CITATION: *Tall Ships Landing Developments v. Leeds Standard Condominium Corporation No. 41*, 2019 ONSC 2600
COURT FILE NO.: CV-18-0190
DATE: 20190425

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
TALL SHIPS LANDING DEVELOPMENTS, A DIVISION OF METCALFE REALTY COMPANY LIMITED	)	
Applicant	)	*Rodrigue Escayola*, for the Applicant
– and –	)	
LEEDS STANDARD CONDOMINIUM CORPORATION NO. 41, 2085971 ONTARIO INC. OPERATING AS EASTERN ONTARIO PROPERTY MANAGEMENT GROUP AND MICHEAL BUDDE	)	*Antoni Casalinuovo*, for the Respondents
Respondents	)	HEARD at Brockville: 24 April 2019

REASONS FOR DECISION
(Motion to dismiss or stay Application)

MEW, J.

[1] The dispute between the parties to this application arises from a Shared Facilities Agreement ("SFA") which provides for the mutual use, maintenance, repair, replacement, governance and cost-sharing of the building shared facilities, the easements and the shared

building services at a mixed use building in Brockville known as Tall Ships Landing (the "Property").

[2] The applicant is the owner and developer of certain lands which became the Tall Ships Landing development, including the Property. The principal and controlling mind of the applicant is Simon Fuller.

[3] The Property includes 86 residential condominium units which are organised under the auspices of the respondent condominium corporation ("LSCC 41"). The respondent Micheal Budde is the owner of one of the residential condominium units and a director of LSCC 41.

[4] The respondent Eastern Ontario Property Management Group ("EOPMG") was, until 30 November 2018, the Property Manager for both LSCC 41 and the building shared facilities. On 3 October 2018, EOPMG resigned as the Shared Facilities Manager, effective 30 November 2018.

[5] A RFP process was initiated by the Shared Facilities Committee (established by the SFA) to appoint a property manager to replace EOPMG. On 22 November 2018, at what the applicant regards as a properly constituted meeting, but LSCC 41 asserts was no more than a "gathering", a vote was taken which purported to appoint Bendale Property Management as the new Shared Facilities Manager. LSCC 41 disputed the validity of this appointment at that time and took the position that adequate due diligence should have occurred, prior to a decision being taken at a properly constituted meeting. While, LSCC 41 acknowledges that Mr. Fuller controls a majority of the votes on the Shared Facilities Committee, it asserts that proper procedure should have been, but was not, followed.

[6] This application was commenced on 6 December 2018 by notice of application, returnable on 2 January 2018. As originally framed, the application sought a declaration that Bendale Property Management had in fact been duly appointed as the new Shared Facilities Manager, together with mandatory orders requiring the respondents to transfer to Bendale information required for the continued and safe operation, maintenance and repair of the shared facilities, to pay its share of the expenses associated with the shared facilities and to grant access to the shared facility. As against EOPMG a declaration was sought that it had breached its

statutory, contractual and/or fiduciary duties. Declarations were also sought that LSCC 41 had conducted itself in an oppressive or unfairly prejudicial manner and that Mr. Budde had breached his statutory standard of care by failing to act in good faith or failing to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The applicant also sought an order rectifying LSCC 41's allegedly oppressive conduct.

[7] The application record compiled by the applicant consisted, initially, of three volumes consisting of a notice of application some 71 paragraphs long, a 57 page, 227 paragraph affidavit of Mr. Fuller, sworn on 17 December 2018 and 128 exhibits. It was served on the respondents' solicitors on 18 December, most of the intervening seven working days between then and the return date of the application being over the Christmas holiday period.

[8] Not surprisingly, when the matter came on for hearing before Mr. Justice Abrams on 2 January 2019, the respondents requested an adjournment. For a start, they said that the return date had been selected unilaterally, without regard to the availability of counsel. While the adjournment request was granted over the opposition of the applicant, Justice Abrams did deal with a request by the applicant for interim injunctive relief to address the refusal of LSCC 41 to accede to the appointment of Bendale and the continued activities of EOPMG in relation to the shared facilities, apparently on instructions from LSCC 41. That request was denied.

