2013 CarswellOnt 161, 2013 ONSC 122

2013 CarswellOnt 161, 2013 ONSC 122

Grey Standard **Condominium Corp**. No. 50 v. Grey Standard **Condominium Corp**. No. 46

Grey Standard **Condominium Corporation** No. 50, Applicant and Grey Standard **Condominium Corporation** No. 46, Respondent

Ontario Superior Court of Justice

DiTomaso J.

Heard: December 21, 2012
Judgment: January 7, 2013
Docket: Barrie CV-12-0874

Counsel: S. Hodis, for Applicant

D.A. Schatzker, for Respondent

Subject: Civil Practice and Procedure; Property

Real property

***DiTomaso J.*:**

The Application

1 The parties are **condominium corporations** located at Blue Mountain Resort and Village near Collingwood, Ontario. The cooling towers for air conditioning equipment are located on the premises of the Respondent Grey Standard **Condominium Corporation** No. 46 ("GSCC 46") but they also provide services to the Applicant Grey Standard **Condominium Corporation** No. 50 ("GSCC 50").

2 The parties are involved in a long-standing dispute in relation to payment of the cost of utilities for the cooling towers. They could not resolve their dispute which culminated in GSCC No. 46 threatening to shut off the air conditioning which serviced GSCC No. 50 around the time of the August 2012 holiday week-end.

3 As a result of GSCC No. 46 threats to shut off the air conditioning, GSCC No. 50 commenced this application. The matter was originally before Justice Eberhard on August 8, 2012. An order was obtained restraining GSCC No. 46 from disrupting any cooling services to GSCC No. 50 that emanated from the cooling towers. The balance of the

application, including costs, was adjourned to be dealt with by this court at a later date.

Background

4 This is a dispute about whether GSCC No. 50 ought to pay its share of the operating costs of the air conditioning services for its building. The air conditioning machinery is located in GSCC No. 46's building and is connected to GSCC No. 46's electricity service. GSCC No. 46 has been paying to operate these utilities since 2002 even though the machinery services GSCC No. 50's building. This peculiarity in the way the complex was originally set up by the developer has led to this dispute.

5 The parties, amongst others, are bound by a Shared Facilities Agreement ("SFA") which speaks to the Shared Facility Costs to be borne by each party. While the SFA, Schedule C, speaks to shared costs of repair and maintenance between the parties, it does not require the parties to share the costs of utilities in respect of the cooling towers.

6 While GSCC No. 50 has paid its proportionate share of repair and maintenance costs regarding the evaporative cooler and ventilation system in accordance with Schedule C, GSCC No. 46 seeks to amend Schedule C to include the cost of utilities for the cooling towers and for those costs to be shared by various parties to the SFA. Those utilities would include electricity, gas and water.

7 The parties attempted to negotiate the issue of shared utility costs, but they were unable to resolve their dispute.

8 Their inability to resolve their issues led to this application being issued August 7, 2012.

9 Contemporaneous with this application was an action commenced by GSCC No. 46 in the Superior Court of Justice at Toronto by way of Statement of Claim dated August 2, 2012 against the Defendants Simerra Property Management Inc., Grey Standard **Condominium Corporation** No. 47, Grey Standard **Condominium Corporation** No. 50 and Grey Standard **Condominium Corporation** No. 51.

10 The key issue now is whether GSCC No. 46 ought to be entitled to continue with its action commenced in the Superior Court as asserted by GSCC No. 46. To the contrary, GSCC No. 50 submits that the Superior Court action commenced by GSCC No. 46 ought to be stayed and that the matter proceed by way of mediation and arbitration pursuant to the Shared Facilities Agreement and the *Condominium Act, 1998*.

The Issues

11 There are three issues arising on the return of this application:

(1) Should GSCC No. 46 be entitled to continue with its action commenced in the Superior Court when the Shared Facilities Agreement and the *Condominium Act* provide that the matter proceed by way of mediation and arbitration?

(2) Should GSCC No. 46 be restrained from demanding payment or threatening to file a lien for payment of utility costs it considers owed to them by GSCC No. 50 prior to the issue being dealt with by way of mediation and arbitration?

(3) Is GSCC No. 50 entitled to full indemnity costs of the application?

Positions of the Parties

Position of GSCC No. 46

12 GSCC No. 46 maintains that it has the right to elect the forum to deal with issues which are more broadly framed in the action such as the equitable remedy of unjust enrichment for past payments. This court should not prohibit GSCC No. 46 from pursuing its action against GSCC No. 50 in the Toronto Superior Court action thereby bifurcating the proceedings. Bifurcation should be avoided in this case by forcing part of the dispute into arbitration pursuant to section 132 of the *Condominium Act*. GSCC No. 46 submits that obligations to pay utility costs pursuant to the SFA for past, present and future expenses are intertwined. To proceed separately would run counter to rule 1.04 of the *Rules of Civil Procedure* creating a multiplicity of proceedings and running the risk of different results. Further, it is submitted that the appropriate forum for the unjust enrichment claim ought to be in the Superior Court action commenced at Toronto.

