DATE: 20080125
DOCKET: 07-CV-337927 PD2

2008 CanLII 1951 (ON SC)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Metropolitan Condominium Corporation No. 1143 (Applicant) v. Li Peng (Respondent)

BEFORE: L.A. Pattillo J.

COUNSEL: *M. Zemel*
For the Applicant

Tung-Chieh Wu
For the Respondent

HEARD: January 22, 2008

ENDORSEMENT

[1] This is an application by Metropolitan Condominium Corporation No. 1143 (the Corporation) for a compliance order pursuant to s.134 (1) of the *Condominium Act, 1998,* S.O.1998, c. 19, as amended (the "Act") requiring the respondent Li Peng, a unit owner in the Corporation, to comply with the Corporation's declaration and rules.

[2] The issue raised in this application is whether the Corporation is entitled to the relief it seeks pursuant to s.134 of the Act having regard to the mandatory provisions for mediation and arbitration set forth in s.132 of the Act.

Background

[3] Mr. Li purchased his unit in the Corporation's high-rise residential building in March 2005. From May 2005 to September 2007, the Corporation alleges that Mr. Li and other occupants of his unit have conducted themselves in a loud, disturbing and unusual manner in the late hours of the night and early hours of the morning. The Corporation also alleges that Mr. Li and/or the occupants of his unit have brought a dog into the building. The complaints in respect of Mr. Li's conduct emanate mainly from the owners of the unit located directly beneath his.

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[4] The Corporation submits that Mr. Li's behavior in making an unacceptable amount of noise is contrary to s. 21 (a) of the Corporation's declaration which provides in part that no unit shall be occupied or used by any owner or by anyone else in any manner that will "unreasonably interfere with the use or enjoyment by owners of the common elements or their respective units." Further, the Corporation submits that the presence of a dog in Mr. Li's unit constitutes a breach of the Corporation's rules restricting dogs which specifically provide that no dogs are allowed in the Corporation except those already residing in the building at the time the rules were passed on February 21, 2000.

[5] Mr. Li's position is that he has not behaved in a way which has resulted in inappropriate noise that would disturb a neighbor. While he admits to having a dog in his unit (belonging to a friend), he states it was only there for a week in May 2007 and was removed immediately upon receiving a warning letter from the Corporation. While the nature of his occupation results in his returning home from work late at night, Mr. Li states that neither he nor any other occupant of his unit have made noise loud enough to constitute a disturbance. Any noise results from his normal every day use of his unit. He has produced statements from his neighbors on the same floor indicating they have not noticed any noise from his unit. Mr. Li

submits that the owners of the unit immediately below his are overly sensitive and have overreacted to the noise from his unit.

[6] From May, 2005 to January 2007, the Corporation sent Mr. Li eight letters complaining about his conduct and requesting that it cease. In the absence of the issue being resolved, the Corporation retained solicitors who also wrote to Mr. Li on February 5, 2007 initiating mediation proceedings under the Act and proposing a mediator. On February 20th, 2007 and in the absence of any reply by Mr. Li to their February 5th letter, the solicitors again wrote to Mr. Li stating that as a result of his failure to reply to their earlier letter, they had no choice but to conclude he was refusing to mediate. The letter went on to state that the Corporation was submitting the dispute to arbitration and provided the name of an arbitrator. The letter stated that Mr. Li would hear from the arbitrator in respect of dates for the hearing and that prior to the hearing the Corporation that would deliver brief written submissions along with documents intended to be relied upon. It advised that the arbitration would proceed, whether or not Mr. Li attended.

[7] On March 1, 2007, the solicitors again wrote to Mr. Li indicating that, in the absence of a response to their earlier letters, they were proceeding to arrange the arbitration. On April 10, 2007 the solicitors again wrote to Mr. Li and stated that in the absence of a response to their letter within five days agreeing to mediate and arbitrate, a court application would be commenced.

[8] Mr. Li's evidence is that throughout the period that he received letters from the Corporation concerning the issue, he (and in one case his then girl friend) communicated with

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the Corporation both orally and in writing indicating his position that he was not creating excess noise or a disturbance. He states that he did not respond to the solicitors letters because he was out of the country when the letters were sent and he denies ever seeing them. Notwithstanding, Mr. Li contacted the solicitors in September, 2007 and attempted to resolve the dispute, without success. The Corporation commenced the application in October, 2007.

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The Issue

[9] The Corporation seeks an order pursuant to s. a 134 of the Act requiring that Mr. Li conduct himself in such a manner as to not unreasonably interfere with the use and enjoyment of other unit owners of their respective units and the common elements, including refraining from making any loud or excessive noises between the hours of 11 p.m. and 6 a.m. and not using appliances which create excessive noise between the hours of 12 p.m. and 6 a.m.. In addition, the Corporation seeks an order that Mr. Li remove a dog from his unit (if he is not already done so).