[9] Abrams J.'s endorsement records that he was persuaded that Ms. Anne Burgoon of EOPMG in her role as property manager for LSCC 41 should continue to manage all essential services of the shared facilities and its equipment and any urgent needs related to life, safety and/or security of persons and/or the property as a whole until such time as a new shared facilities manager could either be appointed at a meeting then scheduled for 29 January 2019 or by further order of this court.

[10] The application was adjourned to 24 April 2019, to be heard concurrently with a motion by the respondents to, *inter alia*, strike out the application or, in the alternative, for a stay of proceedings pending exhaustion of an alternative dispute resolution ("ADR") process provided for in the SFA.

[11] The meeting of the Shared Facilities Committee did subsequently take place on 29 January 2019, as a result of which a majority of the voting members present voted to appoint Bendale as the new Shared Facilities Manager. The respondents no longer challenge the legitimacy of Bendale's appointment. Bendale has been acting in all capabilities as Shared Facilities Manager since 26 February 2019.

[12] An amended notice of application was delivered on 21 February 2019. It is accompanied by five more volumes of the application record, consisting of a further 36 page, 158 paragraph affidavit from Mr. Fuller dated 22 February 2019 with 76 exhibits; an affidavit of Vincent Bennett (of Bendale) dated 18 December 2018; a yet further affidavit from Mr. Fuller sworn on 22 March 2019 with eight exhibits; and an affidavit from a solicitor at the firm representing the applicant addressing the non-attendance of two witnesses summoned by the applicant pursuant to rule 39.

[13] The respondents have also filed materials. There was a responding application record for interlocutory relief containing an affidavit of Anne Burgoon sworn on 2 January 2019 and two volumes comprising a responding application record and a motion record in support of a motion by the respondents to strike the notice of application. These volumes contain two separate affidavits of Doug Bellevue, the President of the Board of LSCC 41. Messrs. Fuller and Bellevue were cross-examined on their affidavits.

[14] By way of further context, there is other litigation involving LSCC 41, Mr. Fuller and Tall Ships Landing Developments ("TSL"). LSCC 41 commenced an application in Toronto in 2016 and, thereafter, an action in 2018, also in Toronto. The statement of claim in the action discloses relief sought including damages connected with what is described as "the historical and continued overpayment of expenses" related to the SFA, and declarations of oppressive conduct on the part of TSL and Mr. Fuller. The City of Brockville and Mr. Fuller are also named as defendants. There are pending motions to strike out the notice of application and to consolidate the application and the action.

[15] The respondents argue that I should not hear the application on its merits. Firstly, they say that a new property manager has now been appointed following the 29 January 2019

meeting, which it acknowledges to have been properly constituted. To the extent that there remain other issues in dispute, they say there is complete overlap with the action and, accordingly, the current application is duplicative of that proceeding and, hence, an abuse of process. They also say that the application should not in any event proceed because of the failure of the applicant to comply with a dispute resolution process set out in article 18 of the SFA. They ask that the application be struck out in its entirety, without leave to amend.

[16] The applicants point to the fact that the other application and action do not involve identical parties to this application. Furthermore, the applicant asserts that there should be a timely adjudication to "allow the new manager to assume control and manage the Shared Facilities". The amended notice of application also seeks a declaration that LSSC 41 is bound by a “Shared Facilities Management Agreement” with Bendale, which has been approved by the Shared Facilities Committee, but which LSSC 41 has not signed because it says it is not required to.

[17] When pressed, counsel for the respondents acknowledged that an agreement with Bendale had been entered into with the approval of the Shared Facilities Committee. But LSCC 41 points to what it perceives as the inadequacy of the SFA and the need to rectify the provisions of that agreement – an issue which is raised in the action it has commenced – as well as the fact that the City of Brockville has not yet indicated its commitment to the new arrangement.