13 As for the second issue, GSCC No. 46 contends that there is no need for such an order to be made at this time. There are no threats demanding payment or lien claims being advanced. Neither has there been any harassment of any GSCC No. 50 condominium owners. The relief sought is unnecessary.

14 As for costs, both sides have agreed that costs are to be determined by way of written submissions.

Position of GSCC No. 50

15 GSCC No. 50 submits that both the Shared Facilities Agreement and section 132 of the *Condominium Act* are consistent in providing a mechanism for the utilities issue to be dealt with by way of mediation and arbitration. The contractual and legislative provisions support this position.

16 As for restraining GSCC No. 46 from demanding payment or threatening to file liens for payment of utility costs, GSCC No. 46 ought to be prohibited from so doing prior to the issue being dealt with by way of mediation and arbitration.

17 As for costs, GSCC No. 50 seeks full indemnity costs regarding the application. As agreed, the issue of costs will be determined by way of written submissions.

Analysis

18 The facts are largely not in dispute and can be recited as follows.

19 The parties are **condominium corporations** located in Blue Mountain Resort and Village near Collingwood, Ontario.

20 The parties, among others, are bound by a Shared Facilities Agreement ("SFA"). Article 3.03(a) of the SFA states that each party to the SFA shall pay its shared facilities costs as allocated in Schedule C.

21 Under the heading "Evaporative Cooler and Ventilation System" (commonly referred to as the "cooling towers") of Schedule C, the parties are only required to share in the costs of repair and maintenance. This provision does not require the parties to share in the cost of utilities with respect to this equipment. As such, GSCC No. 50 asserted that it had no obligation under the SFA to pay for utility costs of the cooling towers. However, there were ongoing discussions between the parties which addressed, although unsuccessfully, the sharing of those costs as between the parties.

22 The equipment for the evaporative cooler and ventilation system is located in GSCC No. 46's building and the

utilities are paid for by that party. GSCC No. 46 has been paying for these utilities since 2002. The evaporative cooler and ventilation system provides air conditioning to GSCC No. 50.

23 To date, GSCC No. 50 has paid its proportionate of repair and maintenance costs in relation to this system in accordance with Schedule C.

24 GSCC No. 46 seeks to amend Schedule C of the SFA to include the cost of utilities for the cooling towers and for those costs to be shared by various parties to the SFA. In January 2012, GSCC No. 46 asked for the electricity cost to be included in Schedule C. In March 2012, GSCC No. 46 demanded that the cost of gas also be included in Schedule C. In April 2012, GSCC No. 46 further demanded that Schedule C be amended to include electricity, gas and water under the SFA.

25 Article 3.04 of the SFA allows the parties from time to time in writing to adjust their respective share of the expenses and to allocate amongst themselves the cost of any item not included in Schedule C. There has been no consent in this regard. The Shared Facilities Agreement can be found in the Application Record at Tab 2, the Affidavit of Robin Rudolph sworn August 7, 2012 at Exhibit A.

26 The issue of payment of hydro has been an ongoing issue since 2006. The issue of concluding an amendment to Schedule C to share the cost of the utilities including water, gas and electricity was not successfully achieved despite various meetings to deal with this specific issue as well as an audit of all shared components and individual components in relation to utilities. Further, all parties were to put forward their individual issues regarding the SFA which would have been addressed when amending the SFA.

27 Unfortunately, none of these issues were resolved. The threat by GSCC No. 46 to shut off the air conditioning to GSCC No. 50's building unless certain amounts were paid resulted in this application being brought and heard originally before Justice Eberhard on August 8, 2012. An order was obtained restraining GSCC No. 46 from disrupting any cooling services to GSCC No. 50 that emanated from the cooling tower which included but was not limited to discontinuing the electricity, gas or water.

The Shared Facilities Agreement ("SFA")

28 Article 3.03(a) of the SFA provides that each party to the SFA shall pay its Shared Facilities Costs as allocated in Schedule C.

29 Schedule C item 5 addresses shared facilities for the evaporative cooler and ventilation system. The parties are only required to share in the costs of repair and maintenance. Item 5 does not require the parties to share in the cost of utilities with respect to this agreement.

30 Article 3.04 of the SFA addresses the readjustment of shared facilities. Article 3.04(a) provides that the parties may from time to time agree in writing to adjust their respective proportionate liability for sharing the cost of any items in Schedule C.

