Case Name:

Metropolitan Toronto Condominium Corp. No. 965 v. Metropolitan Toronto Condominium Corp. No. 1031

RE: Metropolitan Toronto Condominium Corporation No. 965, Plaintiff, and Metropolitan Toronto Condominium Corporation No. 1031 and Metropolitan Toronto Condominium Corporation No. 1056, Defendants

[2014] O.J. No. 4459

2014 ONSC 5362

Court File No. CV-14-00497413

Ontario Superior Court of Justice
Toronto, Ontario

G. Mew J.

Heard: September 9, 2014.
Judgment: September 23, 2014.

(25 paras.)

Counsel:

Michael A. Spears, for the Plaintiff.

William A. Chalmers, for the Defendants.

ENDORSEMENT

1 G. MEW J.:-- The parties to this action are each residential condominium corporations that were developed by the same declarant and which together make up the condominium development known as Grand Harbour on Lakeshore Boulevard West, Toronto.

2 Pursuant to a Shared Facilities Agreement ("SFA") dated 7 May 1991, the parties share certain costs in connection with the operation, management, maintenance and repair of the Grand Harbour complex.

3 In a 53 page statement of claim, the plaintiff Metropolitan Toronto Condominium Corporation No. 965 ("965") alleges various failures on the part of the defendants to comply with the provisions of the SFA and asserts that the conduct of the defendants is or threatens to be oppressive or unfairly prejudicial to the plaintiff or to unfairly disregard the interests of the plaintiff.

4 The facilities shared between the parties are managed by Royale Grande Property Management Limited, which is also the property manager for both of the defendants. The SFA obliges the three parties to share certain costs in connection with the operation, management, maintenance and repair of the shared facilities in certain proportions.

5 The current proceeding was commenced as an application on 29 January 2014. By an order of B. O'Marra J. dated 13 August 2014, the application was converted into an action. The plaintiff issued its statement of claim on 26 August 2014.

6 The defendants now move for a stay of the action and for an order appointing an arbitrator. They do so on the basis of an arbitration clause contained in the SFA which provides:

> 9.01 The validity, construction and performance of this Agreement shall be governed by the laws of the Province of Ontario, and any dispute that may arise under or in relation to this Agreement, including its validity, construction or performance, shall be determined by arbitration upon application to a single judge of the Superior Court of Ontario in accordance with, and pursuant to the provisions of the Arbitrations Act of Ontario, R.S.O. 1980, as amended, and the arbitrator's decision shall be final and binding upon the parties hereto and upon their respective successes and assigns, and shall not be subject to appeal.

7 The plaintiff opposes a stay, arguing that because it seeks, *inter alia*, relief under s. 135 of the *Condominium Act, 1998,* S.O. 1998, c. 19, an action is the appropriate vehicle for resolving the dispute since claims for oppression remedies under s. 135 are not arbitrable.

8 Section 135 of the *Condominium Act* provides:

> 1. An owner, a corporation, a declarant or a mortgagee of an unit may make an application to the Superior Court of Justice for an order under this section.
>
> 2. On an application if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of an unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.
>
> 3. On an application, the judge may make any order the judge deems proper including,
>
> (a) An order prohibiting the conduct referred to in the application; and
>
> (b) An order requiring the payment of compensation.

9 The defendants argue that, aside from the fact that the parties have a broadly worded arbitration clause which encompasses "any dispute that may arise under or in relation to this Agreement", the *Condominium Act* itself requires that certain disputes are resolved by mediation or arbitration, including disputes arising from an agreement between two or more condominium corporations. Section 132 of the Act 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 selected under clause (a) delivers a notice stating that the mediation has failed.

10 The dispute between the parties has not been submitted to mediation. The defendants say that they have requested mediation but that the plaintiff has refused or failed to mediate

11 During the course of argument, counsel tacitly agreed that even if mediation is to be regarded as a prerequisite to a party being able to require arbitration, the failure of the parties to engage in mediation can be cured by an appropriate order from this court as part of an order staying the action because of the arbitration agreement.

12 The nub of the plaintiff's position is that s. 135 requires oppression remedy claims to be dealt with by this court and that s. 176 of the *Condominium Act*, which provides that "[t]his Act applies despite any agreement to the contrary", precludes parties from contracting out of access to the court for a remedy under section 135.

13 The defendants argue that the effect of the "competence-competence" principle enshrined in s. 17(1) of the *Arbitration Act, 1991,* S.O. 1991, c. 17, is that unless it is clear that the dispute between the parties falls outside the terms of the arbitration agreement, questions relating to the jurisdiction of the arbitrator should be decided by the arbitral tribunal, rather than by the court: see *Ontario Medical Association v. Willis Canada Inc.* (2013), 118 O.R. (3d) 241 (C.A.) at para. 47.

