IN THE MATTER OF the *Arbitration Act* 1991, S.O. 1991, c. 17

AND IN THE MATTER OF an Arbitration pursuant to the *Condominium Act*, 1998

BETWEEN:

OTTAWA-CARLETON STANDARD CONDOMINION CORPORATION NO. 815

Claimant

and

90 GEORGE STREET LIMITED

Respondent

APPEARANCES:

Steven Levitt, counsel for the Claimant
Michael S. Hebert and Cheryl Gerhard McLuckie, counsel for the Respondent

HEARD: In Ottawa on June 4, 5 and August 14, 15, 2013

BEFORE: The Honourable James B. Chadwick, Q.C., Arbitrator

INTERIM AWARD

[1] This is an application by Ottawa Carleton Standard Condominium Corporation No. 815 (Condominium Corporation), to recover a budget shortfall in the amount of $115,659 and other relief from the declarant 90 George Street Limited (90 George St.). The application is brought pursuant to s. 75 of the *Condominium Act*. [1]

[2] A number of facts are not in dispute. Terry Guilbault is a developer in Eastern Ontario and Québec. He has been in the development business since the mid-70s and has done substantial residential projects, including apartment buildings. With the encouragement of a number of municipal officials he purchased the old Caplan store on Rideau Street with plans to develop the site. Through his development company, Canril Corporation, he decided to build a

[1] *Condominium Act*, 1998, S.O. 1998, c.19

combination commercial and residential condominium. The building is 19 stories high located at 90 George Street in the City of Ottawa. The top 16th floor is the residential luxury condominium. The bottom 3 floors are commercial and owned by 90 George Street.

[3] According to the evidence of Terry Guilbault and that of the witnesses who testified at the arbitration the condominium was to be a five-star luxury condominium. It was to have many amenities not normally found in condominiums. Understandably, Terry Guilbault was very proud of this development.

[4] 90 George St. is the declarant of the Condominium Corporation and Terry Guilbault is the President of 90 George St.. His son, Jonathan Guilbault, was the Chief Operating Manager of 90 George St. and was involved in the construction since 2007. The construction was delayed as a result of contract disputes and a lengthy strike. The first tenants gained occupancy in the spring of 2009.

[5] In a contract dated June 26, 2008, Canril Corporation, on behalf of the Condominium Corporation to be declared, entered into a contract with Apollo Property Management[2] (Apollo). Apollo was to commence their duties on January 1, 2009. The contract is an extensive contract setting out their duties and responsibilities for managing 90 George St.

[6] 90 George St. also entered into a contract with Michael Monty to provide concierge services for the building. This appointment agreement was dated May 9, 2007 with the commencement date of January 1, 2008. [3] He actually commenced employment in 2009. In addition, a superintendent was hired in the spring of 2009, security guards were retained, and a property manager was in place. 90 George St. takes issue with the security guards and the superintendent, being continued by the Condominium Corporation after the turn over meeting on September 3, 2009.

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[2] Volume 1, Tab 2
[3] Volume 1, Tab 1

[7] The condominium was created by the registration of a Declaration and Description on June 18, 2009 by 90 George St. The turnover by 90 George St. to the Condominium Corporation was on September 3, 2009. Up until this time the operational control of the building was by 90 George St. After turning over the building to the Condominium Corporation, Terry Guilbault continued to occupy a seat on the board of directors of the Condominium Corporation from September 3, 2009 to December 1, 2010.

[8] At the time of the Declaration 90 George Street owned between 15 and 20 units in the building. At the time of this arbitration they still retain 10 units.

Budget

[9] As required by the *Act*, 90 George St. provided a disclosure statement to each original purchaser who bought units. The disclosure statement included a budget statement prepared by 90 George St. for the first year of operation of the condominium following the Declaration.

