**CITATION:** Louiseize v. Peel Condominium Corporation No. 103, 2017 ONSC 4031
**COURT FILE NO.:** CV-17-572054
**DATE:** 2017-06-29

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| Michael Louiseize | ) | Jonathan H. Fine, for the Appellant |
| Appellant | ) | |
| **– and –** | ) | |
| Peel Condominium Corporation No. 103 | ) | Greg Marley, for the Respondent |
| Respondent | ) | |
| | ) | **HEARD in Toronto:** May 29, 2017 |

**DECISION ON APPEAL**

**R.D. GORDON, R.S.J.**

**Overview**

[1] The appellant asks that the awards of arbitrator Armand Conant dated November 27, 2016, and March 6, 2017, be set aside and varied such that he be afforded 75 months to change the use of condominium unit 8 and 55 months to change the use of condominium unit 30. He asks that the costs award be varied so each party is required to pay their own costs and bear the costs of the arbitration equally.

[2] As preliminary matters, the appellant requires an extension of time for the filing of the appeal, and requires leave to appeal under s. 45 of the *Arbitration Act*, 1991, S.O. 1991, c. 17

**Background Facts**

[3] Mr. Louiseize is the owner of three residential condominium units (units 52, 8 and 30) located at 3500 Glen Erin Drive, Mississauga, Ontario. Peel Condominium Corporation No. 103 is the condominium corporation governing the units.

[4] The appellant purchased his three units on August 7, 2001, August 28, 2003, and December 1, 2004.

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[5] The respondent's declaration provides, among other things, that:

> IV.1 (a) Each unit shall be occupied and used as a private single family residence and for no other purpose…"
>
> XIII.4 The failure to take action to enforce any provision contained in the Act, this declaration … irrespective of the number of violations or breaches…shall not constitute waiver of the right to do so thereafter, nor be deemed to abrogate or waive any such provision.

[6] The appellant never lived in the units and at all material times rented his units to unrelated tenants. He concedes that his use was not and has never been in compliance with the respondent's declaration. Furthermore, he admits to failing to provide the respondent with the names of the persons occupying the units as requested by the respondent until 2015.

[7] Aside from sending the appellant the odd notice reminding him of the single family use restriction and asking him to provide the names of the tenants of the units, the appellant took no steps to enforce the single use restriction until October of 2013.

[8] The arbitrator aptly defined the issue when he stated as follows:

> So we arrive at the dilemma in this case, as to what is the proper remedy in circumstances where, on the one hand, the Defendant knowingly breaches the Declaration and fails for almost 14 years to provide requested information that he statutorily is obligated to provide, and, on the other hand, the Plaintiff who knew of these breaches and for some reasons did not start to enforce them until October of 2013.

[9] At the arbitration, the respondent sought a declaration that the appellant was in breach of the declaration in that the occupants of the units were multiple unrelated tenants in the nature of a rooming/boarding house and an order requiring compliance with the single family restriction immediately. The appellant made a claim of his own, seeking a declaration that the respondent had not taken any reasonable steps to enforce the declaration and an order granting the him the right to rent rooms within the units to unrelated tenants for a period equal to one half of the time that the defendant owned the units up until January 30, 2014, or in the alternative, compensation for loss of income at the rate of $600 per month per unit for the same period of time.

[10] In his award dated November 27, 2016, the arbitrator found the appellant to be in breach of the single family restriction. He allowed the appellant to continue to occupy the units in contravention of the single family restriction until August 31, 2017. In a separate costs award dated March 6, 2017, the arbitrator awarded the respondent costs of $30,000 plus taxes and disbursements and required the appellant to reimburse the respondent for any of the arbitrator's fees and expenses paid by it.

[11] The appellant was of the view that the time to appeal did not begin to run until after the issue of costs had been dealt with. He filed his notice of appeal with 15 days of the release of the costs award.

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**Preliminary Matters**

*Extension of Time for Filing the Appeal*

[12] On the evidence before me I am satisfied that the appellant always had an intention to appeal the initial decision of the arbitrator. The error in awaiting the costs decision was made in good faith. The delay was not particularly long and the appeal has been dealt with expeditiously. There has been no prejudice to the respondent. Given these circumstances, an order granting an extension of the time for filing the appeal is to issue.

