rules. Accordingly, MTCC No. 1170 has a legal duty to effect compliance by API [the lessor of some units in MTCC No. 1170] and its landlords and sub-tenants with the declaration and rules.

32 In *Muskoka Condominium Corp. No. 39 v. Kreuzweiser*, 2010 ONSC 2463 (Ont. S.C.J.), at para. 8, the court stated in part, "[s]ection 17(3) of the Act requires a **condominium corporation** to enforce the declaration and rules. These provisions are crucial to the orderly operation of condominiums and for the protection of condominiums unit owners and occupiers." This obligation to enforce was also confirmed in *Halton Condominium Corp. No. 59 v. Howard* [2009 CarswellOnt 5074 (Ont. S.C.J.)], 2009 CanLII 44710, at para. 12, where J.A. Ramsay J. stated in part, "[t]he corporation was required by the *Condominium Act* to enforce the declaration."

33 The mediation and arbitration requirements set forth in sections 134(2) and 132 of the Act do not apply in this case because the issue here is not only the declaration, but also non-compliance with the Act: see *McKinstry v. York Condominium Corp. No. 472* [2003 CarswellOnt 4948 (Ont. S.C.J.)], 2003 CanLII 22436, at para. 39; and *Peel Condominium Corp. No. 283 v. Genik* [2007 CarswellOnt 4113 (Ont. S.C.J.)], 2007 CanLII 23915, at para. 9.

34 I, therefore, find that the Disputed Portion of the Declaration is inconsistent with section 17(3) of the Act. By virtue of sections 7(5) and 176 of the Act, the Disputed Portion of the Declaration is unenforceable and the declaration is deemed to be amended accordingly.

Disposition

35 For the reasons set forth above:

1. I declare that the following Disputed Portion of the Declaration is hereby inconsistent with s. 17(3) of the *Condominium Act, 1998* and unenforceable:

It shall not be the responsibility of the **Condominium Corporation** to enforce Restrictive Covenants herein contained, and the **Condominium Corporation** shall not be added to any such claim as a defendant or third party defendant for failing to enforce such Restrictive Covenant.

2. I order that PSCC 919's declaration shall be amended pursuant to s. 7(5) of the Act by deleting the Disputed Portion of the Declaration, and PSCC 919 shall register forthwith a certified copy of this order against title to all of the units in PSCC 919.

3. I declare that the use of Johri and 222's unit for the purposes of an accounting office including preparing, processing, and filing tax returns, tax planning, financial planning, or any of them, contravenes article 4.1(g) the PSCC 919's declaration.

4. I declare that PSCC 919 breached its statutory duty to enforce the declaration by not taking steps to stop 222 from using or permitting the use of its unit for the purposes of an accounting office including preparing, processing, and filing tax returns, tax planning, financial planning, or any other services offered and carried out in an accounting office.

5. I order that 222 and Johri cease using or permitting the use of its unit for the purposes of an accounting office including preparing, processing, and filing tax returns, financial planning, and tax planning, or for any other services offered or carried out in an accounting office.

36 If the parties are not able to agree on costs, written submissions with a costs outline totaling no more than three pages may be filed within 15 days.

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