31 The parties could come to no resolution in respect of amending Schedule C regarding the sharing of utility costs, past, present or future.

32 Article 3.05 of the SFA provides for a dispute resolution process for parties who wish to add or vary any item in Schedule C. If the parties are unable to reach an agreement within 30 days of giving notice of their request, the matter is to be decided by the Arbitration Tribunal in accordance with Article 12 of the SFA.

33 Article 12.01 of the SFA provides:

> 12.01 Arbitration Tribunal
>
> Except where expressly prohibited if any dispute arises under this Agreement between any of the parties hereto (including, without limitation, a dispute which is expressly referable to the Arbitration Tribunal) then such dispute shall be determined by reference, at the instance of any interested party, to the Arbitration Tribunal in accordance with the following procedures.

34 Article 12.01(a) to (g) sets out the process before the Arbitration Tribunal.

35 The procedures in Article 12 of the SFA have not been followed by any party.

36 The Affidavit of Robin Rudolph sworn August 7, 2012 on behalf of GSCC No. 50 can be found at Tab 2 of the Application Record. Ms. Rudolph was not cross-examined upon her affidavit. At Exhibit D of her Affidavit can be found correspondence from GSCC No. 46's former solicitor. In January 2012 that solicitor acknowledged the mediation and arbitration provisions in the *Condominium Act* and the SFA were the procedures to be followed if the parties could not reach an agreement within 30 days regarding amendments to this SFA, Schedule C, among any other available options.

37 GSCC No. 46, through its current solicitor filed a Statement of Claim in the Superior Court of Justice at Toronto on August 2, 2012 with respect to the SFA. GSCC No. 50 was named among others as a defendant. GSCC No. 46, by issuing and serving the Statement of Claim, ignored the dispute resolution process set out in the Shared Facilities Agreement and the *Condominium Act, 1998*.

38 Superimposed upon the SFA and dispute resolution mechanism provided in that agreement between the parties, are the statutory requirements of the *Condominium Act, 1998*.

39 In particular, section 132 of the *Condominium Act, 1998* requires that Agreements between two or more corporations, such as a Shared Facilities Agreement as in this case, contain a provision that disagreements between the parties be submitted to mediation and arbitration. Section 132 provides:

> 132.(1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,
>
> (a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and
>
> (b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,
>
> (i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or
>
> (ii) 30 days after the mediator selection under clause (a) delivers a notice stating that the mediation has failed. 1998, c.19, s.132(1).

Application

(2) Subsection (1) applies to the following agreements;

1. An agreement between a declarant and a corporation.

2. An agreement between two or more corporations.

3. An agreement described in clause 98(1)(b) between a corporation and an owner.

4. An agreement between a corporation and a person for the management of the property. 1998, c.19, s.132(2).

40 The parties have not mediated or arbitrated the dispute surrounding the Shared Facilities Agreement and the allocation of utility expenses for the cooling towers as required by section 132 of the *Condominium Act, 1998* and the SFA. The parties have never selected a mediator. No notice has been delivered by a mediator under section 132(1)(b)(ii) stating that the mediation has failed. Further, GSCC No. 46 has not delivered a notice directing that the matter proceed to arbitration.

41 Section 176 of the *Condominium Act, 1998* prohibits parties from contracting out of the Act. Section 176 provides:

176. This Act applies despite any agreement to the contrary.

42 I find that in this case the Shared Facilities Agreement between GSCC No. 50 and GSCC No. 46 is the kind of agreement between two or more corporations specifically referenced in section 132(2)2 of the Act. The SFA and section 132 of the *Condominium Act, 1998* provide a consistent mechanism for dealing with disputes between two or more **condominium corporations** as to how shared utility costs should be paid.

43 On behalf of GSCC No. 46, it is argued that it has the right to select the appropriate forum to deal with the payment of utilities past, present and future. The issues are so intertwined and that there should be no bifurcation of the issues so as to have the Superior Court of Justice determine some of the issues in the Toronto action and other issues determined by way of mediation and arbitration. Specifically, it is argued that the claims in the Toronto action are more expansive which action includes an unjust enrichment claim that can only be determined in the Superior Court action.

44 I specifically reject the argument that the subject matter in the Toronto action is somehow broader in scope and deals with equitable remedies such as unjust enrichment giving the Superior Court of Justice ultimate jurisdiction to deal with these types of issues.

45 Notwithstanding the argument of GSCC No. 46, the central issue in the Superior Court Toronto action is who is responsible to pay the past utility expenses and whether there has been unjust enrichment on the part of any of the named defendants.

