COURT OF APPEAL FOR ONTARIO

CITATION: Toronto Standard Condominium Corporation No. 2095 v. West Harbour City (I) Residences Corp., 2014 ONCA 724
DATE: 20141022
DOCKET: C57795

Laskin, Rouleau and Epstein JJ.A.

BETWEEN

Toronto Standard Condominium Corporation No. 2095

Applicant (Appellant)

and

West Harbour City (I) Residences Corp.

Respondent (Respondent)

Thomas McRae and John De Vellis, for the appellant

Richard P. Hoffman, Harry Herskowitz and Sabrina Adamski, for the respondent

Heard: June 3, 2014

On appeal from the judgment of Justice David L. Corbett of the Superior Court of Justice, dated September 23, 2013, with reasons reported at 2013 ONSC 5987.

Rouleau J.A.:

OVERVIEW

[1] West Harbour (I) Residences Corp. ("the declarant") is the declarant of the condominium registered as Toronto Standard Condominium Corporation No. 2095 ("TSCC 2095"). TSCC 2095's first board of directors, appointed by the declarant, adopted By-Law No. 2 requiring TSCC 2095 to enter into a warranty

agreement with the declarant. That agreement limits the declarant's warranties in respect of the common elements of TSCC 2095 to the statutory warranties provided in the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 ("*ONHWP Act*"). The agreement also prevents TSCC 2095 from making any warranty claim in respect of the common elements except through the process established for and administered by the Tarion Warranty Corporation, which administers the *ONHWP Act*.

[2] After a new TSCC 2095 board of directors was elected by the purchasers of individual units, TSCC 2095 brought an application seeking a declaration that By-Law No. 2 and the warranty agreement were invalid on the grounds that enacting the by-law and entering into the warranty agreement were beyond the authority of the declarant-appointed board of directors. TSCC 2095 also maintains that the by-law and agreement are unreasonable and therefore inconsistent with the *Condominium Act, 1998*, S.O. 1998, c. 19.

[3] On September 23, 2013, the application judge dismissed the application, and TSCC 2095 now appeals that dismissal.

FACTS

[4] The dispute grows out of a residential condominium project at 628 Fleet Street in Toronto. The appellant, TSCC 2095, is a condominium corporation. The respondent, West Harbour, is the declarant of the condominium, having filed the

declaration on July 23, 2010. The first board of directors of TSCC 2095 was appointed by the declarant. On July 30, 2010 that board of directors enacted By-Law No. 2, which states, in part, that the "directors of the Corporation [i.e. TSCC 2095] shall cause the Corporation to enter into an agreement with [the declarant]" stipulating, among other things, that

> The Corporation shall have no rights against the Declarant beyond those that are specifically granted to the Corporation under the Condominium Act, the Ontario New Home Warranties Plan Act and by Tarion Warranty Corporation, formerly the Ontario New Home Warranty Program;
>
> the Corporation's only recourse against the Declarant for a final and binding resolution of any outstanding, incomplete or deficient construction items and any other related matters relating to the Property, the Corporation and the Building shall be through the process established for and administered by Tarion Warranty Corporation;
>
> …
>
> (e) the Agreement shall neither be terminated nor terminable by the Corporation following the Turnover Meeting;

[5] Also on July 30, 2010, TSCC 2095 and the declarant entered into the warranty agreement containing the provisions specified in By-Law No. 2. The warranty agreement states that the parties agree to those provisions "in consideration of the premises and mutual covenants and agreements herein contained and other valuable consideration".

[6] The warranties statutorily provided for by the *ONHWP Act* are limited in various ways. For instance, the amount of compensation is capped with respect to the common elements to a maximum of the lesser of $2,500,000 or an amount equal to $50,000 multiplied by the number of condominium dwelling units in the condominium project. There are also specified and limited time periods for reporting certain deficiencies. TSCC 2095 has identified certain alleged construction deficiencies that it says may not be warrantable within the purview of the Tarion Warranty Corporation process. However, the point is in dispute and all of the deficiencies identified to date are being addressed in that process.

[7] The warranty agreement and By-Law No. 2 were disclosed in the declarant's disclosure statement, and in the agreements of purchase and sale that the declarant entered into with original purchasers. In his reasons, the application judge notes that the "by-law and [warranty] agreement were registered on title to the condominium project, to give notice to all prospective purchasers of condominium units that the liability of the developer to the condominium corporation was limited." According to the declarant, all purchasers were represented by counsel.

[8] In accordance with the *Condominium Act*, s. 43, the initial condominium board appointed by the declarant must call and hold a turnover meeting within 42 days after the declarant ceases to be the registered owner of a majority of the

condominium units. At the turnover meeting the individual unit owners elect a new board. The turnover meeting for TSCC 2095 was held on October 28, 2010.

