CITATION: Lexington on the Green Inc. v. Toronto Standard Condominium Corporation No. 1930, 2010 ONCA 751

DATE: 20101109
DOCKET: C50836

2010 ONCA 751 (CanLII)

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Rouleau and Epstein JJ.A.

BETWEEN

Lexington on the Green Inc.

Appellant

and

Toronto Standard Condominium Corporation No. 1930

Respondent

Carol Dirks, for the appellant

Patricia Conway, for the respondent

Heard: July 15, 2010

On appeal from the judgment of Justice Julie A. Thorburn of the Superior Court of Justice, dated June 29, 2009.

O'Connor A.C.J.O.:

[1] Pursuant to s. 112 of the *Condominium Act* (the "*Act*"), the first board of directors elected by the purchasers of units in a condominium project, may terminate certain types of agreements entered into by the corporation before its election. This appeal raises the question of whether the right to terminate in s. 112 applies to a condominium corporation's obligation to buy a manager's residence unit arising from the condominium corporation's declaration. In my view, it does not.

Facts

[2] The appellant, Lexington on the Green Inc., is the declarant of a condominium project in Toronto. The appellant registered the declaration and description for the project on April 29, 2008, thereby creating the respondent, Toronto Standard Condominium Corporation No. 1930 (the "Corporation").

[3] The Corporation's declaration (the "Declaration") provided that the Corporation purchase from the appellant a "Residence Manager Unit" (the "manager's unit") for $240,000 within 120 days of registration of the declaration and description. Section 28 of the Declaration states in part:

> The Corporation shall purchase from the Declarant the ownership interest in the Residence Manager Unit, one Parking Unit and one Locker Unit for a purchase price of $240,000 all inclusive of any applicable goods and services tax. The Corporation shall arrange a mortgage in the amount of the purchase price and shall be responsible for all costs relating to obtaining the mortgage ... All other expenses of ownership and duties of maintenance ... relating to the

2010 ONCA 751 (CanLII)

> Residence Manager Unit shall also be borne by the Corporation. The transfer of ownership of the interest of the Residence Manager Unit to the Corporation shall occur within 120 days of the date of registration of the Declaration.

[4] After registration of the Declaration and description,[1] the appellant, which still owned the majority of the condominium units, appointed a board of directors of the Corporation. The board of directors enacted a by-law authorizing the Corporation to enter into a conveyance and purchase agreement (the "Purchase Agreement") for the purchase of the manager's unit from the appellant. The Board of Directors appointed by the appellant signed the Purchase Agreement on May 1, 2008 on behalf of the Corporation.

[5] As part of the marketing and sale of units in the condominium project, the appellant delivered to every prospective purchaser a disclosure statement as required by s. 72 of the *Act*, which included the Declaration.

[6] The disclosure statement included a description of the Corporation's obligation to purchase the manager's unit in language very similar to that set out in the Declaration. The disclosure statement also included a copy of the first year's operating budget for the Corporation, which showed a budget item of $25,380.00 for the first year mortgage payments to purchase the manager's unit.

[1] The *Act* requires registration of a description. However, this appeal does not raise any issues regarding the description of the Corporation and thus, I am concerned only with the legal status of the Declaration.

2010 ONCA 751 (CanLII)

[7] The parties agree that the disclosure statement complied with s. 72 of the *Act*. There is no suggestion in the record that prospective purchasers were not aware of the provision in the Declaration requiring the Corporation to purchase the manager's unit for $240,000.

[8] By August 2008, the appellant had transferred ownership of a majority of the units in the project to purchasers. On August 14, 2008, a turnover meeting was held pursuant to s. 43 of the *Act* at which a new board of directors was elected by the unit owners (the "New Board").

[9] The New Board decided not to purchase the manager's unit. On March 12, 2009, the New Board passed a resolution purporting to terminate the Purchase Agreement pursuant to s. 112 of the *Act*. The New Board offered to lease the manager's unit from the appellant for $1,000 per month.

[10] On April 15, 2009, the appellant brought an application pursuant to s. 134 of the *Act* for an order requiring the Corporation to immediately purchase the ownership interest in the manager's unit for a price of $240,000 as provided in the Declaration.

[11] On June 9, 2009, the application judge dismissed the application. She held that s. 112 of the *Act* authorized the New Board to terminate the Purchase Agreement within the period of 12 months from the turnover meeting.