*Leave to Appeal*

[13] Section 45 of the *Arbitrations Act, 1991* provides that a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that, (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the question of law at issue will significantly affect the rights of the parties.

[14] I am content to grant leave to appeal. The matters at stake are of considerable importance to the appellant as these units comprise a not insignificant stream of income for him. From the perspective of the respondent, a resolution of the issues on appeal will assist it in making future decisions regarding its unit holders. Both tests for the granting of leave are met.

**Standard of Review**

[15] Neither party addressed the standard of review in their materials.

[16] The arbitration was conducted pursuant to s. 132(3) of the *Condominium Act*, 1998. The parties jointly selected the arbitrator. It is fair to assume that the parties would not have selected this arbitrator unless he was possessed of some expertise in condominium law.

[17] There is a presumption of review of questions of law on a reasonableness standard in these circumstances. I see no reason why that presumption should be displaced.

**The Decision of the Arbitrator**

[18] The arbitration was not about whether the appellant was in breach of the single family restriction. He acknowledged that he was and that at some point he would be required to comply. At issue before the arbitrator was the length of time the appellant should be allowed to continue in non-compliance. The finding of the arbitrator was that nine months from December 1, 2016, would be sufficient and appropriate in the circumstances of this case.

[19] In arriving at the award, the arbitrator made the following factual findings:

- The respondent had knowledge that the appellant was in breach of the declaration, and although it preferred to have documentary evidence to substantiate its position before taking any enforcement steps, it could have taken compliance steps years ago.

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- Although one of the main witnesses for the respondent did change some of his evidence on cross-examination, he was unable to find a clear, obvious and contumelious intent to mislead.

- The appellant was the author of his own predicament. He created this situation in the full knowledge that he was breaching the declaration and the *Act*. He has benefitted from knowingly doing so.

- The units can be rented in compliance with the declaration but at a reduced income of about $600 per month per unit.

- There is fault on both sides. The appellant knowingly breached and continues to breach his obligations thereby gaining a benefit; and the respondent, for whatever reason, failed to enforce the *Act* and its declaration for years.

- The appellant's position did not worsen over his years of ownership of the units, nor has he suffered to his detriment. To the contrary, he had benefitted financially and was in a better financial position as a result of the respondent's failure to enforce the terms of the declaration.

- The evidence suggests that the units can be rented quickly to single family tenants, and all existing leases have 30 day terms that may be terminated on not less than 60 days' notice.

[20] These factual findings cannot be challenged on this appeal.

**Analysis**

[21] The appellant first argues that the arbitrator erred in law in his interpretation and application of s. 17(3) of the *Condominium Act, 1998*. That section imposes a duty on the condominium corporation to take all reasonable steps to effect compliance with its declaration. The appellant argues that although the arbitrator referred to this section, he did not make any finding as to whether the respondent's failure to enforce against the appellant for some 10 years was reasonable, thereby making an error in law.

[22] I do not agree. The arbitrator was clearly aware of s. 17(3). He clearly identified the applicability of this section and he clearly found in paragraph 43 that the respondent was in breach of its obligations: "…on the other hand, the plaintiff who knew of these breaches and for some reason did not start to enforce them until October 2013." This was the basis for his assessing blame to the respondent. Without such a finding, the appellant would have been required to comply with the declaration immediately. Given the blameworthy conduct of the respondent, compliance was delayed for an additional 9 months.

[23] The appellant's second argument is that the arbitrator erred in law by finding there was no attempt to mislead, notwithstanding that the respondent's main witness changed his evidence

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on cross-examination. This was a factual finding by the Arbitrator. It cannot be the subject of review on this appeal.

[24] The third argument raised by the appellant is premised on the arbitrator having found there to be no acquiescence by the respondent. It cites in support of that premise paragraph 37 of the decision. However, a fair reading of the arbitrator's decision as a whole reveals his finding that there was not *complete* acquiescence by the respondent. The respondent sent a notice to all owners, including the appellant, on or about February 27, 2002, requiring notification if their unit was leased and particulars thereof. A letter dated December 9, 2003, was sent to the appellant advising of its information that Unit 80 was being used as a boarding house, bringing to his attention the single family restriction, and requesting particulars of the lease. On October 21, 2013, a further letter was sent to the appellant essentially reiterating the information in the letter of December 9, 2003. The arbitrator found that these notices to the appellant were reasonable requests for information prior to taking enforcement steps and to that extent the respondent cannot be said to have acquiesced. However, it is clear from his reasons that he accepted that the respondent knew for many years of the appellant's breach and took no additional steps to enforce even though it could have done so. Although he does not specifically refer to this as acquiescence, it is a tacit acceptance that the respondent acquiesced for several years. Ultimately, that acquiescence was one of the factors considered by the arbitrator in arriving at his award. I see no error in law.

