COURT OF APPEAL FOR ONTARIO

CITATION: Toronto Standard Condominium Corporation No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc., 2014 ONCA 696
DATE: 20141010
DOCKET: C58192

Blair, Pepall and Hourigan JJ.A.

BETWEEN

Toronto Standard Condominium Corporation No. 1908 also known as Toronto Condominium Corporation No. 1908

Applicant

(Appellant)

and

Stefco Plumbing & Mechanical Contracting Inc.

Respondent

(Respondent)

Jonathan H. Fine and Yadvinder S. Toor, for the appellant

No one appearing for the respondent, Stefco Plumbing & Mechanical Contracting Inc.

Doug A. Bourassa, for the intervening party, Business Development Bank of Canada

Heard: August 22, 2014

On appeal from the order of Justice Wailan Low of the Superior Court of Justice, dated December 13, 2013, with reasons reported at 2013 ONSC 7709.

Hourigan J.A.:

[1] The appellant, Toronto Standard Condominium Corporation No. 1908 ("Toronto Standard"), commenced an application, wherein it sought, *inter alia*, an order that the respondent, Stefco Plumbing and Mechanical Contracting Inc. ("Stefco"), the owner of two condominium units, pay the full arrears of its outstanding condominium common expenses, plus interest and collection costs.

[2] Stefco did not dispute that its common expenses were in arrears and did not participate in the application below or on this appeal. The central issue, both on the application and on this appeal, is the question of the priority between the claim of the Business Development Bank of Canada ("BDC") as mortgagee of Stefco's condominium units and the claim of Toronto Standard for common expenses.

[3] The application judge granted an order that Stefco pay common expense arrears plus interest, but declared that Stefco's failure to pay such expenses did not constitute damages to Toronto Standard. The effect of that finding is that the claim of BDC, as mortgagee, stands in priority to the claim of Toronto Standard.

[4] Toronto Standard appeals the decision, arguing that the application judge failed to properly interpret and apply the provisions of the *Condominium Act*, *1998*, S.O. 1998, c. 19 (the "Act"), and that its claim has priority, pursuant to ss. 86(1) and 134(3).

[5] For the reasons that follow, I would dismiss the appeal.

FACTS

[6] Toronto Standard is a non-profit corporation created under the Act by registration of a declaration on January 21, 2008 by 1288124 Ontario Inc. (the "Declarant").

[7] On January 7, 2009, the Declarant transferred units 18 and 27, Level 1 to Stefco. On August 10, 2010, BDC registered first mortgages against the Stefco units.

[8] Under the Act, the Declarant was obliged to hold a turn-over meeting transferring control of Toronto Standard to a new board of directors elected by the unit owners within 21 days of the transfer of a majority of units. It was also obliged to provide financial information and documentation to the new board. As of January 7, 2009, title to the majority of the units had been transferred from the Declarant to unit purchasers, but the turn-over meeting did not occur within the prescribed time limits and the Declarant did not produce any financial documents or accounting details.

[9] On September 7, 2011, the unit owners took the initiative of holding their own turn-over meeting, at which they elected a new board. The Declarant did not recognize the new board as valid. Consequently, an application was commenced

in the Superior Court by various unit owners regarding the validity of both the turn-over meeting and the new board.

[10] As a result of Stefco's default under its mortgages, BDC commenced enforcement proceedings on December 9, 2011. Stefco was subsequently noted in default and BDC obtained default judgment for in excess of $1 million.

[11] Judgment was delivered in the application bought by the unit owners on January 5, 2012. The court validated the elected board and ordered production of, *inter alia*, an accounting of all payments received to date by Toronto Standard on account of common expenses. The Declarant failed to comply with that order.

[12] The new board of Toronto Standard eventually determined, through an examination of bank records, that there was no record of Stefco having paid any common expenses since the inception of the condominium. It is not disputed that Stefco owed common expense arrears totaling $49,790.84 as of June 30, 2012.

[13] Pursuant to s. 84 of the Act, unit owners are obliged to contribute to the common expenses in the proportions specified in the declaration. The legislation also provides, in s. 85, that if an owner defaults in its obligation to contribute to common expenses, a lien arises in favour of the condominium corporation against the owner's unit for such expenses, plus interest, and reasonable legal and other costs incurred in the collection or attempted collection of the unpaid amount.

[14] The lien expires three months after the default that gave rise to the lien occurred, unless the condominium corporation registers a certificate of lien. The condominium corporation is required, on or before the day that the certificate of lien is registered, to give written notice of its lien to every encumbrancer whose encumbrance is registered against title to the unit. Pursuant to s. 86 of the Act, the amounts subject to the lien have priority over all registered encumbrances, regardless of when they were registered.