[10] In response, while Mr. Li disputes the allegations against him, he also takes the position that the Corporation, having failed to proceed with mediation and arbitration in accordance with s. 132 of the Act, is prohibited by s. 134 (2) from obtaining an order for compliance against him pursuant to s. 134 of the Act.

[11] The Corporation submits that it is not required to proceed with mediation and arbitration as provided by the Act because the issues for resolution on the application do not constitute a "disagreement" within the meaning of s. 132 (4) of the Act. Rather, the Corporation submits that its application seeks to enforce its declaration and rules. In the alternative, the Corporation submits that, having regard to the facts of this matter, mediation and arbitration were

not "available" to the Corporation within the meaning of s. 134 (2) of the Act as a result of Mr. Li's actions and accordingly that subsection does not operate to prohibit the application.

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[12] Sections 134 (1) and (2) of the Act provide as follows:

> 134. (1) Subject to subsection (2), 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, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.
>
> (2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

[13] The mandatory mediation and arbitration provisions of the Act are contained in s. 132 of the Act, the relevant provisions of which are as follows:

> 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.
>
> (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
>
> (4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively.

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Does the dispute between the parties constitute a "disagreement" within the meaning of s. 132 (4) of the Act?

[14] The purpose of the mandatory mediation and arbitration provisions in s. 132 of the Act is to permit, among other things, the expeditious resolution of disagreements between a condominium corporation and its unit owners with respect to the corporation's declaration, by-laws and rules in a simple and inexpensive manner. (See: *McKinstry v. York Condo Corp. No. 472* (2003), 68 O.R. (3rd) 587 (Ont. S.C.J.) at para. 19.)

[15] In *McKinstry, supra*, at para. 19 and 20, Juriansz J. (as he then was) considered the meaning of "disagreement" in s. 132 (4) of the Act in respect of whether the arbitration provisions of the Act applied to an oppression claim for damages pursuant to s. 135 of the Act. The learned judge was of the view, having regard to the purpose of the mediation and arbitration provisions in the Act that "disagreement" in s. 132 (4) should be given a "generous interpretation". In Juriansz J.'s view, s. 132 applies to "disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules." I agree with the learned judge's comments.

[16] Notwithstanding that the Corporation characterizes its application as seeking to enforce its declaration and rules, in my view, the essence of the dispute between the parties is best characterized by the Corporation's solicitors as stated in their letter to Mr. Li on February 15, 2007, instituting arbitration. In that letter the solicitors described the issue to be whether Mr. Li and the occupants of his unit are responsible for excessive noise which breaches the declaration of the Corporation and interferes unduly with his neighbors in the peaceful enjoyment of their units and the common elements. To that I would add the further issue raised in the application of whether Mr. Li has a dog in his unit contrary to the rules of the Corporation. Mr. Li's response to the issues is that he did not breach the declaration and if he did breach the rules concerning dogs it was a mistake, long since corrected. The issues raised are issues involving the interpretation and application of the Corporation's declaration and rules. They require evidence from both parties concerning the conduct complained of and, based on the evidence and a consideration of the declaration and rules, a determination of whether such conduct is in breach thereof. The issues are clearly, in my view, within the meaning of a "disagreement" in s. 132 (4) of the Act. They are precisely the type of issues between a condominium corporation and its unit owner that the legislature intended should be resolved through mediation and arbitration and not by application to this court.

[17] In submitting that the mandatory mediation and arbitration provisions of the Act do not apply to the issues raised by the application, the Corporation relied on *Peel Condominium Corporation No. 33 v. Johnson* (2005), 35 R.P. (4th) 300 (Ont. S.C.J.). In that case, the court considered an application by the condominium corporation to appoint an arbitrator to determine the costs it had incurred in pursuing mediation and arbitration with the respondent. In dismissing

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the application, Baltman J. held that, because there was no agreement between the condominium corporation and the respondent in accordance with clause 98(1) (b) of the Act, s. 132 (2) 3 was not applicable and accordingly the mandatory mediation and arbitration provisions in s. 132 of the Act did not apply. The facts of that case are not the same as in this application. In this application, s. 132 (2) of the Act is not engaged. Rather, the mandatory mediation and arbitration provisions of s. 132 (1) apply pursuant to s. 132 (4) of the Act.