2010 ONCA 751 (CanLII)

[12] In addition, the application judge ordered that the provision in the Declaration which obliged the Corporation to purchase the manager's unit be amended to state that such obligation is subject to s. 112 of the *Act*.

[13] Finally, the application judge ordered that if it was necessary to amend the Declaration further to take into account the Corporation's rights under s. 112, the Declaration be amended by deleting ss. 28 and 1(u) of the Declaration in their entirety (the sections creating the obligation to buy the manager's unit).

Issues

[14] The outcome of this appeal turns on the interpretation of s. 112 of the *Act* and, in particular, the extent of the authority conferred upon a board of directors elected at a meeting held pursuant to s. 43 of the *Act* to terminate pre-existing obligations of a condominium corporation.

[15] The relevant parts of s. 112 read as follows:

> 112 (1) Subject to subsection (4), a corporation may, by resolution of the board within 12 months following the election of a new board at a meeting held in accordance with subsection 43(1), terminate an agreement mentioned in subsection (2) that the corporation has entered into with a person other than another corporation before the election of the new board.
>
> (2) Subsection (1) applies to the following agreements
>
> ...

2010 ONCA 751 (CanLII)

> 2. An agreement for the provision of facilities to the corporation on other than a non-profit basis.

2010 ONCA 751 (CanLII)

The Position of the Parties

[16] The appellant accepts that the New Board was properly elected under s. 43(1) of the *Act*. Further, it is common ground that the New Board purported to terminate the obligation to purchase the manager's unit within 12 months of its election.

[17] The appellant submits, however, that although s. 112 gave the New Board the authority to terminate the Purchase Agreement, it did not confer authority to terminate the Corporation's obligation to purchase the manager's unit, which obligation arose from the Declaration.

[18] Specifically, the appellant argues that the obligation to purchase that arose from the Declaration, is not "an agreement ... that the corporation [had] entered into" before the election of the New Board so as to be subject to the authority to terminate in s. 112.

[19] The appellant points out that the Corporation's obligation to purchase the manager's unit was fully and accurately disclosed to all unit owners before they agreed to purchase their units and argues that there would be no unfairness in requiring the Corporation to fulfill this obligation.

[20] In response, the Corporation argues that the *Act* is consumer protection legislation. As such, the power to terminate found in s. 112 must be interpreted broadly. One of the

objectives of s. 112 is to allow a board of directors elected by unit owners to scrutinize all of the arrangements put into place by the corporation while it was controlled by the declarant, and to terminate agreements which the board, elected by the unit owners, considers not fair or desirable for the condominium corporation. In order to fulfill this objective, the power to terminate in s. 112 should be interpreted to include all pre-existing obligations of the condominium corporation, including those arising from a declaration.

2010 ONCA 751 (CanLII)

[21] The Corporation submits there is no unfairness to a declarant in interpreting s. 112 in the manner suggested. When declarants, such as the appellant in this case, register a declaration creating obligations on a condominium corporation, they do so with the knowledge that the board, elected by the unit owners, may terminate the obligations within 12 months of its election.

[22] The Corporation also argues that the disclosure of the obligation to purchase the manager's unit to prospective purchasers does not eliminate the power of the board elected by unit owners to terminate under s. 112. If it were otherwise, a developer could exempt itself from the *Act* based on disclosure. That would be a convenient means of bypassing the intent of the Legislature.

[23] Finally, the Corporation argues that the *Act* is paramount to a declaration. A right given under the *Act*, such as that in s. 112, cannot be taken away by a declaration.

[24] The application judge did not address directly the issue of the application of s. 112 to the Declaration. However, implicit in her decision is the conclusion that the New Board's authority to terminate an agreement extended to an obligation created by the Declaration. Indeed, she ordered that, if necessary, the Declaration be amended to delete the Corporation's obligation to purchase the manager's unit so that the Declaration would take into account the authority of the New Board under s. 112 to terminate that obligation.

Analysis

[25] In my view, s. 112 of the *Act* did not confer the authority on the New Board to terminate the obligation to purchase the manager's unit arising from the Declaration.

[26] The interpretation of s. 112 of the *Act* is central to the resolution of this appeal. What does the phrase, "terminate an agreement … that the Corporation has entered into" mean? Did the Legislature intend that it be broad enough to include a right to terminate an obligation arising from a declaration of a condominium corporation?

