CITATION: Kerr v. King's Landing, 2015 ONSC 84
COURT FILE NO.: 14-60825
DATE: 20150106

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LAWRENCE KERR and ENIKO VERMES Applicants	Bruce F. Simpson, for the Applicants
- and -	
KING'S LANDING CO-TENANCY COMMITTEE Respondent	Christy J. Allen, for the Respondent
	ARGUED: November 27, 2014 (Ottawa)

HACKLAND J.

REASONS FOR DECISION

Background:

[1] This is an application under section 45 of the *Arbitration Act, 1991* (the "Act") for leave to appeal the arbitral award of an arbitrator, The Hon. James B. Chadwick, Q.C., dated April 11, 2014 ("the decision").

[2] The arbitration that resulted in the decision was conducted pursuant to article 12 of an agreement known as the King's Landing Co-Tenancy Agreement, which is an agreement that was registered on December 24, 1998 on title to all homes within the King's Landing development as Instrument No. 1172030 (the "Co-Tenancy Agreement").

[3] The issue before the arbitrator was whether or not the King's Landing Co-Tenancy Committee (the "Committee") had the authority, pursuant to the provisions of the Co-Tenancy Agreement, to require the removal or relocation of an air conditioning (AC) unit that had been installed at ground level, by the applicants without the permission of the Committee.

[4] The arbitrator determined that the Committee did have authority to require the removal or relocation of the AC unit. The applicants seek leave to appeal from that decision.

The Facts

[5] King's Landing is a 61 home residential development fronting on the Rideau Canal in Ottawa. The applicants own one of the homes. The Respondent, The King's Landing Co-Tenancy Committee, is a Committee created pursuant to the provisions of the Co-Tenancy Agreement and is responsible for the management of the shared property and the administration of the Co-Tenancy Agreement. The Committee is comprised of three individuals who are elected by all of the owners within the King's Landing development.

[6] The Co-Tenancy Agreement contains the following provision at article 6.2:

> Alterations to Exterior. An Owner shall not make any alteration to the exterior of the Unit without the prior written approval of the Co-Tenancy Committee, unless such alteration is minor or cosmetic in nature, in which event such approval shall not be required. The Co-Tenancy Committee shall determine whether an alteration is minor or cosmetic and its decision shall be final and binding. Such alterations shall be subject to the requirements, if any, of the National Capital Commission.

[7] At the time of construction of King's Landing, the AC units for all uneven numbered homes in the development (being generally the homes closest to the Rideau Canal which do not have enclosed yards) were installed on the rooftops of the homes. As time passed the roof top AC units required replacement and some owners wished to relocate their AC units to ground level outside their homes, on their own property.

[8] The arbitrator heard evidence on and carefully considered the procedural history of this dispute. He noted that at a 2001 general meeting of the King's Landing Community the following motion was adopted:

> In recognition of the desire of homeowners to preserve the architectural integrity, quality and value of the community, and with reference to Section 6.2 of the Shared Property Agreement, I move that the Co-tenancy Committee withhold approval of all requests for major alterations or additions to the exterior of units in Kings Landing, with the exception of the following:
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> 1. Additions or alterations that are permitted by the original site plan, and which were available as an option for the unit at the time of original purchase;
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> 2. Fences or hedges on private property between the units backing on Greenfield Avenue;
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> 3. Open decks, patios, or landscaped ground cover on private property at the rear of units backing on Greenfield Avenue.
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> In all cases, such additions or alterations must conform as closely as possible to the design and material specifications of the original dwellings. All costs associated with any authorized alterations or additions are to be the responsibility of the owner. Copies of all plans, permits and approvals are to be submitted to the committee prior to construction.

[9] In 2005 the Committee considered a request by the applicant unit owners to relocate their AC unit to ground level. The Committee concluded, "After taking these factors into account all with noise, aesthetic, and precedent setting considerations the committee unanimously agreed that it could not support the approval for this proposal."

[10] In the spring of 2013 the Committee considered a 12 page document prepared by one of the home owners that detailed some 19 considerations pertaining to the pros and cons of allowing re-location of the roof top AC units to ground level. The Committee ultimately decided to maintain the existing policy and communicated their decision to the home owners as follows:

DECISION

Based on past and existing challenges to interpret and enforce the legally binding Kings Landing Shared Property agreement, your Co-Tenancy Committee found that the enforceability of multi-jurisdictional policies, and the establishment and monitoring of effective community regulations to be unrealistic and unmanageable. Within Kings Landing jurisdiction alone, the relocation would necessitate an excessive number of cost-neutral control measures to regulate:

a. the selection and placement of ACs,
b. the level and propagation of noise from ACs,
c. the landscaping changes and upkeep requirements, and
d. the enforcement of good AC maintenance practices.

