COURT OF APPEAL FOR ONTARIO

CITATION: Dewan v. Burdet, 2018 ONCA 195
DATE: 20180228
DOCKET: C62853

Hourigan, Roberts and Fairburn JJ.A.

BETWEEN

Patrick Dewan, Domicile Developments Inc., 1436984 Ontario Ltd., Amira Gabriel, 1496055 Ontario Inc., 117490 Canada Ltd., the Estate of Sheila Eberts, 2201894 Ontario Inc., BBG Equity Management Corporation and Powell Grifiths

Plaintiffs and Defendants by Counterclaim/
Respondents in appeal/Appellants in cross-appeal

and

Claude-Alain Burdet, in Trust, Claude-Alain Burdet, Enterprises Ted Rubac Inc. and 1443957 Ontario Inc.

Defendants and Plaintiffs by Counterclaim/
Appellants

and

Carleton Condominium Corporation No. 396

Defendant/
Respondent in cross-appeal

Claude-Alain Burdet, for the appellants

Kenneth Radnoff, Q.C. and Jonathan Collings, for the respondents

Gary Boyd, for the defendant/respondent, Carleton Condominium Corporation No. 396

Heard: February 15, 2018

On appeal from the judgment of Justice Paul B. Kane of the Superior Court of Justice, dated August 8, 2016, with reasons reported at 2016 ONSC 4917, and from the cost order, dated February 2, 2017.

REASONS FOR DECISION

[1] This case is one of a series of legal proceedings regarding the management of Carleton Condominium Corporation No. 396 ("CCC396").

A. BACKGROUND

[2] Following a 35-day trial, the trial judge released reasons for decision that were in excess of 200 pages. After exhaustively reviewing the complex factual background and considering the parties' legal arguments, he ordered, among other things, the following relief:

> (a) An order that the respondents/appellants in the cross-appeal (the "minority owners") owe CCC396 common expense arrears plus interest in the amounts specified in the reasons, which amounts shall be paid forthwith;
>
> (b) A declaration that the appellant/respondent by cross-appeal, Claude-Alain Burdet, oppressed the minority owners;
>
> (c) An order that CCC396 is terminated as a condominium corporation pursuant to s. 128 of the *Condominium Act, 1998*, S.O. 1998, c. 19, or, alternatively, pursuant to s. 135 of that Act;
>
> (d) An order that Mr. Burdet's claim for services rendered to CCC396 in 2001 is granted in the amount of $20,000, plus interest;
>
> (e) An order granting the claims of the appellant/respondent by cross-appeal, Enterprises Ted Rubac Inc. ("ETRE"), against CCC396 for amounts owing under certain promissory notes in the total amount of $50,000, plus interest, and dismissing ETRE's claims under other promissory notes; and

(f) An order dismissing all other claims in the counterclaim.

[3] Mr. Burdet, Claude-Alain Burdet in Trust, and ETRE (collectively the "appellants") raise a number of grounds of appeal, which will be considered below. The minority owners cross-appeal the trial judge's order regarding the timing of the payment of their arrears. All parties, save CCC396, seek leave to appeal the cost order. For the reasons that follow, we dismiss the appeal, grant the minority owners leave to appeal the cost order, allow their cross-appeal with respect to costs, and dismiss the balance of the cross-appeal.

B. ANALYSIS

(i) Appeal

[4] The appellants submit that the trial judge erred in declaring that Mr. Burdet acted in a manner that was oppressive to the minority owners' interests. There is no merit in this submission. The evidence of oppressive conduct on the part of Mr. Burdet is detailed, effectively unchallenged, and overwhelmingly compelling. It includes a long history of self-dealing, lack of financial disclosure, charging CCC396 legal fees for personal matters, failing to declare conflicts, refusing to produce records despite being court-ordered to do so, and implementing an invalid by-law.

[5] As noted above, the trial judge declared that Mr. Burdet oppressed the minority owners. He also found Mr. Burdet personally liable, along with ETRE and

Claude-Alain Burdet in Trust, for the minority owners' costs. Mr. Burdet submits that the trial judge erred in finding him personally liable. We disagree.

[6] The very recent decision of the Supreme Court of Canada in *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037 is instructive. There the court found that determining a director's personal liability under an oppression remedy requires a two-pronged approach. First, the oppressive conduct must be properly attributable to the director because of his or her implication in the oppression. Second, imposing personal liability must be fit in all the circumstances see paras. 47-57.