[9] On May 15, 2012, TSCC 2095 filed its Notice of Application, through which it sought a declaration that By-Law No. 2 and the warranty agreement were void and of no force or effect.

[10] The application judge dismissed TSCC 2095's application finding that "[n]othing in the *Condominium Act,* the *ONHWP Act*, or any other provincial legislation, precludes a developer from limiting its liability in respect to common elements." There was, therefore, no basis for concluding that By-Law No. 2 or the warranty agreement were *ultra vires* the declarant board or unreasonable within the meaning of the *Condominium Act*.

ISSUES

[11] On appeal, TSCC 2095 argues that By-Law No. 2 is void and of no force or effect because:

a. it is not within the enumerated subject matters of permissible by-laws provided for in s. 56 of the *Condominium Act*, and is inconsistent with the *Condominium Act* and TSCC 2095's declaration; and

b. it is otherwise unreasonable, contrary to the *Condominium Act*.

[12] TSCC 2095 then argues that, absent a properly enacted by-law, the directors had no authority to enter into the warranty agreement with the declarant.

[13] The issues on appeal are, therefore, as follows:

1. Is the impugned by-law *ultra vires*?
2. Is the impugned by-law unreasonable?
3. Can the warranty agreement be valid even if the by-law is found to be invalid?

ANALYSIS

(1) Is the impugned by-law *ultra vires*?

[14] The application judge found that s. 56 of the *Condominium Act* provided the initial board of TSCC 2095 broad authority to adopt by-laws governing the management and operation of the condominium. Encompassed within this broad discretion was the power to enact By-Law No. 2. In his reasons, the application judge noted that

> it would be within the Board's jurisdiction to assert, prosecute and settle a claim against [the declarant]. It follows, then, that it is within the Board's jurisdiction to decide not to do any of these things and to embody that decision in an agreement.

[15] TSCC 2095 argues that the application judge erred in three respects. First he erred in concluding that the by-law fell within the powers granted in s. 56 of the *Condominium Act*. Further, he erred in failing to find that, even if authority for the passage of By-Law No. 2 could be found in the various subsections of s. 56(1), it was nonetheless unauthorized because it breached the requirement in s. 56(1) that a by-law adopted by the board not be otherwise "contrary to this Act or to the declaration". Finally, he erred in failing to find that by passing By-Law No. 2 the declarant-appointed directors breached their statutory obligations set out in s. 37 of the *Condominium Act*. I will deal with these three submissions in turn.

(a) Does the by-law fall within one of the powers listed in s. 56(1)?

[16] The relevant portions of s. 56 provide as follows:

> 56. (1) The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration,
>
> …
>
> (l) to govern the management of the property;
>
> (m) to govern the use and management of the assets of the corporation;
>
> (n) to specify duties of the corporation in addition to the duties set out in this Act and the declaration;
>
> …

> (p) to govern the conduct generally of the affairs of the corporation.

[17] TSCC 2095 argues that the powers listed in s. 56(1)(l), (m), (n) and (p) "are far too general to support the By-law authorizing the execution of the Agreement."

[18] I acknowledge that the wording of these provisions is general. They grant very broad authority to the board of directors of a condominium corporation. Subsection (p) is particularly broad in that it provides that a by-law will be within the board's by-law making power provided that it "governs the conduct generally of the affairs of the corporation". I see no reason not to give effect to the words chosen by the legislature. TSCC 2095 provides no case law in support of its argument that, because the power conferred is general, it ought to be ignored or somehow limited or read down.

[19] The purpose of By-Law No. 2 and of the warranty agreement is to arrange the affairs of the condominium corporation and, more specifically, its relationship with the declarant. By-Law No. 2 provides a framework within which the condominium corporation will deal with any and all outstanding or incomplete work and construction deficiencies. The decision by the board of directors of TSCC 2095 to limit the corporation's options to making claims within the Tarion process is clearly an exercise in the governance of the affairs of the corporation.

[20] TSCC 2095 acknowledges that if By-Law No. 2 and the warranty agreement had not been entered into, it would have the jurisdiction to advance a claim against the declarant. If the corporation has the authority to advance a claim then, presumably, it has the authority to resolve any claim it might choose to advance. Surely, therefore, the corporation's authority must extend to deciding that a claim will not be advanced, or that it will be advanced in a particular manner or venue, such as before the Tarion Warranty Corporation. In other words, deciding when to advance such claims, and in which forum, is part of "the conduct generally of the affairs of the corporation." A by-law that governs the way in which the corporation is to advance such claims, whether it is adopted by the current board or by the declarant-appointed board, is therefore authorized by s. 56(1)(p), so long as it is not otherwise contrary to the *Condominium Act* or the declaration.