The ability of the Co-Tenancy Committee to deal with infractions could potentially lead to legal action that would challenge the cost-neutrality of this endeavor.

In addition, notwithstanding the possibility of other unforeseen unintended consequences and conflicts that could stem from relocating ACs at ground level, the members of your Co-Tenancy Committee found that on balance, the adverse effects on the quality of life of the residents of Kings Landing as well as the potential risks to the overall property value of the community, ultimately outweigh the financial benefits that individual owners could gain from relocating their ACs at ground level.

Therefore, after reviewing each factor in detail and weighing the advantages and disadvantages for individual homeowners, for immediate neighbours and for the Community as a whole, your Co-Tenancy Committee has determined that the relocation of ACs at ground level, on or over shared or private property cannot be supported.

[11] Notwithstanding this decision of the Committee the applicants saw fit to remove their AC unit to the ground level.

The Arbitrator's Decision

[12] The arbitrator said the first issue for consideration was whether removal of the AC unit from the roof to the ground level constituted an alteration of the exterior of the home within the meaning of section 6.2 of the Co-Tenancy Agreement. He answered that question in the affirmative, accepting the Committee's opinion that the relocation of the applicants' AC unit

affected the King's Landing Community at large. He noted that the Committee had considered the 19 documented factors relevant to this issue and that they proceeded in a fair manner and were acting in good faith.

[13] The arbitrator then posed the issue of whether the Committee had the authority to require the removal of the air conditioning unit and concluded that it did, based essentially on his view that the Committee was acting reasonably in the interests of the King's Landing Community and within their authority under the Co-Tenancy Agreement.

Issue

[14] I agree with the submissions of counsel for the respondents that the preliminary issue on this application for leave to appeal is whether the applicants have raised any question of law that would justify an appeal. Section 45 (1) of the *Arbitration Act* provides:

> **Appeals**
> **Appeal on question of law**
> 45. (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
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> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
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> (b) determination of the question of law at issue will significantly affect the rights of the parties. 1991, c. 17, s. 45 (1).

Analysis

[15] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997]1 S.C.R. 748 at para. 35 the Supreme Court explained that questions of law have been found to be "questions about what the correct legal test is". Conversely, questions of fact "are questions about what actually took place between the parties" and questions of mixed law and fact "are questions about whether the facts satisfy the legal tests".

[16] The respondents submit that the Decision to which this Application for Leave to Appeal relates is effectively a decision respecting the interpretation of a contract – the Co-Tenancy

Agreement. In the recent decision of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 S.C.C. 53, the Supreme Court of Canada discussed the issue of appellate review of arbitral decisions in the context of contractual interpretation.

[17] The Supreme Court clarified in *Sattva* that the standard of review for decisions of arbitrators when dealing with issues of contractual interpretation, is one of reasonableness. This flows from the fact that contractual interpretation invariably involves the application of the principles of contractual interpretation to the words of the contract "considered in light of factual matrix" (see para.50). For the purposes of appeal, such decisions are not characterized as dealing with questions of law, but rather of mixed questions of fact and law.

[18] I agree that the arbitration in this case dealt with issues of contractual interpretation. Essentially the issue before the arbitrator was whether the relocation of the applicants' rooftop AC unit to ground level constituted a "major exterior alteration" as opposed to a minor or cosmetic alteration, so as to fall within section 6.2 of the Co-Tenancy Agreement and thereby giving the Committee the right to approve or not approve the alteration. As the arbitrator recognized the answer to this question involved a contextual analysis of the community interests or, at least, he was required to ensure that the Committee had carried out such an analysis. He was satisfied that they did. This was clearly a mixed question of fact and law.

[19] In my view it can be readily appreciated that two of the grounds on which the applicants seek leave to appeal are factual and not questions of law. I refer to the applicants' submissions that there was no evidence to support the arbitrator's conclusions that the relocation of the AC unit "affects the King's Landing Community at large" or that the relocation of the AC unit was an alteration to the exterior of the building which was not "minor or cosmetic in nature".

[20] The applicants submit however that the arbitrator's reasons do raise an arguable question of law which can be viewed as an "extricable question of law" from within what might otherwise be characterized as a question of mixed fact and law, as contemplated in *Sattva* (para. 53).

[21] The applicants' principle submission is that the arbitrator erred in law by failing to apply a binding decision of the Ontario Court of Appeal, *Wentworth Condominium Corporation NO. 198 v. McMahon,* 2009 ONCA 870 and a related argument, being that the arbitrator failed to provide reasons for distinguishing *Wentworth* thereby precluding appellate review on the point.