[7] We recognize that *Wilson* was decided under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"). However, the holding in *Wilson* is apt in the *Condominium Act* context. Like the oppression remedy provision in s. 241(3) of the *CBCA*, s. 135(3) of the *Condominium Act* grants a judge broad discretion in crafting an appropriate remedy. That subsection permits a judge to make "any order the judge deems proper" and lists two non-exhaustive examples. In *Wilson*, the Supreme Court noted that one of the remedial examples listed in s. 241(3) of the *CBCA* contemplated "an order compensating an aggrieved person" without specifying against whom such an order may lie: see para. 29. Similarly, s. 135(3)(b) of the *Condominium Act* contemplates "an order requiring the payment of compensation" without further specification. As the *Condominium Act* itself does

not indicate when it would be "proper" to hold a director personally liable for oppression, guidance can be sought from *Wilson.*

[8] Where, as here, it is clear that a director is the motivating force behind the oppressive conduct, he or she should be held personally liable. To hold otherwise in the present case would result in the oppressed minority owners being denied their costs or making CCC396 liable for those costs. The latter result would be particularly inequitable, as it would perpetuate Mr. Burdet's practice of having CCC396 pay the legal costs associated with defending his oppressive conduct.

[9] The appellants submit that the trial judge erred in terminating CCC396. We disagree. The trial judge was well aware that a termination order was a remedy of last resort. However, there was an ample record to support that order in this case. Indeed, it is difficult to imagine a more dysfunctional condominium corporation. It is clear from the evidence, including from the independent court-appointed property manager, that the corporation could not continue. In these circumstances, termination was the most just and equitable order. It was consistent with the scheme and intent of the *Condominium Act*, was in the best interests of all owners, and protected against unfairness to the minority owners.

[10] The appellants submit that the oppression claims and other related relief are statute-barred. This submission is based on the argument that these claims were raised for the first time in the statement of claim. That is incorrect. The impugned

claims were asserted in an application in 2001 and were not statute-barred at that time. The application was later converted by court order to an action. The claims asserted in the statement of claim are essentially the same as those made in the application. We therefore conclude that they are not statute-barred.

[11] We see no error in the trial judge's conclusion that the appellants did not satisfy their onus of establishing that the minority owners acted in an oppressive manner, either by reason of their non-payment of arrears or their conduct in this litigation.

[12] The trial judge's decision to dismiss the balance of the counterclaim was well-grounded in the evidence and free of legal error. We note that Mr. Burdet elected not to testify in support of the claims made in the counterclaim.

(ii) Cross-Appeal: Payment of Arrears

[13] With respect to the cross-appeal, the minority owners acknowledged the existence and quantum of the common expense arrears owing to CCC396. However, they submit that the trial judge erred in ordering that the arrears be paid forthwith and not after Mr. Burdet has paid his arrears.

[14] The trial judge had discretion to determine when the arrears should be paid. We see no basis for appellate interference with the exercise of that discretion. CCC396 is in dire need of funds and there is no reason why it should be forced to wait to collect the arrears that the minority owners admit to be owing.

(iii) Costs

[15] We see no error in principle in the cost order made against the appellants. Accordingly, we decline to grant leave to appeal the cost order made against those parties.

[16] We grant the minority owners leave to appeal the cost order made against them because we are of the view that the trial judge erred in principle in making that order.

[17] Pursuant to s. 85 of the *Condominium Act*, where an owner defaults on an obligation to contribute to the common expenses payable, a condominium 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".

[18] At trial, the minority owners conceded that they owed arrears and agreed to pay same. Consequently, very little trial time was dedicated to the issue of collecting the arrears. In his cost endorsement, the trial judge recognized that the "lengthy trial largely related to other issues, not the determination of this common expense arrears award against the Plaintiffs".

[19] We are of the view that the trial judge erred in principle in awarding costs that were disproportionate to the cost of collecting the common expense arrears.

He should not have ordered the minority owners to pay legal costs unrelated to the collection of arrears. We therefore set aside the cost award made against the minority owners. In its place, we order that the minority owners are liable for 20 percent of CCC396's costs below. We further order that the appellants, as the unsuccessful parties at trial, are jointly and severally liable for 80 percent of CCC396's costs below. We fix CCC396's all-inclusive costs of the proceedings below at $220,000.

C. DISPOSITION

[20] For the foregoing reasons, we dismiss the appeal, grant the minority owners leave to appeal the cost order, allow their cross-appeal with respect to costs, and dismiss the balance of the cross-appeal.

[21] The appellants are jointly and severally liable for the minority owners' costs of the appeal and cross-appeal, which we fix in the all-inclusive amount of $25,000. CCC396's costs of the appeal and cross-appeal, in the all-inclusive amount of $15,000, shall be borne 50 percent by the appellants jointly and severally, and 50 percent by the minority owners.