[10] A number of draft budgets were prepared up until the Declaration on June 18, 2009. In the original disclosure statement of July 27, 2007, the draft budget showed total operating expenses of $879,206. [4]

[11] The proposed budget statement from the first year dated June 3, 2009 showed total operating expenses of $931,951.[5]

[12] The final budget for the first year of operation is dated June 18, 2009 and the total operating expenses for the first year of operation of the condominium shows $756,912. This budget was incorporated into the June 18, 2009 declaration.

[4] Volume 3, Tab 57
[5] Volume 3, Tabs 49 and 58

Audit

[13] Arrangements were made for an audit of the first year of operation as required by the *Act*.[6] The audit was conducted and a report dated October 15, 2010 was issued. Unfortunately, the audit covered a period in excess of 365 days as it ended on June 30, 2010. According to that audit there was a shortfall of $123,993. 90 George St. was notified of this shortfall in a letter dated December 10, 2010.[7]

[14] As a result of a complaint by 90 George St. relating to the time period covered in the first audit, a second audit was prepared, covering the first year of operation. This was dated February 23, 2012 and shows a shortfall of $123,993.[8] 90 George St. was notified of this shortfall by letter dated March 23, 2012.[9] Pursuant to s.75 of the *Act*, the Condominium Corporation sought reimbursement from 90 George St of this amount of shortfall.

[15] There were negotiations and attempts to resolve a number of outstanding matters which were unsuccessful. As a result, the Condominium Corporation gave this notice of arbitration.

90 George St. Claims

[16] 90 George St. raised a number of issues in defence of this claim by the Condominium Corporation. Counsel for 90 George St., in their factum at Appendix A, showed a list of matters which they claim should be deducted from any shortfall. According to their list, the Condominium Corporation owed 90 George St. $53,468.10. The first item on the list is insurance deductible recovered by the Condominium Corporation in the amount of $10,000. There is no issue and this amount should be deducted. The other items relate to expenses which are in excess of those contained in the budget items. An examples of the major expenses would be the security costs in excess of what was contemplated by the budget which

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[6] Section 67(4) of the *Condominium Act*, 1998, S.O. 1998, c.19
[7] Volume 2, Tabs 29, 30 and 31
[8] Volume 2, Tabs 38 and 41
[9] Volume 2, Tab 42

amounts to $92,936. Terry Guilbault argues part of this cost should be set off against the doorman which was provide for in the budget, but was never hired Another major item was warranty repairs of some $42,220.72. It is the position of 90 George St. that the Condominium Corporation went ahead and made these repairs without claiming against various warranties which were available at the time.

Warranty Items

[17] In support of the position that the $42,220.72 items are warranty items, Jonathan Guilbault, in his evidence, went through a series of invoices including Direct Energy. Although a number of the invoices were vague as to what services were rendered and why, he consulted contractors and engineers and concluded that these items could have been covered under the contractor's warranty, Tarron Warranty, the manufacturer's warranty, or a variety of other options.

[18] He acknowledged that Tarron warranties would result in a claim back against 90 George St. However, as he pointed out, the Condominium Corporation had signed off with Tarron. Jonathan Guilbault had strong opinions on many of the issues, even some outside his knowledge.

[19] Although Jonathan was very strong in his evidence in support of this issue on the warranties, he acknowledged that he had very little involvement with these matters and was only offering an opinion. His evidence in support of the warranty classification was based upon discussions with contractors and engineers. He did not have copies of the warranties or written confirmation from any of the contractors that the items in issue could have been covered by a warranty. As such, it is impossible to attach any weight to his evidence.

[20] Pat Charbonneau, the President of Apollo Property Management, testified both in chief and on cross-examination as to a number of these alleged warranty items. He indicated that they had difficulty in dealing with the sub-trades as there had been disputes between the sub-

trades and Canril/90 George Street. Also in his opinion, after going through the items line by line , these were all matters outside of the warranties.

[21] There are many contradictions between Pat Charbonneau's evidence and the evidence of Terry Guilbault. Terry Guilbault, in giving his evidence both in chief and on cross-examination, habitually gave long rambling speeches in support of his position. An example of this was during the cross-examination by Mr. Levitt when he was dealing with the Apollo contract. Rather than answering the questions directed to him, he spent his time reading paragraph 7 and contemplating what action he could take against Apollo for breach of contract. As a result of the many conflicts, where the evidence of Terry Guilbault conflicts with that of Pat Charbonneau, I prefer the evidence of Mr. Charbonneau.