[27] The Supreme Court of Canada has stated on several occasions that when interpreting a statute, the 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 statute, the object of the statute and the intention of Parliament: see *Chieu v. Canada*, [2002] 1 S.C.R. 84.

2010 ONCA 751 (CanLII)

[28] I start with the ordinary meaning of the words in issue. The power to terminate in s. 112 applies to "agreement[s] … that the corporation has entered into with a person other than another [condominium] corporation". The ordinary meaning of the word "agreements" does not include "declarations". The word "agreements" when used in a legal context generally refers to legally binding contracts entered into by two or more parties. Declarations, on the other hand, are statutorily prescribed documents that are prepared and registered by developers. It is upon the registration of the declaration that a condominium corporation comes into existence and the developer becomes the declarant. Declarations have been referred to as the equivalent of the constitution of a condominium corporation. They provide the legal framework for condominium corporations upon which the purchasers of units, and declarants, can rely (A.M. Loeb, *The Condominium Act: A User's Manual*, 3rd ed. (Toronto: Carswell, 2009)).

[29] Declarations become legally effective upon registration. Unlike agreements, they are not "entered into" with another person. The use of the phrase, "that a corporation has entered into" in s. 112 suggests an action by a corporation after its creation. This language does not seem to relate to a declarant's actions in preparing and registering a declaration, thereby creating a condominium corporation.

[30] In my view, the ordinary meaning of the language in s. 112 does not include the authority to terminate legal obligations arising from a declaration, the registration of which creates the condominium corporation.

2010 ONCA 751 (CanLII)

[31] Turning to the scheme of the statute, I am of the view that the interpretation that accords with the ordinary meaning of the language used in s. 112 is also consistent with the statutory scheme of the *Act*.

[32] As I pointed out above, a declaration is a type of foundational document for a condominium corporation. The *Act* contains specific provisions relating to declarations. It sets out the matters that must be included and the matters that may be included in a declaration: see ss. 7(2) and 7(4), respectively. Notably, s. 7(4)(d) provides:

> 7(4) … A declaration may contain,
>
> (d) a list of the responsibilities of the corporation consistent with its objects and duties.

[33] Section 72 of the *Act* requires a declarant to deliver to purchasers of condominium units a copy of a current disclosure statement that must contain a copy of the existing or proposed declaration. I also note, pursuant to section 17(1)(g) of O. Reg. 48/01 under the *Act*, that the disclosure statement must include "an indication of the units and assets that the corporation is required to purchase, …".

[34] Section 107 of the *Act* sets out the process by which a condominium corporation may amend a declaration. The threshold is high. A super majority of unit holders (80 or 90 per cent, depending on the nature of the amendment) must approve a proposed amendment. In addition, the declarant must consent, if it still owns units and fewer than three years have elapsed from the later of the date of registration or the date the declarant

2010 ONCA 751 (CanLII)

first entered into an agreement of purchase and sale with respect to a unit in the project. To be effective, an amendment must be registered.

[35] Declarations may create statutory obligations for a condominium corporation. Section 119 of the *Act* provides *inter alia* that "a corporation … shall comply with … the declaration".

[36] Section 134(1) of the *Act* provides the means by which those with an interest in a condominium project, including a declarant, may enforce an obligation arising from a declaration. It reads as follows:

> … an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, **the declaration**, the by-laws, … [Emphasis added.]

[37] In summary, the *Act* has detailed provisions relating to declarations. If a matter is properly included in a declaration, then it is subject to those provisions.

[38] None of the provisions of the *Act* suggest that agreements entered into by a condominium corporation have the same legal status under the *Act* as declarations.

[39] The affairs of a condominium corporation are managed by a board of directors.

[40] The *Act* requires that immediately after registration of a declaration and description, the declarant will appoint the first board of directors. Sections 42 and 43 set

2010 ONCA 751 (CanLII)

out a gradual, multi-step process by which the control of a condominium corporation is transferred from the declarant to the owners who have purchased units. Upon the declarant transferring ownership of a majority of the units to purchasers, a "turnover meeting" of owners must be called for the purpose of electing a new board.

2010 ONCA 751 (CanLII)

[41] Section 17 of the *Act* empowers condominium corporations to enter into agreements for the purposes of managing and operating the corporation's enterprise in accordance with the corporation's objects and the *Act*.