[25] The fourth argument advanced by the appellant is that the arbitrator failed to apply s. 176 of the *Condominium Act, 1998* when analyzing the effect of the non-waiver provision in the declaration. The non-waiver provision is reproduced above and essentially provides that the failure to enforce a provision of the declaration does not amount to a waiver of the right to so in the future. At paragraph 61 of his decision the arbitrator held that: "Even if I were to accept the argument of the Defendant about the Plaintiff's conduct in these proceedings, including the change of its evidence on cross examination, I find that on the equities I am compelled to exercise my discretion and hold that the non-waiver provision of the Declaration is effective and would be determinative of the issue before me."

[26] Section 176 says that the *Condominium Act, 1998* applies despite any agreement to the contrary. Section 17(3) of that same *Act* provides that the corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with the act, the declaration, the by-laws and the rules.

[27] The appellant argues that the non-waiver provision is contrary to s. 17(3) because it permits enforcement of the declaration that is *unreasonable* in all of the circumstances, namely after acquiescing to the appellant's breach for some 10 years.

[28] I do not agree. To begin with, it should be noted that the arbitrator's reliance upon the non-waiver provision was as a secondary or alternate means of granting a remedy to the respondent. Accordingly, even if he was wrong to have relied upon the non-waiver, there remained other reasons for the relief as granted. Furthermore, the obligation imposed by s. 17(3) is not that all steps taken by the corporation be reasonable, but that the corporation take all

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reasonable steps. It imposes a duty to act as opposed to a restriction on how its acts. Accordingly, I do not see the non-waiver provision being contrary to s. 17(3) either on its face or in its application.

[29] The appellant's fifth argument is that the arbitrator erred in law by considering similar fact evidence relating to a different condominium corporation. I note that the arbitrator's sole reference to this evidence was in paragraph 49 of his decision: "In his cross-examination, the Defendant admitted that he was doing the same thing in another corporation, being PCC 36, contrary to its declaration." This was not evidence led by the respondent as part of its case. There is no indication that the admissibility of the evidence was disputed. It seems not to have figured significantly in the ratio of the arbitrator. In the context of the entire decision, this evidence appears to have been used by the arbitrator as additional evidence that the appellant had not relied upon the inaction of the respondent to his detriment. I see no error in law.

[30] The last argument advanced by the appellant is that the arbitrator erred in law by failing to provide the appellant with a commercially reasonable time to wind down his affairs. The amount of time provided to the appellant to bring his use of the units into compliance with the declaration was entirely in the discretion of the arbitrator. He found as fact that the units were readily rentable as single family dwellings and that the existing leases could be terminated on notice of 60 days. There was little other evidence before him to indicate why an extended period to wind down would be required and no evidence of what a commercially reasonable time to wind down his affairs would be. There was no error in law in this respect.

[31] Lastly, the appellant argued that the arbitrator erred in his costs award because he assessed fees on a partial indemnity basis but required payment of the arbitrator's expenses in full. In my view, the expenses attributable to the arbitrator are akin to disbursements. Typically, a costs order requires payment of disbursements in full notwithstanding an award of partial indemnity fees. I am not satisfied that the arbitrator made any error in principle in his costs award.

**Conclusion**

[32] Although the time for filing the appeal is extended and leave to appeal is granted, the appeal is dismissed. I have reviewed the costs outlines provided by counsel and considered the factors outlined in Rule 57 which inform an award of costs. In the circumstances, I order the appellant to pay the costs of the respondent which I fix at $8,200 all inclusive.

R.D. Gordon, R.S.J.

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**Released:** June 29, 2017

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**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Michael Louiseize

Appellant

**– and –**

Peel Condominium Corporation No. 103

Respondent

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**DECISION ON APPEAL**

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R.D. Gordon, R.S.J.

**Released:** June 29, 2017