(b) Is the by-law otherwise "contrary to the Act or to the declaration"?

[21] TSCC 2095 submits that even if the authority to pass By-Law No. 2 can be found in subsections (l), (m), (n) or (p), the by-law does not meet the overarching requirement imposed in s. 56(1) that the by-law not be contrary to other provisions of the *Condominium Act* or to the declaration. In TSCC 2095's view, the by-law runs afoul of this condition as it is inconsistent with ss. 18, 23, 89 and 90 of the *Condominium Act* as well as para. 10.1 of the declaration. Those provisions read as follows:

18. (1) The corporation may own, acquire, encumber and dispose of real and personal property only for purposes that are consistent with the objects and duties of the corporation.

(1.1) The assets of the corporation do not include any real property that the corporation does not own or any interest in real property where the corporation does not own the interest.

(2) The owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

(3) A grant or transfer of an easement to the corporation is valid even though the corporation does not own land capable of being benefited by the easement.

…

23. (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,

> (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
>
> (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.

(2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names are in the record of the corporation maintained under subsection 47(2) except if,

> (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17(3); or
>
> (b) the action is commenced in the Small Claims Court.
>
> …

89. (1) Subject to sections 91 and 123, the corporation shall repair the units and common elements after damage.

(2) The obligation to repair after damage includes the obligation to repair and replace after damage or failure but, subject to subsection (5), does not include the obligation to repair after damage improvements made to a unit.

…

90. (1) Subject to section 91, the corporation shall maintain the common elements and each owner shall maintain the owner's unit.

(2) The obligation to maintain includes the obligation to repair after normal wear and tear but does not include the obligation to repair after damage.

The Declaration

10.1 The Corporation shall be responsible to enforce and abide by the provision of the Declaration, By-laws and Rules in the best interests of the Owners. …In addition to any specific duties and obligations of the Corporation set out elsewhere in this Declaration and/or specified in the Act and the By-laws and Rules of the Corporation or in any agreements entered into by the Corporation, the Corporation's duties shall include the following, namely:

…

> (j) Without limiting the specific duties of the Corporation to maintain, repair and replace (where necessary) as set forth in this Declaration, to maintain, repair and replace the components of the Building so that the Building is maintained and operated in good order and clean condition and to a standard acceptable to the majority of the Unit Owners; and
>
> (k) To take all actions reasonably necessary as may be required to fulfill any of the Corporation's duties and obligations pursuant to this Declaration."
>
> [Emphasis added.]

[22] Broadly speaking, ss. 89 and 90 of the *Condominium Act* and para. 10.1 of the declaration impose obligations on TSCC 2095 to repair and maintain the property. The condominium's power to make claims is provided in s. 23 of the *Condominium Act* and that section includes a requirement that notice be given to owners before a claim is made. Section 18 restricts a condominium board's ability to dispose of personal property – including, in the TSCC 2095's submission, a potential cause of action against the declarant – to dispositions "that are consistent with the objects and duties of the corporation".

[23] In TSCC 2095's submission, because By-Law No. 2 disposed of the right to sue the declarant for any construction deficiencies, it impaired TSCC 2095's ability to meet its repair and maintenance obligations imposed by ss. 89 and 90 of the *Condominium Act* and article 10.1 of the declaration. As a result, even if

the by-law fell within one of the subsections of s. 56(1), it is nonetheless *ultra vires* as it did not meet the requirement that it not to be contrary to the Act or to the declaration.

[24] I do not agree. Assuming that By-Law No. 2 and the warranty agreement constitute a disposition of personal property as contemplated in s. 18, the disposition is not inconsistent with TSCC 2095's obligation to repair and maintain the property. As the declarant points out, the by-law and warranty agreement simply impose limits on the options that TSCC 2095 may have to pursue the declarant and seek recovery of any costs it may incur in carrying out its repair and maintenance obligations. The by-law and the warranty agreement do not restrict TSCC 2095's repair and maintenance obligations; they simply circumscribe to a certain extent the manner in which TSCC 2095 will manage its resources and fund any repair and maintenance costs.

[25] In my view, s. 23 is also of no assistance to TSCC 2095. Section 23 simply provides that a condominium corporation "may" commence a claim for damage to common elements. There is no statutory requirement that a claim be made nor, as suggested by TSCC 2095, that unit owners need to receive notice should the condominium corporation decide not to advance such a claim. In any event, all of the unit owners have received proper disclosure of the limits placed on TSCC 2095's ability to advance claims against the declarant.