[15] It is not disputed that Toronto Standard did not register a certificate of lien with respect to Stefco's units until September 20, 2012. This lien only covers arrears from July, 2012 onward because the lien for the earlier common expenses had expired.

[16] BDC proceeded by power of sale proceedings. The units were sold and BDC suffered a deficit of several hundred thousand dollars on the sale. This deficit gives rise to the priority dispute between BDC and Toronto Standard.

THE APPLICATION

[17] In May, 2012, Toronto Standard commenced an application seeking:

(i) A declaration that Stefco was in breach of its s. 84 obligation to pay common expenses since January, 2009;

(ii) An order pursuant to s. 134(1) of the Act, requiring Stefco to comply with its obligations under the Act, more particularly, an order requiring Stefco to comply with s. 84 of the Act;

(iii) An order pursuant to s. 134(3)(b)(i) of the Act that Stefco pay Toronto Standard the full amount of common expense arrears plus interest at a rate of 18%;

(iv) An order pursuant to s. 134(3)(b)(ii) of the Act that Stefco pay Toronto Standard its full costs of the application, and all costs associated with the collection and attempted collection of the sum claimed; and

(v) An order pursuant to s. 134(3)(b)(ii) of the Act that all damages and costs awarded be added to the common expenses payable in respect of Stefco's units.

[18] Under s. 134(1) of the Act, an interested party (e.g. a condominium corporation, a unit owner, or a mortgagee of a unit) may make an application to the Superior Court of Justice for an order enforcing compliance with, *inter alia*, the Act, a declaration or by-laws. The court has the power to grant such relief as is fair and equitable in the circumstances, including an award of damages and costs. Pursuant to s. 134(5), if a condominium corporation obtains an award of damages or costs against an owner or occupier of a unit, the damages or costs,

together with any additional actual costs of enforcement, shall be added to the common expenses for the unit.

[19] In its application, Toronto Standard attempted to utilize the procedure in s. 134 of the Act to claim the arrears in common expenses as damages and have the damages added to the common expenses payable by Stefco. If successful, Toronto Standard could then register a lien for the full amount of the arrears, plus interest and collection costs. Pursuant to s. 86 of the Act, the lien would stand in priority to all other encumbrances, including the mortgage held by BDC, notwithstanding the fact that Toronto Standard had failed to register a certificate of lien within the time limits in s. 85.

[20] The application judge characterized Toronto Standard's application as an attempt to "revive" lien rights previously lost. She observed that this revival strategy had been the subject of negative commentary in G. William Dunn & Wayne S. Gray, *Marriott and Dunn: Practice in Mortgage Remedies in Ontario*, 5th ed. (Scarborough: Carswell, 1995) at 56-8.2. The application judge also noted that the case law cited by Toronto Standard in which the revival strategy had been successfully employed, involved situations where no mortgagee was named as a party. Moreover, these cases did not provide any reasons for the decision to permit the revival of lien rights.

[21] The application judge recognized that s. 134 grants the court a broad discretion to fashion an appropriate remedy, having regard to the equities of the case. She also found that "a central feature to the priority regime [in the Act] is that the lien loses priority if notice is not given" (at para. 51). She concluded that the equities favoured the mortgagee, as the failure of Toronto Standard to comply with the Act was prejudicial to the rights of the encumbrancers, including BDC.

[22] The application judge declined to make a declaration that the common expense arrears constituted damages to Toronto Standard, stating at para. 54:

> I do not consider that the failure to pay common expenses by Stefco results in damages to the condominium corporation. The condominium corporation is a statutory conduit. Damages, if any, accrue to the unit owners who have borne the consequences of under-contribution to common expenses. In my view, it would not be fair and equitable to declare the product of this litigation a basis for a new lien right and thus in effect revive lien rights that the applicant has long ago allowed to expire. Accordingly, I do not make a declaration that the common expense arrears constitute damages to the condominium corporation.

[23] The application was granted only to the extent that an order was made that Stefco pay common expenses arrears commencing January 1, 2009, with interest accruing from the date upon which each such payment came due. The application was otherwise dismissed. The effect of this order is that Toronto

Standard's claim to common expense arrears arising before July 2012 is subject to the priority of BDC's mortgage.

POSITIONS OF THE PARTIES

[24] Toronto Standard submits the application judge made a "critical error" in finding that damages awarded under s. 134 for unpaid common expenses were not damages suffered by the condominium corporation, but by the individual unit owners.