[18] The fact that the mediation and arbitration provisions of the Act apply to the dispute between the Corporation and Mr. Li is further confirmed, in my view, by the actions of the Corporation's solicitors following their retainer. Rather than commence an application for a compliance order, the solicitors instituted the mediation and arbitration provisions of the Act. It was not until their letter of April 10, 2007 that they indicated that the Corporation would bring an application to the court and then only if Mr. Li did not agree to proceed to mediation and arbitration within five days from receipt of the letter.

[19] Accordingly, for the reasons stated, the issues raised by the Corporation's application are, in my view, clearly a "disagreement" within the meaning of s. 132 (4) of the Act and therefore, the mandatory mediation and arbitration provisions of the Act apply.

Were the mediation and arbitration processes available to the Corporation?

[20] The Corporation submits that as a result of Mr. Li's failure to respond to its solicitors' letters in February, March and April of 2007 proposing first mediation and then arbitration, it had no choice but to institute the application in order to obtain an order for compliance. It submits that as result of Mr. Li's actions (or rather inaction), neither mediation

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nor arbitration was available to it and accordingly s. 134 (2) is not applicable and it is entitled to proceed with the application.

[21] While I agree that mediation was not available, in my view arbitration was. It is clear from a review of the mandatory mediation and arbitration provisions in s. 132 of the Act that, notwithstanding Mr. Li's failure to respond to the solicitors' letters or to agree to mediation, the Corporation could still have proceeded with arbitration. Although it initiated the arbitration process, it chose to abandon it and bring the application instead. Accordingly, because arbitration was available but not utilized, s. 134 (2) of the Act is applicable.

[22] Section 132 (4) of the Act deems the Corporation's declaration to contain a provision that the Corporation and the owner agree to submit a disagreement to mediation and arbitration as provided in s. 132 (1). Section 132 (1) (a) and (b) provide for the mediation and, should it not proceed or fail, arbitration. In particular, s.132 (1) (b) provides that in the absence of the parties selecting a mediator within 60 days from the submission of the disagreement to mediation, the disagreement shall be submitted to arbitration under the *Arbitration Act, 1991* S.O. 1991, c.17. The *Arbitration Act* provides for the appointment of an arbitrator by the court in the absence of the parties being able to agree (s. 10). It also provides for the conduct of the arbitration (s. 27) and specifically that if a party fails to appear or produce evidence on arbitration, it can proceed in the absence of the party (s. 27(3)). It is clear, therefore, that notwithstanding the failure of Mr. Li to respond to the Corporation's submission of the dispute to mediation, the above noted provisions of s. 132 of the Act enabled the Corporation to proceed to arbitration 60 days thereafter. Further, the failure of Mr. Li to respond to the Corporation's submission to arbitration or to agree to the proposed arbitrator did not bring the process to an end. The *Arbitrations Act*, as

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noted, enables the Corporation to apply to the court for an order appointing an arbitrator. Finally, once an arbitrator has been appointed, if Mr. Li continued to ignore the process or failed appear at the hearing, the arbitrator has the authority to proceed in his absence.

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[23] As noted, at the outset of their retainer, the Corporation's solicitors utilized the provisions of s. 132 of the Act to institute a mediation and subsequently arbitration of the disagreement. Rather than waiting for 60 days from February 1, 2007 which was the date the Corporation's solicitors first wrote to Mr. Li submitting the dispute to mediation, the solicitors purported to institute arbitration proceedings in their letter of February 15, 2007, a mere 15 days later. Then, rather than proceeding with arbitration, which was its expressed intention, the Corporation, for reasons which are unexplained, advised Mr. Li in its solicitors' letter of April 10, 2007 that it intended to proceed by way of application. Even then, it did not commence the application until October 2007.

[24] Accordingly, in my view, while mediation was not available given Mr. Li's failure to respond, arbitration clearly was. To the extent that arbitration was unavailable, it was solely as a result of the Corporation's failure to follow the procedure in s. 132 of the Act and the *Arbitration Act* and through no fault of Mr. Li.

Conclusion

[25] For the above reasons, therefore, in the absence of the Corporation proceeding with the mandatory arbitration provisions of the Act, s. 134 (2) of the Act is applicable and the Corporation is not entitled, in my view, to apply for a compliance order pursuant to s. 134 (1) of the Act. The application is accordingly dismissed.

[26] Mr. Li is entitled to his costs of the application on a partial indemnity basis. Mr. Li's counsel has indicated that the actual amount he has charged Mr. Li in order to respond to the application is $4500 inclusive of disbursements and GST. In the circumstances therefore, I fix the costs of the application at $3000 inclusive of disbursements and GST, payable by the Corporation to Mr. Li forthwith.

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Pattillo J.

Released: January 25, 2008

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