(c) Is By-Law No. 2 invalid because, in passing it, the directors breached their statutory obligations?

[26] TSCC 2095 further argues that by passing By-Law No. 2 and entering into the agreement, the directors appointed by the declarant breached their statutory obligations. Section 37 of the *Condominium Act* imposes on directors of condominium corporations obligations as follows:

> 37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
>
> (a) act honestly and in good faith; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[27] In TSCC 2095's submission, by releasing the declarant from all liability other than the statutory minimum imposed by the *ONHWP Act*, the transitional board of directors appointed by the declarant disposed of an asset (the potential causes of action against the declarant) in a manner that was not consistent with the objects and duties of the condominium corporation. By passing the by-law and entering into the agreement, the directors fundamentally undermined the condominium corporation's ability to ensure that repairs and maintenance necessitated by the declarant's actions or inaction would be corrected and paid for by the declarant. Because no careful or diligent director cognizant of the condominium corporation's obligations to maintain and repair the common

elements would pass such a by-law, TSCC 2095 submits that the by-law and the agreement are *ultra vires* as being contrary to s. 37.

[28] I disagree. Section 37(1) creates a standard of care that applies to directors and officers and describes circumstances in which directors and officers of condominium corporations may be held personally liable for their acts. TSCC 2095 has cited no case in which s. 37(1) forms the basis for a finding that a particular by-law or resolution of a condominium board was *ultra vires*.

[29] Further, the actions of the board initially appointed by the declarant must be viewed in context. In *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257 (C.A.), this court considered a condominium corporation's application for rescission of an agreement between the corporation and the declarant requiring the corporation to purchase superintendent and guest units from the declarant. The corporation argued, in part, that the declarant-appointed directors on the corporation's initial board had failed to disclose their conflict of interest and had breached their fiduciary duties. This court disagreed, stating at p. 264:

> These directors did no more than organize the affairs of the condominium in the manner anticipated by the declaration and agreed to by the purchasers of the individual units.

[30] It is the declarant, as developer of the property, who defines the content, character and structure of the condominium project. This is done through the

filing of the declaration creating the condominium corporation as well as by having the founding board pass by-laws and enter into agreements structuring the condominium corporation and governing its operation. How the condominium project is structured will have an impact on the value and therefore, the selling price of the individual units. For example, if the superintendent's suite and guest units are included as part of the common elements, the value of each of the condominium units sold to purchasers by the declarant will be higher than if the superintendent's suite and guest units had to be purchased or rented from the declarant by the condominium corporation. Similarly, one could well expect that the declarant in this case, absent the protection of the warranty agreement, would seek to net a higher sale price for the units to compensate for the additional risk it would be assuming.

[31] In implementing the structure determined by the declarant, the initial directors are not acting as fiduciaries for the purchasers of condominium units. Their role is not to try and obtain the best possible agreement for the condominium corporation or for the purchasers of units. As explained in *Tedley Homes*, at p. 264, their role is to "organize the affairs of the condominium in the manner anticipated by the declaration and agreed to by the purchasers of the individual units", provided of course, that the directors are acting within the limits and constraints imposed by the *Condominium Act*.

[32] By-Law No. 2 and the warranty agreement entered into by the board of directors appointed by the declarant do not, as explained earlier, contravene the *Condominium Act*. The by-law and agreement were disclosed to the individual unit purchasers and the by-law was placed on title giving notice to the world of its terms. In these circumstances, I see no basis for finding that in passing the by-law and entering into the warranty agreement the directors acted in violation of their duties or for concluding that the by-law was *ultra vires*.

(2) Is the impugned by-law unreasonable?

[33] TSCC 2095 argues that By-Law No. 2 and consequently, the warranty agreement, are unreasonable and therefore contravene ss. 56(6) and (7) of the *Condominium Act*. Those sections read as follows:

> 56. (1) The board may, by resolution, make, amend or repeal by-laws, not contrary to this Act or to the declaration,
>
> …
>
> (6) The by-laws shall be reasonable and consistent with this Act and the declaration.
>
> (7) By-laws proposed by the declarant before the registration of a declaration and description shall be reasonable and consistent with this Act and the proposed declaration.

[34] In support of this submission, TSCC 2095 relies on its earlier submissions to the effect that the by-law and agreement are inconsistent with the

Condominium Act and the declaration. TSCC 2095 adds the further argument that the by-law and agreement do not meet the reasonableness requirements in ss. 56(6) and (7) because TSCC 2095 received no consideration for entering into the warranty agreement and because disclosure of the by-law and agreement was inadequate.