[22] Mr. Charbonneau, in giving his evidence, was direct and to the point in answering questions both on examination-in-chief and on cross-examination. Likewise, I also prefer the evidence of Catherine Zongora to that of Terry Guilbault.

[23] Catherine Zongora is a high ranking retired civil servant. She retired in 2007 and in September 2009 was elected to the board of directors of the Condominium Corporation. She and her husband had decided to downsize and met with Terry Guilbault on a number of occasions and were impressed with his presentations. They were concerned with security for the building, along with other prospective purchasers, as the building was to be located in the Market Area. They went to a presentation where Terry Guilbault talked about the security along with the head of the security firm. When the head of the security was finished with his presentation Terry Guilbault expanded upon the security for the building. Terry Guilbault denied he made a presentation on security. I accept Catherine Zongora's evidence.

[24] Catherine Zongora described the living conditions in the building during the spring and summer of 2009. As was a very difficult period until well after substantial completion in October 2009.

Condominium Corporation

[25] The board of the Condominium Corporation had a very difficult first year. Some people, including 90 George St., were not paying their condo fees and as such they had a cash flow problem. They had difficulties in dealing with the sub-trades as a result of the previous relationship with 90 George St.. Catherine Zongora described how she retired from the government to take an almost full-time position on the board of the Condominium Corporation. In addition to the regular meetings there was daily email communication amongst the members of the board.

[26] During the first year of operation Terry Guilbault was a member of the Condo Board and attended most meetings but he was opposed to any reduction in services. He wanted the Condominium Corporation to be operated as a five-star luxury building. There was never any request by him to reduce security or any discussions regarding a building superintendent. There was never any verbal or written complaints received from Terry Guilbault regarding any of these matters during the first year of operation. This is all contrary to the evidence given by Terry Guilbault who says he complained all the time about the level of services and encouraged the Board to reduce security and the services of the superintendent. When confronted with the minutes of the Board meetings, in which he was in attendance, he claimed they were not accurate and did not record his objections. He never complained in writing about the minutes. This is contrary to the evidence of Catherine Zongora, which I accept.

[27] As the hearing lasted four days, I have just touched upon the highlights of some of the evidence. Mr. Levitt, on behalf of the Condominium Corporation, put forth many other contradictions to Terry Guilbault and his evidence. The evidence of Pat Charbonneau, Catherine Zongora and the many exhibits also contradicted Terry Guilbault's evidence..

[28] It is obvious that the cost of these proceedings will far surpass any amount at issue. The troubling aspect is that there are other outstanding arbitrations and proceedings between the parties in the Superior Court of Ontario.

The Act

[29] Mr. Levitt, counsel for the Condominium Corporation, in his submissions takes the position that I have no discretion, as the trier of fact, to go outside of s. 75(1) of the *Act*. In other words, I cannot consider the issues raised by 90 George St. by way of a defence and set off.

[30] Section 75(1) of the *Act*, reads as follows:

> The declarant is accountable to the Corporation under this section for the budget statement that covers the one year period immediately following the registration of declaration and description.

[31] The other relevant sections of s. 75 are as follows:

> (2) the declarant shall pay to the Corporation the amount by which the total actual amount of common expenses incurred for the period covered by the budget statement, except for those attributable to the termination of an agreement under section 111 or 112, exceeds the total budgeted amount.
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> (3) the declarant shall pay to the Corporation an amount by which the total actual amount of fees, charges, rents and other revenues paid or to be paid to the Corporation, during the period covered by the budget statement, for the use of any part of the common elements were assets or of any other facilities related to the property, is less than the total budgeted amount.

