COURT OF APPEAL FOR ONTARIO

CITATION: Seto v. Peel Condominium Corporation No. 492, 2016 ONCA 548
DATE: 20160708
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Sharpe, Lauwers and Miller JJ.A.

BETWEEN

Karen Seto, Patrick Wong and Philip Lam

Respondents

and

Peel Condominium Corporation No. 492

Appellant

Carol A. Dirks, for the appellant

Bradley Chaplick, for the respondents

Heard: June 21, 2016

On appeal from the orders of Justice James F. Diamond of the Superior Court of Justice, dated November 12, 2015, with reasons reported at 2015 ONSC 6785; December 15, 2015; and January 20, 2016, with reasons reported at 2016 ONSC 477.

ENDORSEMENT

[1] The application judge found that the appellant condominium corporation's declaration required the costs of waste disposal for food court waste to be paid as common expenses by all unit owners, not by the respondent owners of food

court units. It is not contested that the cost of removing and disposing of food court garbage is a major budget item and that the food court units generate significantly more garbage than the other units and the common elements.

[2] The evidence shows that charges for those costs had been levied by the condominium corporation on the owners of food court units for many years without apparent complaint. That changed in 2012 when a large increase was levied upon the advent of a new board of directors.

[3] The case turns on the interpretation of the condominium's Declaration.

[4] The food court itself is described in the Declaration as an "exclusive use" common element. Section 12(c) provides:

> (c) The Owners of Units 23 to 30, inclusive, Level 1, shall jointly have the right to the exclusive use of exclusive use Common Area A-1, Level 1, which shall be for the purpose of providing a seating area portion of the Food Court Area for which such Units shall be utilized…. The Owners of Units 23 to 30, inclusive, Level 1, shall be responsible for all costs of cleaning, furnishing, maintaining, policing and managing the Food Court Area. Specifically allocated to Units 23 to 30, inclusive, Level 1, shall be the separate costs incurred by the Corporation for such purposes, which shall be allocated as a separate item of Common Expense exclusive to those Units. [Emphasis added.]

[5] Schedule "E" of the Declaration is titled "Specification of Common Expenses." Clause (m) of Schedule "E" provides:

> (m) All costs of maintaining, repairing, cleaning, policing and managing the Food Court area shall be allocated

> separately and equally to each of the Owners of Units 23 to 30, inclusive, Level 1.

[6] Clause (b)(vi) of Schedule "E" provides:

> (b) All sums of money payable by the Corporation on account of any and all public and private suppliers ... including, without limiting the generality of the foregoing, monies payable on account of:
>
> …
>
> (vi) Waste disposal for the Common Elements only….

[7] Finally, s. 15 of the Declaration provides, in part:

> All refuse and garbage must be retained by each Owner within such Owner's Unit and shall be the responsibility and obligation of each Owner to dispose of such refuse and garbage on a timely basis and in accordance with the Rules of the Corporation in this regard.

[8] The application judge stated that his task was to reconcile these provisions and, relying on clause (b)(vi) of Schedule "E", concluded that "the specific cost of waste disposal from common elements, including the Food Court seating area, is a regular common expense to be shared among all Mall unit owners."

[9] The condominium corporation asserts that the references to "cleaning" in s. 12(c) of the Declaration and in clause (m) of Schedule "E" give the corporation authority to charge the respondents directly for disposal costs for waste from the food court seating area. However, neither of those provisions deals expressly with such costs, while paragraph (b)(vi) of Schedule "E" does so by referring to "Waste disposal for the Common Elements only." The food court seating area is

plainly a common element. On that basis the application judge ruled in favour of the food court unit owners.

[10] The application judge's ruling is one of mixed fact and law that attracts deference on appeal: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633. The appellant has not demonstrated that the application judge made a palpable and overriding error or an extricable error of law in his interpretation of the declaration.

[11] The appellant argues that the application judge erred in law by failing to consider the past practice of charging waste disposal fees directly to the food court unit owners when interpreting the provisions of the declaration.

[12] We disagree. The application judge did refer to the past practice at para. 22 of his reasons where he rejected the submission that the respondents had lost the right to complain of the charges through acquiescence. The argument advanced on appeal has no merit since there is no evidence regarding the genesis of this conduct or what inferences should be drawn from it that would contradict the plain language of the declaration.

[13] Accordingly, we reject the contention that the application judge's interpretation should be set aside on appeal.

[14] The appellant points out that in the remedy provided, the application judge effectively excused the food court unit owners from having to pay for the disposal

of their own individual unit wastes at their own costs, despite the express provision of s. 15 of the declaration. This was a clear error. We are unable to determine from the record, with any degree of confidence, what the amount of this expense might be. We therefore remit the determination of the amount of the expense associated with the disposal of waste for the individual food court units to the application judge, in the event that the parties are unable to settle the issue.

[15] Accordingly, the appeal is allowed in part.

[16] Costs of this appeal to the respondents fixed in the amount of $6,500. This amount takes account of the marginal success of the appellant.

"Robert J. Sharpe J.A."

"P. Lauwers J.A."

"B.W. Miller J.A."