[18] Aside from the relief sought against EOPMG and Mr. Budde, the applicant maintains that the issues of access to all Shared Facilities, of whether the November 2018 appointment of Bendale was valid and of whether LSCC 41 is bound by the new management agreement with Bendale, are very much live. And the applicant also points to the fact that EOPMG and Mr. Budde are not parties to the SFA and, hence, are not governed by the alternative dispute resolution provisions contained in that agreement.

[19] I pause to mention that the respondents’ motion also seeks, in the event that the application is not struck out in its entirety, to have paragraphs 31 and 32 of and exhibit 5 to Mr. Fuller’s 17 December 2018 affidavit struck from the record. The impugned paragraphs refer to exhibit 5, which is a 17 July 2018 letter from LSCC 41’s solicitors to the board of LSCC 41.

The letter is clearly a privileged document on its face. LSCC 41 says it was inadvertently released to the applicant by Ms. Burgoon and that it never waived the privilege. Given the assurance by counsel for the applicant that no attempt will be made to argue that the release of this letter – whether such release was inadvertent or otherwise – could support a claim that there has been a broader waiver of privilege by the respondents, together with the concession by the respondents' counsel that the consequences of the waiver of privilege (in light of the assurance from the applicant's lawyer) are not overly prejudicial, I do not consider it necessary to rule on this issue.

[20] After hearing argument on the respondents' motion for half a day and deliberating over the lunch break, I informed the parties that I had concluded that the application should be stayed. I undertook to provide full written reasons in due course, but indicated that the basis for coming to this conclusion was that the applicant and LSCC 41 are bound by the dispute resolution provisions of the SFA. To the extent that there remain live issues between the applicant and LSCC 41, the essence of their dispute relates to matters arising from the process and implementation of the appointment of Bendale, rather than the allegedly oppressive conduct of LSCC 41. Hence, a stay of proceedings should occur to enable those issues to be resolved by the ADR process agreed to by the parties. Depending on the outcome, the remaining allegations against EOPMG and Mr. Budde may not be sustainable, or may be of insufficient consequence to warrant continuing against them.

[21] These, then, are my reasons.

[22] I start with the dispute resolution provisions contained in Article 18 of the SFA. It will be noted that completion of ADR is stated to be a condition precedent to the commencement of a proceeding in respect of the question or matter in dispute being arbitrated.

> 18.1 The parties agree to use their best efforts to resolve any disputes or matters which may arise between them in respect of the Shared Facilities through good faith negotiations and the parties further agree that they shall resort to legal proceedings or mediation and ADR against one another only as a last resort. In order to attempt to resolve such disputes prior to legal proceedings or mediation and ADR, the Shared Facilities Committee shall appoint a Technical Consultant yearly, in advance of any dispute, and upon a dispute arising, the Technical Consultant may be provided with each

parties report with respect to the dispute in question, and attend at a meeting of the Owner's Committee and/or Sub-Committee and provide his opinion. The costs of the Technical Consultant shall be shared equally between the parties to the dispute. If, after using their best efforts to resolve any such dispute or matter, such dispute or matters cannot be resolved by good faith negotiations and with the assistance of a Technical Consultant, then any such dispute, other than with respect of non-payment of any party's Allocated Share of the Shared Costs, shall be determined in the following manner.

18.2 Whenever ADR is permitted or required under this Agreement and the Act, ADR proceedings may be commenced by the parties in accordance with the following principles and procedures:

(a) If the parties, with or without the assistance of legal counsel as set forth in 18.1 above, are unable to resolve the questions or matter in dispute through good faith negotiations, (as provided in Section 132 of the *Condominium Act*, 1998 as applicable), the parties shall, within thirty (30) days thereafter, select a mediator qualified by education and training to assist the parties in dealing with the particular questions or matter in dispute, and the parties shall attempt to mediate their differences, and the mediator shall confer with the parties and endeavour to obtain a settlement with respect to the disagreement submitted to mediation. The parties shall initially share equally in the costs of a mediator, however, the settlement shall specify the share of the mediator's fees and expenses that each party is required to pay. Upon obtaining a settlement between and among the parties with respect to the disagreement submitted to mediation, the mediator shall make a written record of the settlement which shall form part of the agreement or matter that was the subject of the mediation.