[32] The argument in support of this interpretation is that this provision of the *Act* is put in place to prevent a developer from producing an unreasonably low budget statement, to generate sales, misleading purchasers that the monthly common expenses will be lower than actual expenses. As such this section makes the declarant fully liable for any first-year shortfall.

[33] Mr. Hebert, on behalf of 90 George St., argues that this interpretation is draconian and would take away the ability of the declarant to raise any claim for set-off that may be available to him. There are other provisions in the Act which would provide recourse to the declarant.

[34] The courts have found that the *Condominium Act* is consumer protection legislation. Being remedial legislation it requires the court "to give it such large and liberal interpretation as will best attain the object of the *Act* according to its true intent, meaning and spirit".[10] Likewise the court in *Windisman v. Toronto College Park Ltd.*[11] was dealing with the situation under s. 51(6) of the *Condominium Act* where there was interim occupancy by the purchasers and the developer held monies in trust. The issue dealt with the payment of interest and the court made the following comment relating to the *Condominium Act* in general:

> 20. I turn next to the purpose of the Act as a whole and of s. 53 in particular. In my view, this consideration strongly supports interpretation advanced by the plaintiff class. The *Condominium Act* provides a comprehensive scheme designed to protect consumers of condominium units. The *Act* recognizes an imbalance of bargaining power and seeks to redress the imbalance in favour of consumers: *Ceolaro v. York Humber Limited* (1994), 37 R.P.R (2d) 1 (Ont. Gen. Div.) at 73 per Winkler J. The appropriate approach to interpreting the *Condominium Act* was described as follows by Krever J. in *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985), 49 O.R. (2d) 194 (H.C.) at 209.
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> > The *Condominium Act* was, without question, remedial legislation... As remedial legislation one is obliged to give it such a large and liberal interpretation as will best attain the object of the *Act* according to its true intent, meaning in spirit: see s.10 of the *Interpretation Act*.
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> The protective purpose of the *Act* with respect to purchasers was emphasized by the Court of Appeal in *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.*

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[10] *Carleton Condominium Corp. No. 11 v. Shenkman Corp.* (1985) 49 O.R (2d) 194

[11] *Windisman v. Toronto College Park Ltd.,* 1996 CarswellOnt 759 (OCJ Gen.Div.) at para.20

[35] Mr. Hebert referred me to a decision in *Lewis v. Cantertrot Investments Limited.*[12] In that case the court was dealing with a motion for the approval of the settlement of the class action. The action was settled at a pre-trial and minutes of settlement were signed subject to the approval of the court. This also involved a Condominium Corporation where security was in issue in the first year budget. After the turnover of the Condominium Corporation the directors made a decision to increase the amount of on-site security. As a result, the security costs in the year one budget increased and there was also an issue with electricity and natural gas in the budget for that year. The increased costs were carried forward into the second year and the Condominium Corporation attempted to recover this increase from the declarant. The matter was settled and in approving the settlement the hearing judge made the following comment:

> As the action progressed, it was apparent that the plaintiff's faced considerable risk in proving damages.
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> They do not claim for the increase in the first-year expenses since Cantertrot was required by law to reimburse this amount. The declarant (in this case Cantertrot) is required to pay to the condominium corporation the difference between the actual operating expenses for a project in its first year after registration and the budgeted amount. After the first year, Cantertrot was advised that the shortfall amounted to approximately $203,000. A large portion of this increase related to the condominium board's decision to increase on-site security by 100% (from 12 to 24 hours per day). There was also an unusual increase in utility rates in that year, largely due to changes in governmental regulations. Through negotiation, a compromise was reached and the condominium corporation was paid approximately $154,000 towards that shortfall in exchange for a full and final release.

[36] The plaintiffs claim that the amounts provided to them in the year one budget led them to assume that expenses for the second year of operation would be relatively the same and this proved not to be the case. The Condominium Corporation did not increase security, but maintained the same level of service provided to them by 90 George St., until the turn over on September 7, 2009.