[35] As to the first prong of the submission, I have already concluded that the by-law and agreement do not contravene and are not inconsistent with either the *Condominium Act* or the declaration.

[36] With respect to TSCC 2095's submission that the warranty agreement is unreasonable because TSCC 2095 received no consideration, I agree with the application judge's finding that the consideration given was to be found in the declarant's "agreement to transfer the project to the condominium corporation and the unit owners." This is not to say that TSCC 2095 exchanged its potential causes of action against the declarant in return for the transfer of the project, but rather that the warranty agreement was part of the structure of the condominium project imposed by the declarant before the declarant sold any of the units. Through the disclosure detailed above and the terms in the agreements of purchase and sale, the original purchasers were made aware of precisely what warranty came with their purchase.

[37] The *ONHWP Act* imposes on a declarant certain statutory warranty obligations. The degree to which a declarant would, at common law, be exposed to potential deficiency claims over and above those imposed by statute will, as noted earlier, invariably factor into the price at which the declarant is prepared to sell and the price a potential purchaser of units is prepared to pay. Through the disclosure of the by-law and agreement, both vendor and purchaser were fully informed of the terms of the bargain being proposed and the consideration they agreed to exchange on the purchase reflects those terms.

[38] TSCC 2095 then suggests that because the warranties sought to be avoided by the declarant are in respect of common elements, the consideration for the warranty agreement should flow to TSCC 2095. In TSCC 2095's submission, therefore, the consideration exchanged between the unit owners and the declarant cannot constitute consideration for TSCC 2095's agreeing to the declarant limiting its exposure to warranty claims in respect of common elements.

[39] I do not agree. The consideration for the warranty agreement is to be found in the creation of the condominium project as a whole. The unit owners, as a group, own all of the common elements and their purchase from the declarant includes both the purchase of their respective units and, in the aggregate, the purchase of the common elements – common elements as defined and structured by the declaration as well as the resolutions and by-laws adopted by the initial board and disclosed to the purchasers.

[40] The purchase price reflects not only the value of the individual unit acquired but also the value of the interest in the common elements that attach to the unit.

[41] Finally, I would not give effect to TSCC 2095's suggestion that inadequate disclosure somehow makes the by-law and agreement unreasonable. No claim has been advanced by a purchaser alleging that disclosure was inadequate. Nor has TSCC 2095 referred to any provision in the *Condominium Act* or jurisprudence that supports the submission that inadequate disclosure renders a by-law unreasonable.

[42] In any event, the by-law and agreement were disclosed in both the declarant's disclosure statement and in the agreements of purchase and sale signed by each of the original purchasers of units. Further, By-Law No. 2 was registered on title to give notice to all prospective purchasers. Should there be any issue as to the adequacy of this disclosure, there are provisions in the *Condominium Act* that offer remedies to affected purchasers of units.

(3) Can the warranty agreement be valid even if the by-law is found to be invalid?

[43] Because I have concluded that the by-law is valid, I need not address this submission. If the by-law was valid, the entering into of the warranty agreement was authorized and the agreement is binding whether or not TSCC 2095 chooses to now amend or repeal the by-law.

CONCLUSION

[44] As noted by the declarant, TSCC 2095 has the benefit of the *ONHWP Act*. There is no suggestion that, when it entered into the agreement, the declarant knew of any deficiencies that would not be covered by the Tarion Warranty Corporation process. All of the construction deficiencies identified to date are being addressed within that process. Further, although I acknowledge that consumer protection is a significant purpose of the C*ondominium Act* (see *Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930*, 2010 ONCA 751), all of the initial purchasers received notice of these arrangements prior to concluding their purchase. Finally, no evidence of deception, misfeasance or misrepresentation by the declarant has been advanced.

[45] In conclusion, therefore, I find that By-Law No. 2 and the warranty agreement are lawful and valid. There is nothing inherently unreasonable in a declarant limiting its liability for construction deficiencies in the manner done here. None of the provisions cited by TSCC 2095, either individually or read in the context of the *Condominium Act* as a whole, prevents a declarant from entering into such an arrangement.

[46] Whether developers should be prevented from limiting their liability to the statutory warranties provided in the *ONHWP Act* is a matter of policy for the legislature and not one for judicial determination.

[47] For these reasons, I would dismiss the appeal. If the parties are unable to agree on costs, the declarant is to provide brief written submissions within 15 days of the release of these reasons and TSCC 2095 is to provide a brief response within 15 days thereafter.

Released: OCT 22, 2014
"JL"

"Paul Rouleau J.A."
"I agree John Laskin J.A."
"I agree Gloria Epstein J.A."