46 The subject matter of the court action is the same as the ongoing dispute between GSCC No. 50 and GSCC No. 46; namely, who is responsible to pay the shared utility costs associated with the cooling towers. This issue is not one which is static in time. It relates to past payments, present payments and payments in future.

47 I reject the argument that only the Superior Court can deal with a claim in equity such as the unjust enrichment claim. Section 31 of the *Arbitration Act, 1991* provides:

> 31. An arbitral tribunal shall decide a dispute in accordance with the law, including equity, and may order specific performance, injunctions and other equitable remedies.

48 "Other equitable remedies" would include a claim for unjust enrichment.

49 Further, the courts have upheld dispute resolution processes in agreements and have forced parties by way of injunctive relief to abide by those processes which the parties agreed to and to pursue their remedies by way of these dispute resolution processes and not by court action. (See *Toronto Truck Centre Ltd. v. Volvo Trucks Canada Inc.*, 1998 CanLii 14815 (ONSC) paras. 45 and 46)

50 Counsel for GSCC No. 46 cited the Court of Appeal decision in *Nipissing* ***Condominium Corporation*** *No. 4 v. Simard*, [2009] ONCA 743in support of the position of GSCC No. 46 that all matters raised should be dealt with in the Superior Court Toronto action. I find the *Simard* case is distinguishable from the case at bar. In *Simard*, there was a dispute between a condominium tenant and the **condominium corporation**. The dispute centred on Mr. Simard having rented his units to students. The issue involved whether Mr. Simard was in violation of the declaration of the **Condominium Corporation** which provided that each unit would be occupied only as one family residence. The Court of Appeal upheld the motion judge who ruled the matter should not proceed by way of mediation and arbitration but rather by way of application to the Superior Court. On its facts, *Simard* differs from the facts in the case at bar. The ultimate issue in *Simard* was whether a unit owner was bound by what he alleged to be a provision in violation of the *Ontario Human Rights Code* and was therefore discriminatory. The Ontario Court of Appeal upheld the decision of the motions judge not to bifurcate and to proceed in one forum, namely the Superior Court.

51 Such is not the case here where we have no such *Human Rights Code* issue. Rather, we have two **condominium corporations** engaged in a dispute regarding the shared payment of utilities for the cooling towers.

52 The dispute resolution mechanism included in the SFA was consensual and provided for a constructive, timely and cost effective method for dealing with differences such as the utilities payments dispute in this case.

53 I find that the parties are bound by their contractual agreement. It makes commercial sense that they abide by the terms of their agreement and proceed by way of mediation and arbitration of the utilities payment dispute. Further, this finding is supported by the legislative provisions contained in the *Condominium Act, 1998* such as section 132 and section 176 as well as section 31 of *Arbitration Act, 1991* which gives jurisdiction to an arbitral tribunal to decide a dispute in accordance with law, including equity and that tribunal may order equitable remedies such as unjust enrichment.

Conclusion

54 As for the first issue to be determined, GSCC No. 50's action commenced in Toronto in the Superior Court is hereby stayed. GSCC No. 46 is hereby ordered to follow the dispute resolution process as set out in the Shared Facilities Agreement and section 132 of the *Condominium Act, 1998* as amended.

55 As for the second issue to be determined, I am not satisfied that an order should issue restraining GSCC No. 46 from demanding payment for utility costs in relation to the cooling towers from GSCC No. 50 or the filing of a lien until the dispute resolution process as set out in the Shared Facilities Agreement and the *Condominium Act, 1998* is complete.

56 I say this because there are no such demands or threats of lien proceedings extant at this time. It is unnecessary that such an order be made presently given the fact that there is nothing to suggest that GSCC No. 50 is in imminent danger of being subjected to these types demand or attack by GSCC No. 46. On a without prejudice basis, GSCC No. 50 may renew its Application in this regard should it become necessary to do so.

57 Also taken into account is the fact that the parties have agreed to a continuation of the order of Justice Eberhard dated August 8, 2012. GSCC No. 46 continues to be bound by that order restraining GSCC No. 46 from disrupting any cooling services to GSCC No. 50 that emanates from the cooling towers, which includes, but is not limited to discontinuing the electricity gas or water.

58 The parties have consented that Justice Eberhard's order continues until further order of the court. Given my reasons and the continuing order of Justice Eberhard, it should be very clear to GSCC No. 46 that the kind of anticipatory conduct complained of by GSCC No. 50 would not meet with the court's approval in any way should GSCC No. 46 issue fresh threats and demands.

59 Costs are to be determined by way of written submissions. The parties are to deliver a concise Costs Summary no longer than two pages in length, together with a Costs Outline, Bill of Costs and any supporting cases within 14 days. Those written submissions are to be delivered to my Judicial Assistant at Barrie.

END OF DOCUMENT