[42] Sections 111 to 113 set out the means by which a board of directors elected by unit owners may terminate or apply to the court to terminate certain types of agreements entered into by the corporation before its election. The obvious purpose of these sections is to protect the purchasers of units against agreements entered into by a declarant controlled board that a newly elected board does not consider to be in the best interests of the corporation. The concern is that the declarant controlled board may have entered into "sweetheart agreements" for the management of the condominium corporation or the provision of services that potentially have long-term and undesirable obligations for the condominium corporation. There are no limits in the *Act* on the reasons why a newly elected board may terminate or seek to terminate agreements under these sections.

[43] In summary, the *Act* treats declarations and agreements entered into by a condominium corporation differently in a number of respects. They are created differently: a developer prepares and registers a declaration; whereas once created,

condominium corporations may enter into agreements with others to carry out their objects. The *Act* gives declarations legal effect on registration. The legal effect of agreements arises from contract law. Declarations and agreements are enforced differently: those with an interest in a condominium corporation have the statutory right to enforce compliance with a declaration, whereas parties to an agreement involving a condominium corporation do not have a statutory right to enforce, but are left to pursue remedies under the law of contract.

[44] Significantly, s. 107 of the *Act* creates a high threshold for the amendment of a declaration, including the need for approval by a super majority of unit owners and consent of the declarant in some circumstances. On the other hand, section 112 authorizes a board of directors, elected by unit holders, to terminate, by simple resolution, certain agreements entered into by a declarant controlled board. If s. 112 is interpreted to include the right to terminate obligations of a condominium corporation arising from a declaration, the high threshold for amending declarations set out in s. 107 would be bypassed.

[45] It is worth noting that s. 114 of the *Act*, which gives a condominium corporation the power to terminate an insurance trust agreement, is explicitly available, "Despite anything contained … in the declaration." Had the legislature intended the power in s. 112 to operate in a similar fashion, that is despite what the declaration provided, it seems likely the legislature would have done so with similar language.

2010 ONCA 751 (CanLII)

[46] The Corporation argues that s. 7(5) of the *Act* supports an interpretation of s. 112 that includes the authority to terminate obligations created by a declaration. Section 7(5) provides that if any provision in a declaration is inconsistent with the provisions of the *Act*, the provisions of the *Act* prevail and the declaration shall be deemed to be amended accordingly. The Corporation's argument is premised on the notion that if a declaration does not specifically include the power to terminate under s. 112, it is inconsistent with the *Act* and the authority in s. 112 must prevail. The flaw in this argument is that it presumes that s. 112 applies to a declaration. If s. 112 only applies to agreements, as the ordinary language and the scheme of the *Act* suggest, and not to declarations, there is no conflict and s. 7(5) has no application.

[47] In short, the *Act* makes a logical and reasonable distinction between declarations, on the one hand, and agreements entered into by a condominium corporation, on the other. The *Act* provides declarations with a different and, in several respects, a higher legal status than agreements.

[48] Finally, in my view, an interpretation of s. 112 that recognizes the difference between declarations and agreements entered into by a condominium corporation is consistent with the purposes of the *Act*.

[49] A significant purpose of the *Act* is consumer protection. The *Act* sets out a detailed and sophisticated scheme of disclosure in an attempt to ensure that purchasers of condominium units are fully informed of the rights and obligations attendant on their

2010 ONCA 751 (CanLII)

purchases. A disclosure statement must include a copy of the declaration. Purchasers are given a 10-day "cooling off period" with rights of rescission after entering into agreements to purchase the units. Misleading or inadequate disclosure can lead to a variety of remedies for those affected.

2010 ONCA 751 (CanLII)

[50] In addition, s. 135 of the *Act* entitles a condominium corporation or a unit owner to bring an application against a declarant for conduct that is oppressive or unfairly prejudicial or unfairly disregards the interest of the corporation.

[51] A second but also important purpose of the *Act* is to provide predictability and sufficient certainty to those involved in condominium projects, including developers and unit purchasers, to enable them to make informed decisions about their investments. The *Act* provides a regime for the creation of condominium projects, the sale of units, and the management of condominium corporations. That regime must have sufficient certainty so as not to discourage development, or prospective purchasers from acquiring units in a development.

[52] In my view, an interpretation of the *Act* that recognizes a distinction between declarations and agreements entered into by a condominium corporation, particularly as that distinction applies to s. 112, achieves a reasonable balance between the two objectives mentioned above.

