COURT OF APPEAL FOR ONTARIO

CITATION: Toronto Standard Condominium Corporation No. 2051 v. Georgian Clairlea Inc., 2019 ONCA 43
DATE: 20190124
DOCKET: C65612

Sharpe, Juriansz and Roberts JJ.A.

BETWEEN

Toronto Standard Condominium Corporation No. 2051

Plaintiff (Respondent/Cross-appellant)

and

Georgian Clairlea Inc., Residences of Clairlea Gardens Inc., Anthony Maida, Frank Maida, Gene Maida, Georgian Corporation, The Equitable Trust Company and Firm Capital Mortgage Fund Inc.

Defendants (Appellants/Cross-respondents)

and

Georgian Properties Corporation

Plaintiff by Counterclaim (Appellant/Cross-respondent)

Andrew Bernstein, Jeremy Opolsky and Shalom Cumbo-Steinmetz, for the appellants/cross-respondents

Megan L. Mackey and Sandra Dawe, for the respondent/cross-appellant

Heard: January 15, 2019

On appeal from the judgment of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated May 31, 2018.

Juriansz J.A.:

A. THE APPEAL

[1] The appellant, Georgian Properties Corporation ("GPC"), appeals from the summary judgment of Justice Akbarali dated May 31, 2018 reducing the amounts owing under two mortgages given by the respondent, Toronto Standard Condominium Corporation No. 2051 ("TSCC 2051") to the developer of the condominium. The developer, which is now in bankruptcy, had assigned the mortgages to GPC. In the summary judgment proceeding, GPC agreed to be bound by the judicial findings against the developer and to be responsible for any costs award.

[2] The summary judgment was granted in the action brought by TSCC 2051 seeking, *inter alia*, relief under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19 ("the Act"). Section 135(2) gives the court jurisdiction to grant an oppression remedy within the purview of the *Condominium Act*. It provides:

> On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter.

[3] GPC was the plaintiff by counterclaim and moved for summary judgment on three debt instruments, two of which are the mortgages at issue in this appeal.

[4] Both mortgages are vendor take-back mortgages entered into when the developer controlled the board of TSCC 2051.

[5] The first mortgage relates to the HVAC equipment in TSCC 2051. Originally, the developer intended to have a third party supply the HVAC equipment and lease it to purchasers of the condominium units. The Agreements of Purchase and Sale entered into with 47 persons, who purchased units prior to the condominium's registration, reflected this intention. Subsequently, the developer decided to purchase the HVAC equipment itself and sell it to the condominium corporation in the form of service units. The developer-controlled board of TSCC 2051 agreed to pay for the service units by giving the developer the mortgage in the amount of $2,228,100 with interest at the rate of 10% per annum.

[6] The other mortgage relates to 32 parking units, 16 storage units, and two combination parking/storage units that remained unsold at the time of the condominium's registration. The developer conveyed these unsold units to TSCC 2051. To pay for the units, the developer-controlled board of TSCC 2051 gave the developer a vendor take-back mortgage in the amount of $1,026,000 with interest at the rate of 10% per annum.

[7] The motion judge found the developer's revised disclosure documents infringed s. 74 of the *Condominium Act* and that both transactions were oppressive. She reduced the principal amount of the service unit mortgage to $652,050 and the principal amount of the parking unit mortgage to $73,000 with both accruing interest in accordance with their terms.

(1) Disclosure was Insufficient

[8] GPC submits the motion judge failed to apply the statutory standard of materiality in assessing the developer's revised disclosure documents. Instead, GPC submits, the motion judge concluded that the developer's revised disclosure documents did not meet the requirements of the Act because they failed to use "simple, readable language". GPC submits: "Materiality does not turn on how easy the disclosure is to understand, but on the *significance* or *effect* of the alleged misstatement" (emphasis in original); and "there is no legal support for using a 'simple, readable' standard in place of materiality."

[9] GPC's argument fails to keep distinct "materiality" and the clarity of the information about material changes that must be provided. Materiality has to do with the significance of changes from what the developer has provided in earlier disclosure. Section 74(1) provides:

> Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser.