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[12] *Lewis v. Cantertrot Investments Limited*, 2011 ONSC 2713 (CanLII)

[37] Based upon the evidence of Catherine Zongora I find the Condo Board was very cognizant of the expenses and explored ways to reduce these expenses, especially in the first year of operation. In my view they were very conscientious and acted in a very reasonable and responsible manner.

[38] Even if I am wrong in my interpretation of s. 75 of the *Act*, the proper determination of the short fall is the bottom line, not an item by item evaluation.

[39] For the above reasons, Ottawa-Carleton Standard Condominium Corporation No. 815 shall have an interim award for the amount of $115,669.00 against the respondent, 90 George Street Limited.

Interest

[40] The Condominium Corporation seeks interest of the monies owing by 90 George Street. Bylaw No. 1, Article 11.5(b) provides as follows:

> It is noted that in article 11.5 this bylaw would appear to be applicable to a condominium order who is defaulted in payment of an assessment. The issue is whether the interests specified in article 11.5 should apply to the declarant, 90 George Street, for arrears of the first year's deficit.

[41] Counsel for the Condominium Corporation relies upon a decision in *Metropolitan Toronto Condominium Corporation No. 1250 v. Mastercraft Group Inc.*[13] In that case Pitt J. was dealing with many issues regarding a Condominium Corporation in Toronto which also was a mix of commercial and residential. There was a claim by the Condominium Corporation against the declarant for recover of the deficit in the first year budget. There was no issue that the monies owed however the declarant was claiming a set off relating to a lease dispute. In dealing with the issue of interest he stated:

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[13] 2007 CarswellOnt 921, 54 R.P.R. (4th) 260, 155 A.C.W.S. (3d) 707

> 33 In consequence of the Declarant's failure to forthwith pay to the plaintiff MTCC 1250 the first year's substantial deficit, an interest obligation has arisen.
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> 34 I can find no reasonable objection to the plaintiff's position that since the debt arises from the Declarant's failure to pay common expenses, the interest rate payable ought to be the rate specified in Bylaw No. 1, which is prime plus four percent, or 10 percent.
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> 35 What is more, I find the Declarant had no proper basis for its delay in making the required payment and thereby knowingly placed an unfair burden on MTCC 1250 and the unit owners.

[42] Although Mastercraft may not have disputed the amount of the deficit they still raised the lease issue by way of set-off. Likewise, although 90 George Street contested the deficit itself on many grounds, none of which were successful. Failure of 90 George Street to pay the deficit caused grave financial hardship to the Condominium Corporation. I see no reason why they should not pay interest at the rate prescribed for in bylaw number 1 which had originally been prepared and declared by 90 George Street. Therefore the plaintiffs will be entitled to interest on the sum of $115,659 at the rate prescribed in bylaw number 1, article 11.5 from April 23, 2012, in accordance with the *Act*. [14]

Costs

[43] The Condominium Corporation is entitled to their cost of these proceedings, including disbursements. The costs of preparation of the 3 volumes of documents in support of all their expenses, is a proper disbursement.

[44] Counsel for the Condominium Corporation will prepare a draft Bill of Costs outlining a breakdown of their time and hourly rates. The draft Bill of Costs should reflect costs calculated on a partial indemnity, substantial indemnity and full indemnity. They can also include written submissions regarding costs, not to exceed 5 pages in length. Counsel for the Condominium

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[14] s. 75.6 of the *Condominium Act*

Corporation shall deliver the draft Bill of Costs and written submissions within 15 days of the release of this award.

[45] Counsel from 90 George Street shall have a further 15 days in which to prepare their submissions regarding the draft Bill of Costs and the Condominium Corporation's written submissions. Their submissions should not exceed 10 pages in length.

[46] Counsel for the Condominium Corporation will be entitled to a brief reply not to exceed 2 pages in length, and shall be filed within 5 days of receiving 90 George Street's submissions.

Interim Award

[47] In accordance with the provisions of the *Act* I will remain ceased with these matters until completed. [15]

DATED: September 10, 2013

James B. Chadwick

The Honourable James B. Chadwick, Q.C.
Arbitrator

[15] s. 42 of the *Condominium Act*

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