[53] In summary, I am of the view that s. 112 of the *Act* should not be interpreted to include the right of a board of directors elected pursuant to a s. 43 meeting to terminate obligations of a condominium corporation arising from the corporation's declaration. Thus, I am satisfied in this case that the New Board did not have authority under s. 112 of the *Act* to terminate obligations arising from the Declaration.

[54] The remaining question is whether the Corporation's obligation to purchase the manager's unit in this case was properly included in the Declaration. In my view, it was. The authority is found in s. 7(4)(d) of the *Act* which, for ease of reference, I repeat here:

> s. 7(4) … a declaration may contain
>
> > (d) a list of the responsibilities of the corporation consistent with its objects and duties.

[55] Using the ordinary meaning of the words of s. 7(4)(d), the obligation to purchase the manager's unit as set out in the Declaration is a "responsibility of the corporation". Moreover, purchasing the manager's unit is clearly consistent with the object of the Corporation to manage the condominium project.

[56] In *Peel Condominium Corp. 417 v. Tedley Homes* (1997), 35 O.R. (3d) 257, this court concluded that it was permissible under the predecessor section to s. 7(4)(d) of the *Act* for developers (declarants) to provide in a declaration that a condominium corporation be required to purchase manager units. The predecessor section – s. 3(3)(d) –

2010 ONCA 751 (CanLII)

provided that a declaration may contain "a specification of duties of the corporation consistent with its objects".

[57] In *Tedley*, Robins J.A., for the court, said:

> … The question raised here is whether the corporation can be required by means of a provision in the declaration to purchase such units [manager units and guest suites] or whether, as the corporation argues, the declaration to this effect is *ultra vires* …. Section 3(3) … is broad enough to permit the inclusion of a provision of this nature. The imposition of a duty on a condominium corporation by way of the declaration in relation to the common elements of the condominium, in my opinion, falls within the category of duties consistent with the objects of the corporation that may be specified in the declaration. Furthermore, in the circumstances of this case, where it can be taken that unit owners have relied on the representations contained in the declaration, I think, for the reasons to which I shall come, it would be unreasonable if not unfair to void the declaration on this basis.

See also, *Carleton Condominium Corp. No. 441 v. Carleton Condominium Corp. No.441* (1998), 42 O.R. (3d) 62 (Ont. C.A.).

[58] Although s. 7(4)(d) has somewhat different wording from its predecessor section, I am of the view that the revision did not change the meaning. Section 3(3)(d) referred to "a specification of duties consistent with its [the corporation's] objects". Section 7(4)(d) of the present *Act* refers to "a list of responsibilities of the corporation consistent with its objects and duties". I see no difference in substance.

2010 ONCA 751 (CanLII)

[59] Thus, I am satisfied that the provision in the Declaration obliging the Corporation to purchase the manager's unit was properly included in the Declaration pursuant to s. 7(4)(d).

2010 ONCA 751 (CanLII)

[60] Finally, I note that in this case, the board of directors controlled by the appellant enacted a by-law and caused the corporation to enter into the Purchase Agreement with the appellant for the manager's unit. I accept that the New Board had authority to terminate that Purchase Agreement pursuant to s. 112. However, in my view, the exercise of that authority did not extend to the obligation created by the Declaration. The Corporation was obliged to purchase the manager's unit pursuant to the Declaration. To the extent that the Purchase Agreement gave effect to this obligation and did not add to or change it, it was superfluous. Terminating the Purchase Agreement did not terminate the pre-existing obligation.

Disposition

[61] In the result, I would allow the appeal, set aside the judgment below and grant the relief sought in para. 1 of the Supplementary Notice of Appeal, being an Order that the Corporation purchase the manager's unit forthwith. The other relief requested by the appellant in the application below was not addressed by the parties at the hearing of this appeal. Thus, to the extent that the parties cannot agree upon terms that would put the appellant in the position it would have been had the purchase taken place as contemplated in the Declaration, I would remit those matters to the court below.

[62] I would also set aside the costs order below and award costs of the hearing below to the appellant. If the parties cannot agree on the amount of those costs, I would remit that issue to the court below.

[63] The parties agreed that the costs of this appeal be fixed in the amount of $10,000 inclusive of disbursements and applicable taxes. I would award costs to the appellant in that amount.

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"D. O'Connor A.C.J.O."
"I agree Paul Rouleau J.A."
"I agree Gloria Epstein J.A."

2010 ONCA 751 (CanLII)