[10] The motion judge took note of this provision and set out the statutory definition of "material change" in s. 74(2) of the Act. A "material change" is:

> a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded

> collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale

[11] The motion judge found that the creation of the service units, the service unit mortgage and the parking unit mortgage were material changes. There can be no doubt that the creation of the service units and the mortgages in the amounts of $2,228,100 and $1,026,000, which did not appear in the original disclosure statement, were material changes. The motion judge committed no error in deciding the issue of materiality.

[12] On the other hand, there is the clarity of the developer's communication of the material changes. The Act addresses the clarity of the revised disclosure expressly. Section 74(3) requires that a developer's revised disclosure statement under s. 74(1) must "clearly identify" all material changes and "summarize the particulars of them". The provision reads:

> The revised disclosure statement or notice required under subsection (1) shall clearly identify all changes that in the reasonable belief of the declarant may be material changes and summarize the particulars of them.

[13] Cases decided under s. 52 of the *Condominium Act*, R.S.O. 1990, c. C.26 must be read with the awareness that the earlier version of the Act did not have the specific requirements of s. 74(3).

[14] The motion judge said: “Disclosure will not meet the requirements of the Act where the terms of the deal are not clear, coherent or consistent, or where they do not provide full and accurate disclosure”. Further, she instructed herself that an objective standard must be used in deciding whether a disclosure statement complies with the Act, and that the question to be posed is what a reasonable person in an Ontario community would think about the disclosure’s sufficiency. She said that “purchasers are entitled to know what the terms of the deal are.” It was in describing the clarity of the disclosure of the material changes that the motion judge said that disclosure was not made in “simple, readable language”. However, that is not her only finding about the clarity of the disclosure.

[15] In relation to the service unit mortgage, she found the individual documents to be “confusing” and also found the documents to be “confusing” when she considered them collectively. She said she failed to see “how any reader of the disclosure would have any idea, for example, which pipes they were purchasing.” She added that the disclosure relating to the service unit mortgage was replete with grammatical errors and missing words that exacerbated the problem.

[16] The motion judge was correct to reject GPC’s argument “that the purchasers could have found the deal by reviewing the registered declaration on title, and that they should have done so because their APS required them to satisfy themselves as to title.” In advancing this argument, GPC failed to keep in

mind s. 74(3)'s requirement that the developer's revised disclosure statement must "clearly identify" all material changes and "summarize the particulars of them".

[17] Having reviewed the documents, I am satisfied that the motion judge's description of the various documents and her analysis of them are accurate. I agree with her conclusion that the developer's disclosure relating to the service unit mortgage is "confusing" and "does not indicate clearly to purchasers what they are buying".

[18] In relation to the parking unit mortgage, the motion judge found the developer's revised disclosure statement did not tell purchasers the amount of the mortgage. GPC points out that at the time it did not know how many parking units would remain unsold and argued below that a purchaser could figure out the maximum financial liability from the parking unit mortgage from the pricing information in the disclosure statement. Before the motion judge, GPC also argued purchasers could download amortization schedules from the internet to determine the mortgage payments.

[19] The uncertain maximum amount of the mortgage aside, the motion judge found that the covering letter that accompanied the revised disclosure statement confused matters. The covering letter is the developer's "summary of particulars" required by s. 74(3). The covering letter directs purchasers to the revised budget

statement to see the mortgage payments owing, but the revised budget statement shows no mortgage payments. In addition, the revised budget statement contains a note telling purchasers "that there are no services the declarant provides, or expenses the declarant pays, that are reasonably expected to become a common expense at a subsequent time." This could be taken to mean that the mortgage was not anticipated to have an effect on the purchasers' maintenance fees in the future. Purchasers could be misled by the revised disclosure considered as a whole.

[20] The motion judge also found that the developer did not disclose that purchasers were almost uniformly buying only one parking unit with their residential unit. There was no way that the purchasers reading the revised disclosure statement would know the surplus units would not be sold or that there was no market for the unsold units. The motion judge found: "Only the developer had that information, and it did not share it."