[25] In coming to this erroneous conclusion, the application judge is said to have failed to appreciate the inherent risk that a mortgagee of a condominium unit takes as a result of the provisions of the Act that permit a condominium corporation to add certain amounts to the common expenses of a unit. The application judge is also alleged to have erred in failing to recognize that the Act provides various methods for a condominium corporation to collect common expenses, not just the lien procedure in ss. 85 and 86.

[26] In addition, Toronto Standard submits that the application judge failed to appreciate that the Act is consumer protection legislation, which favours the rights of unit owners over mortgagees and, thus, the application judge's conclusion that the equities favoured the mortgagee was in error.

[27] BDC submits that the decision of the application judge under s. 134 of the Act was discretionary in nature and therefore, is entitled to a high degree of

deference on appeal. Its position is that the application judge properly exercised her discretion by granting an order for the payment of arrears by Stefco and by refusing to allow the arrears to be collected by use of a priority lien.

[28] BDC argues that the application judge did not err in concluding that damages in the nature of unpaid common expenses were not damages suffered by Toronto Standard. Rather, the application judge correctly recognized that the actual economic loss will be borne by the unit holders, as they will be obliged to contribute more money to cover the costs of the unpaid common expenses.

ISSUES

[29] The appeal raises the following issues:

(i) What is the standard of review of the application judge's decision?

(ii) Can a condominium corporation's claim for common expenses constitute a claim for damages under s. 134 of the Act?

ANALYSIS

(i) Relevant Sections of the Act

[30] In order to consider these issues, it is necessary to have regard to the following sections of the Act:

84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

…

85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

…

86. (1) Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose …

…

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.

…

> (3) On an application, the court may, subject to subsection (4),
>
> (a) grant the order applied for;
>
> (b) require the persons named in the order to pay,
>
> (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
>
> (ii) the costs incurred by the applicant in obtaining the order; or
>
> (c) grant such other relief as is fair and equitable in the circumstances.
>
> …
>
> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

(ii) Standard of Review

[31] The granting of a remedy under s. 134(3) of the Act is within the discretion of the application judge, who is obliged to consider what is fair and equitable in the circumstances of the case: *Metro Toronto Condominium Corp. No. 545 v. Stein*, (2006) 212 O.A.C. 100 (Ont. C.A.), at para. 37; *Gordon v. York Region Condominium Corp. No. 818*, 2014 ONCA 549, at para. 8.

[32] The jurisdiction of an appellate court to review the exercise of a judicial discretion is very limited. An appellate court generally will not interfere unless it is

clearly demonstrated that the judge applied the wrong legal standard or based his or her conclusions on irrelevant factors, or on factors to which he or she attached inappropriate weight: *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] 2 C.N.L.R. 355 (Ont. C.A.) at para. 82; *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566 (Ont. C.A.) at para. 43.

[33] BDC submits that the application judge based her decision on a consideration of the fairness and equity of the situation. Therefore, the decision should attract considerable deference, and should not be subject to reversal on the facts of the case.

[34] Toronto Standard accepts the limited jurisdiction of this court to interfere with the exercise of the discretion by the application judge, but submits that the application judge erred in law in finding that damages suffered as a consequence of unpaid common expenses are not damages suffered by the condominium corporation, but by the individual unit owners. Given this legal error, it submits that this court has jurisdiction to reverse the finding of the application judge and award it damages under s. 134.

[35] In my view, the application judge made a legal error in her implicit finding that unpaid common expenses can constitute damages under s. 134 of the Act. The application judge approached the issue by reviewing the scheme of the Act and then determined that the revival strategy was not fair and equitable in the

circumstances of the case. The correct approach was to first determine whether a claim for common expenses as damages could be made under s. 134. If the answer to that question is no, there is no necessity to consider whether it is fair and equitable for Toronto Standard to be permitted to revive its expired lien.

[36] This legal error adversely impacted on the application judge's exercise of discretion and consequently, appellate interference is warranted. It falls to this court to undertake the analysis on the critical issue of whether common expenses can constitute damages under s. 134 of the Act.

(iii) Common Expenses as s. 134 Damages

[37] Whether unpaid common expenses can constitute damages under s. 134 is a matter of statutory interpretation. As LaForme J.A. recently stated in *Tyendinaga Mohawk Council v. Brant*, 2014 ONCA 565, at para. 51, statutory interpretation cannot be founded on the wording of the legislation alone; strict construction of statutes has given way to purposive and contextual interpretation. The Supreme Court of Canada has described the court's role in the modern approach to statutory interpretation as engaging in a consideration of the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005]

3 S.C.R. 141, at paras. 9-12, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[38] For the reasons that follow, I find that the interpretation of s. 134 urged by Toronto Standard is contrary to the legislative purpose of the Act, the scheme of the Act, and is not consistent with the wording of s.134.