[22] In *Wentworth*, the Court of Appeal was required to interpret section 98 (1) of the *Condominium Act* in circumstances where a unit owner in a condominium had installed a hot tub on his backyard patio. The patio area was part of the common elements. Section 98 (1) requires an owner to obtain approval of the condominium board of directors if the owner seeks to "make an addition, alteration or improvement to the common elements" of the corporation. The court concluded that in this case the hot tub was not an "addition" or "alteration" and was more analogous to a barbeque or a picnic table which could not be said to affect the integrity of the common elements. The court held that a balancing of the individual owner's rights with those of owners as a group is required. The essence of the court's analysis can be found in paragraphs 27-29:

> [27] It is true that the integrity of the common elements of a condominium complex is an important feature of the structure and content of the *Condominium Act.* However, an equally important feature of the *Act* is the rights of the owners.
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> ...
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> [28] In my view, the application judge's interpretation of s. 98(1) of the *Act* strikes an appropriate balance between the rights of individual owners and the rights of the owners collectively speaking through their board of directors. The appellant's definition of the three key words of s. 98(1), anchored in the shared thread of "change" is, as discussed above, both semantically unpersuasive and overly broad. The application judge's interpretation, linking "addition" and "alteration" to connections or changes to the structure of the condominium unit and linking "improvement" to bettering the value, not just the enjoyment, of the property, strikes me as a balanced interpretation of the provision consistent with this court's description of the *Act* in *Rochon.*
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> [29] That is not to say that the application judge's definition of "addition", "alteration" and "improvement" can resolve every case where a s. 98(1) issue arises. Indeed, the application judge recognized this: "I note that it is possible for a large freestanding item to become an addition, alteration or improvement if it

> were so large and so difficult to move that it becomes a permanent part of the property, but that is not the case here."

[23] I agree with the applicants' point that the hot tub scenario in *Wentworth* is factually similar to the AC unit in the present case. However, that does not mean that *Wentworth* mandated the same result in the present case. The fact that these cases turn on their own particular facts and circumstances is made clear by paragraphs 31 and 32 of the Court's decision in *Wentworth*:

> [31] However, there will be cases where the application judge's definition will not work. The size and difficulty of moving an object, as mentioned by the application judge, might lead to a different result. To this I would add the possibility that a qualitative assessment of an object an owner might want to place on the patio might also lead to a different result – for example, an owner could not hope to store scores of disused and ugly tired, or ugly rusting equipment or vehicles, or a giant ugly billboard on the New York Yankees World Series team on his patio without obtaining the approval of the board of directors of the condominium corporation.
>
> [32] In the end, each case will have to be decided on its own facts. For now, though, I would say that the application judge's interpretation of the key words of s. 98(1) of the *Condominium Act* is a good one. It will resolve most, but not all, cases. It resolves this case.

[24] In the present case the arbitrator was very much aware that he was required to balance the unit owners' private interests with the interests of the King's Landing Community. As noted, the standard of review of this decision is reasonableness; see *Sattva* (para. 75). The arbitrator came to a reasonable conclusion on the record before him, notwithstanding that he could have reached a different, yet reasonable conclusion to the contrary. Deference is required to the arbitrator's decision just as he properly showed deference to the decision of the Committee (who were elected home owners) who were chosen to make decisions affecting and balancing the interests of the community with those of the individual home owners. In any event, assuming this is a question of law I do not consider that an appeal has the potential to succeed on this point given the reasonableness of the arbitrator's decision.

[25] The applicants also argue that the arbitrator's reasons for not following the *Wentworth* decision were not adequately explained thereby depriving the applicants of a proper appellate review of his decision. This point is also made with reference to the arbitrator's decision on the interpretive points about whether relocating the AC unit is not merely minor or cosmetic and as to how it could be said to affect the community at large.

[26] I am not persuaded that the arbitrator's reasons are deficient in this regard but if they are, I would follow are the decision of the Supreme Court of Canada in *N.L.N.U. v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 which holds that inadequate reasons are not a stand-alone basis for quashing a decision. What the court must look for in reviewing an arbitrator's decision is "justification, transparency and intelligibility" in the reasons and the outcome. Abella J. stated at paras. 14 and 15:

> 14 Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses – one for the reasons and a separate one for the result (Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 12:5330 and 12:5510. It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
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> 15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[27] Abella J. also endorsed this statement from the appellants factum:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties'

> submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para. 44]

Disposition

[28] In conclusion, in the court's opinion this proposed appeal does not raise a question of law, but rather mixed questions of fact and law and if leave were granted there would be no likelihood of success because the arbitrator's decision was reasonable. Accordingly, leave to appeal is refused.

[29] The respondents may provide the court with a concise written submission on costs within 14 days of the release of the decision and the applicants are to provide their responding submission within 14 days of receiving the respondents' submission.

Hackland J.

Mr. Justice Charles T. Hackland

Released: January 6, 2015

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REASONS FOR DECISION

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