14 In determining whether to grant a stay it is therefore necessary for the court to make a preliminary assessment of the case to determine whether it is at least arguable that the dispute is arbitrable.

15 Section 135 of the *Condominium Act* is permissive in its terms. It says that a corporation may make an application to the Superior Court for an oppression remedy.

16 There is a strong legislative policy that accepts arbitration as form of dispute resolution and even seeks to promote its expansion: *Desputeaux v. Éditions Chouette (1987) Inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, per LeBel J. at para. 52.

17 In *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339, 265 O.A.C. 1, the court considered whether a provision in the *Solicitors Act*, R.S.O. 1990, c. S.15 designating the Superior Court of Justice as the court with jurisdiction to hear contingency fee disputes between solicitors and clients rendered an arbitration clause in a contingency fee agreement unenforceable as contrary to public policy because parties cannot contract out of the provisions of the *Solicitors Act*. The court agreed that the substantive provisions of the Act cannot be abrogated by contract. However, the court narrowly construed the statute "[g]iven the strong policy of deference afforded to arbitration agreements" and found that the Superior Court had concurrent -- not exclusive -- jurisdiction to hear such matters. It was equally appropriate for the parties to resolve their disputes through arbitration: *Jean Estate*, at para. 73. See also *Advanced Explorations Inc. v. Storm Capital Corp.*, 2014 ONSC 3918.

18 The practical effect of the position taken by the plaintiff would be that even where parties have, as in the present case, expressly turned their minds to the issue of dispute resolution and decided to arbitrate their disputes, all a party would need to do to avoid its agreement to arbitrate is to categorise all or part of its dispute as oppression.

19 Furthermore, even if the plaintiff is correct and oppression remedy disputes are not arbitrable, an arbitral tribunal considering its jurisdiction over the present dispute would doubtless want to take into account what the true nature of the dispute between the parties consists of. Is the dispute in fact an oppression case or is it in pith and substance a dispute arising "under or in relation to" the SFA? As the Supreme Court of Canada noted in *Non-Marine Underwriters, Lloyds of London v. Scalera,* [2000] 1 S.C.R. 551, albeit in the context of the scope of insurance coverage rather than the application of an arbitration clause, a court or, in this case, an arbitral tribunal, should look beyond the labels chosen by the parties and examine in the substance of the allegations which have been pleaded.

20 The arbitrator will, presumably, also want to consider the interplay between the apparently permissive provisions of s. 135 and the mandatory requirements of s. 132 of the *Condominium Act* and in particular whether the lack of any cross reference between these provisions supports or undermines the respective positions of the parties.

21 By notice of commencement of arbitration and appointment of arbitrator dated 24 February 2014 and evidently delivered as part of the defendants' reaction to the plaintiff's commencement of this proceeding, the defendants (claimants in the arbitration) nominated Robert P. Armstrong QC (Arbitration Place) as arbitrator. Counsel for the plaintiff advised that in the event that the court decided to stay this action in favour of arbitration, the plaintiff would not oppose the appointment of Mr. Armstrong.

22 For the foregoing reasons I am of the view that it is at least arguable that the dispute between the parties is arbitrable and that a stay of proceedings should be ordered.

23 Because the parties have not yet mediated, the dispute should be deemed to have been submitted for mediation on the date that this endorsement is released and the provisions of section 132(1) should thereafter be applied with necessary modifications.

Disposition

24 For the foregoing reasons it is ordered that:

a. This proceeding is stayed pursuant to s. 7(1) of the *Arbitration Act, 1991*;

b. Unless, as provided for in section 132(1) of the *Condominium Act, 1998*, a mediation has resulted a settlement between the parties with respect to their disagreement, the Honourable Robert P. Armstrong QC is appointed as sole arbitrator to arbitrate all disputes between the parties which are arbitrable pursuant to the Shared Facilities Agreement dated 7 May 1991 or the *Condominium Act, 1998*.

Costs

25 Having considered the factors set out in Rule 57.01(1) and having regard to the general principle that the court should fix an amount for costs that is fair and reasonable to the party against whom costs are awarded, rather than an amount fixed by reference to the actual costs incurred by the successful litigants (*Boucher v. Public Accountants Council of Ontario*, [2004] 71 O.R. (3d) 291 at para. 26), the plaintiff shall pay the defendants partial indemnity costs fixed at $11,808.21. In determining this amount I have had regard not only to the costs outline prepared by the defendants, which sought the amount that I have awarded, but, also, to the partial indemnity costs which would have been sought by the plaintiff, if successful, which amounted to $26,292.84.

G. MEW J.