[21] I agree with the motion judge's finding that the revised disclosure regarding both mortgages was insufficient and did not meet the requirements of the Act.

[22] Given the motion judge's finding that the disclosure was confusing, it is unnecessary to consider GPC's criticism that she found the disclosure of the material changes was insufficient because it was not made in "simple, readable

language". Suffice it to say that the documents a developer uses to make revised disclosure must be readable and free of unnecessary complexity.

(2) Oppression

[23] GPC submits the motion judge erred in finding oppression, and further erred in the remedies she granted.

[24] The motion judge applied the two-part test for oppression that the Supreme Court of Canada set out in para. 68 of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560:

> In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[25] GPC stresses that the oppression remedy protects what a claimant reasonably expected and nothing more. In relation to the service unit mortgage, GPC points out that the unit purchasers did not initially expect to own the HVAC appliances and, after receiving the revised disclosure, would have reasonably expected TSCC 2051 had agreed to a mortgage in the amount of $2,122,000 for the purchase of the HVAC equipment. GPC, assuming it would be immaterial to unit purchasers whether they owned the pipes and wires personally or collectively through the condominium, argues that the purchasers' reasonable

expectations could be met by redefining the service units to include only the HVAC appliances, leaving the price intact. Given that they expected there would be a mortgage in the amount of $2,122,000, there is no basis for the remedy granted by the motion judge.

[26] There are three problems with this argument. First, the value of the pipes and wires was significant. The HVAC appliances cost the developer only $575,000 but the developer took back a $2,122,000 mortgage. Second, whether the unit purchasers or the condominium owned the pipes and wires is material as it could affect the determination of responsibility for repair and liability for damage. Third, and most importantly, the motion judge found the unit purchasers did not reasonably expect to be paying a mortgage in respect of items they reasonably thought they had already bought when they purchased their residential units.

[27] Having found the purchasers' reasonable expectations were violated, the motion judge next considered whether the evidence established that TSCC 2051's and the purchasers' reasonable expectations were violated by conduct that constituted "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. She concluded that they were.

[28] I agree. As she found, the developer ignored the interests of the condominium and the unit purchasers. It took advantage of its preferred position

and control of the condominium board to purport to sell to the condominium unit purchasers collectively, service units that included pipes and wires the unit purchasers had good reason to believe were included in the purchase of the individual units. Without clearly disclosing what it was purporting to do, the developer had unfairly saddled the condominium with a vendor take-back mortgage in large measure for the purchase price of pipes and wires the purchasers had good reason to believe they owned. It had unfairly disregarded the interests of TSCC 2051 and the unit purchasers.

[29] The remedy chosen by the motion judge was appropriate to rectify the harm from the breach of TSCC 2051 and the unit purchasers' reasonable expectations that they would not be paying a mortgage in respect of items the unit purchasers reasonably thought they had already bought. The motion judge found the unit purchasers did not expect that the mortgage would include the wires and pipes, or any other fixtures other than the HVAC appliances. The motion judge did not err by reducing the principal owing on the mortgage to reflect the cost of the supply and installation of the HVAC appliances plus some margin of profit.

[30] In relation to the parking unit mortgage, GPC argues the developer notified the purchasers about the conveyance of the unsold parking and storage units and the creation of the parking unit mortgage in the revised disclosure statement. It disclosed the price of each unit, explained that no payment would be due on

the mortgage in the first year and disclosed the interest rate. The amount of the mortgage could be easily calculated from the number of unsold units and the price set for each.

[31] The motion judge properly rejected the argument. She observed: “As with the service unit mortgage, the parking unit mortgage was entered into when the developer was in control of the board, prior to the turnover meeting.” As noted earlier, she found the developer knew that purchasers were almost uniformly buying only one parking unit with their residential unit. On my reading of her reasons, she found there was no market for the unsold units and they were almost worthless. She found the developer did not share this information with the condominium and the purchasers. Using its control of the condominium’s board, the developer conveyed the unsold units to TSCC 2051 at inflated prices and concealed the cost of servicing the mortgage by including a term that specified no mortgage payments would be due in the first year. This stratagem enabled the exclusion of the annual cost of the mortgage from the revised budget statement and the inclusion of a note in the budget statement that there were “no services the declarant provides, or expenses the declarant pays, that are reasonably expected to become a common expense at a subsequent time.” The motion judge was entitled to find the developer unfairly disregarded the interests of TSCC 2051 and the purchasers.