[39] The first part of the analysis involves a consideration of the legislative purpose behind the enactment of the sections of the Act dealing with the collection of common expenses. Toronto Standard describes the Act as being consumer protection legislation, which demonstrates a clear preference for the rights of a condominium corporation to collect common expenses over the rights of a mortgagee to enforce payment obligations under a mortgage.

[40] That statement is accurate only to a point. In recognition of the special significance of common expenses in the on-going operation of a condominium building, s. 86 grants the condominium corporation a powerful tool by creating a priority for the collection of common expenses. However, the use of that tool is conditional on the condominium corporation fulfilling its obligation to register its lien and provide notice to encumbrancers.

[41] In my view, this part of the Act is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp.*

No. 482 v. Christiansen, (2003), 64 O.R. (3d) 65 (Ont. S.C.J.) when he observed, at para 5: "[A] principal object of the Act is to achieve fairness among the parties -- owners, their tenants, their mortgagees, the corporation itself -- in raising the money to keep the common enterprise solvent."

[42] In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. The proposed revival strategy ignores the fair balance the legislature has struck between the rights of mortgagees and condominium corporations.

[43] With respect to the purpose of s. 134 (5) of the Act, we have the guidance of this Court in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties*, 2005 CarswellOnt 1576 (C.A.), at para. 40:

> [T]he section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to

> the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

[44] In the *Skyline* case, the issue was not whether common expenses could be classified as damages under s. 134. However, the court's interpretation of the purpose of the subsection is instructive. The court considered it to be a tool available to the condominium corporation to ensure that the costs of obtaining compliance orders were not borne by all of the unit owners. Such an additional tool is not necessary for the collection of common expenses because ss. 85 and 86 provide the condominium corporation with the process to collect such costs.

[45] In summary, I am of the view that the revival scheme proposed by Toronto Standard is inconsistent with the purpose of the Act and the intention of the legislature. This interpretation of the Act upsets the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the detriment of mortgagees.

[46] Toronto Standard's position is also inconsistent with the scheme of the Act. If its interpretation were accepted, and a priority could be revived utilizing the s. 134 procedure for an expired lien right, s. 85(2) would be rendered meaningless. A condominium corporation could ignore its obligation to register a lien under that sub-section, safe in the knowledge that it could always assert its

lien rights later and still claim priority. Thus, Toronto Standard's interpretation would result in a statute that is internally inconsistent.

[47] Toronto Standard submits that the Act permits a condominium corporation to add to the common expenses on an unlimited basis in circumstances where the condominium corporation has carried out repair or restorative work, or constructed an addition to the building (e.g. ss. 92(4), 98(4), 105(2), 162(6) and 163(4)). It argues that mortgage lenders willingly accept the risk that the value of their security can be diminished or eliminated, if such costs are added to a unit owner's common expenses account. Therefore, it submits, that adding common expenses as damages under s. 134 is entirely consistent with the scheme of the Act.

[48] The difficulty with this argument is threefold. First, the examples cited involve situations where the costs incurred are added to common expenses. However, in the present case, we are being invited to add common expenses to common expenses, through the artifice of briefly labelling them as damages. Second, although the sections cited permit a condominium corporation to increase a unit owner's common expenses, contrary to the submission of Toronto Standard, they do not provide a new mechanism for the enforcement of existing common expense claims. Third, while a mortgagee must recognize that it runs the risk of having its security imperiled by an increase in common expenses, it

does so based on the understanding that such a priority is limited to expenses incurred in the three months prior to the registration of a lien.

[49] In my view, therefore, Toronto Standard's proposed interpretation of s. 134 is inconsistent with the scheme of the Act.

[50] Finally, the lien revival scheme is also inconsistent with the language of s. 134. Subsection 134(5) states that "damages or costs" awarded to a condominium corporation are to be "added to the common expenses". Clearly, on the plain language of the subsection, a distinction is drawn between damages and common expenses.

[51] There is nothing in the language of s.134 that evidences any intention on the part of the legislature to permit common expenses to be classified as damages so that they can then be reclassified back to being common expenses. This circular statutory interpretation argument is simply not borne out by the wording of the section.

DISPOSITION

[52] I would dismiss the appeal.

[53] As agreed between the parties, BDC, as the successful party, is entitled to its costs payable by Toronto Standard, fixed in the amount of $5,000, all inclusive.

Released: October 10, 2014 "RAB"

"C.W. Hourigan J.A."
"I agree R.A. Blair J.A."
"I agree S.E. Pepall J.A."