[32] The remedy awarded by the motion judge is premised on TSCC 2051 and the unit purchasers' reasonable expectations that the unsold units would be conveyed at fair market value. Adjusting the principal of the mortgage to the units' fair market value according to the expert evidence she accepted was appropriate. I do not accept GPC's submission that the expert's opinion reflected her personal experience and was not based on her expertise.

[33] GPC repeatedly drew the court's attention to the fact that 49 purchasers purchased under the original disclosure statement and 69 units were sold to purchasers under the revised disclosure statement. I do not see this as pertinent. The individual unit purchasers were not seeking the remedies available to them under s. 74 of the Act. The action was brought by TSCC 2051 seeking an oppression remedy based on its claim that the developer had unfairly disregarded its and the unit purchasers' interests. TSCC 2051 established its claim of oppression by showing the nature of the transactions the developer entered into with the board it controlled and the insufficient disclosure of those transactions contrary to s. 74(3) of the Act.

[34] For these reasons, I would dismiss the appeal.

B. THE CROSS-APPEAL

[35] TSCC 2051 cross-appeals seeking to set aside the motion judge's order that the interest rate on principal amounts of the mortgages as reduced by her

would continue to be payable in accordance with the terms of the mortgages, i.e. compound interest at the rate of 10% per annum. In relation to the service unit mortgage, the motion judge said:

> The plaintiff and unit purchasers would have reasonably expected the mortgage to accrue compound interest. Mortgages typically do. I also find that the interest rate of 10% was properly disclosed, and not unreasonable, especially in view of the interest rates the developer was paying on its own loans, and the fact that the mortgage was fully open.

[36] Her reasoning was the same in relation to the parking unit mortgage.

[37] Given the motion judge's finding that TSCC 2051 and the unit purchasers would have reasonably expected the mortgages to accrue compound interest, she could not adjust the interest rate as part of the oppression remedy she granted.

[38] TSCC 2051 offers a second reason why it should not be required to pay compound interest. It submits the mortgages should not be considered in default until the date of judgment because of an oral agreement it had with the developer that the mortgage payments due to the developer would be set off against the condominium fees the developer owed to the condominium.

[39] The parties dispute whether the effect of the oral agreement was raised before the motion judge. The motion judge's reasons for judgment dated May 31, 2018 and her endorsements of June 21, June 28 and July 26, 2018 show she did

not determine any set-off issue, none was argued before her on the motion, and she considered none was pleaded. She explained that paragraph 11 of the formal judgment was included at the request of and with the consent of the parties. Paragraph 11 deals with GPC's right to set off the amounts, including costs, she ordered it to pay TSCC 2051 against the mortgage payments TSCC 2051 owes it.

[40] I am not persuaded that the motion judge made any error in deciding that issues of set-off were not before her. TSCC 2051 submits that it referred to the oral agreement in paragraphs 142 and 148 of its factum on the motion. The general oblique references in those paragraphs do not raise the agreement squarely and, in any event, do not seek the disposition sought on appeal.

[41] I would conclude that whether there was an oral agreement that no payments were due on the mortgages as long as GPC owed money to TSCC 2051 was not an issue in the motion below and is not properly before us on appeal.

[42] The cross-appeal is dismissed.

C. CONCLUSION

[43] I would dismiss the appeal and the cross-appeal. As agreed by the parties, I would fix costs of the appeal in favour of TSCC 2051 in the amount of $35,000

and the costs of the cross-appeal in favour of GPC in the amount of $15,000, both amounts inclusive of disbursements and taxes.

Released: “RJS” JAN 24 2019

“R.G. Juriansz J.A.”
“I agree. Robert J. Sharpe J.A.”
“I agree. L.B. Roberts J.A.”