(b) If good faith negotiations and the mediation process as described in Sections 18.2(a) hereof are exhausted, and the parties are still unable to resolve the question or matter in dispute within thirty (30) days after the mediator delivers a notice to the parties stating that the mediation has failed, the parties agree to submit the question or matter in dispute for resolution by a single arbitrator whose appointment is agreed upon by the parties, and the decision of the arbitrator shall be binding upon the parties hereto, and no legal recourse shall be exercised by either party hereto with respect to the question or matter in dispute until the ADR has been completed .

(c) The parties shall meet and attempt to appoint a single arbitrator who is well qualified with education and training to pass upon the particular question or matter in dispute. In the event that the parties are unable to agree upon a single arbitrator, each party shall appoint one arbitrator within seven (7) days of the meeting and notify the other party.

The arbitrators so appointed shall, within seven (7) days of the appointment of the last arbitrator so appointed, choose a single arbitrator who is qualified by

> education and training to pass upon the particular question or matter in dispute. If either party neglects or refuses to name an arbitrator within seven (7) days of being requested to do so by the other party, the arbitrator named by the first party shall proceed to resolve the dispute in accordance with *Arbitrations Act* 1991 (Ontario) and the parties agree that the arbitrator's decision shall be final and shall not be subject to appeal by any party other than on a question of law in accordance with Subsection 45(2) of the *Arbitrations Act*, 1991 or pursuant to a specific ground for appeal or for setting aside the arbitrator's award pursuant to Section 46 of the *Arbitrations Act*, 1991.
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> (d) The decisions and reasons of the arbitrator shall be made within thirty (30) days after the hearing of the question or matter in dispute, and the decisions and reasons shall be drawn up in writing and signed by the arbitrator who shall also be entitled to award costs of the ADR. The compensation and expenses of the arbitrator shall initially be paid in equal proportions by each party, subject to the final outcome and any award being made as to costs of the ADR.
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> Where ADR is required by this Agreement, commencement and completion of such ADR in accordance with this Agreement shall be a condition precedent to the commencement of an action at law or in equity in respect of the question or matter in dispute being arbitrated.

[23] The general power of a court to stay a proceeding is provided for by s. 106 of the *Courts of Justice Act*. Furthermore, rule 21.01(3) permits a defendant to move for a stay of proceedings where the court has no jurisdiction over the subject matter of an action (notably, rule 21.01(3) refers to an "action" rather than a "proceeding") or where there is another proceeding pending between the same parties in respect of the same subject matter.

[24] There is a general (and statutorily enshrined) policy in favour of the resolution of disputes by arbitration, where the parties have agreed to that method. In *Haas v. Gunasekaram*, 2016 ONCA 744 (at para.10), Lauwers J.A. notes that:

> The law favours giving effect to arbitration agreements. This is evident in both legislation and in jurisprudence. Section 7 of the *Arbitration Act* contains mandatory language, stating "the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding".

[25] The facts that the application involves parties who cannot be bound by an arbitrator's award (EOPMG and Mr. Budde) or that relief is sought in the application which would be out

with the competence of an arbitrator (the oppression remedy provided for by s. 135 of the *Condominium Act*) are not fatal to a request for a stay of proceedings.

[26] In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2019 ONSC 1827, Sossin J. stated, at para. 48:

> In determining whether to grant a stay, the question is whether it is at least arguable that the dispute is arbitrable: *MTCC No. 965 v. MTCC No. 1031 and No. 1056*, 2014 ONSC 5362("*MTCC No. 965*"), at para. 14.

[27] Where the essence of the dispute is the oppression remedy, which, under s. 135 of the *Condominium Act*, falls within the exclusive jurisdiction of this court, a stay in favour of arbitration proceedings would be inappropriate: *TSCC No. 1628*, at paras. 57 and 69.

[28] On the other hand, courts should guard against allowing the mere invocation of an oppression remedy under s. 135 to avoid the consequence of an arbitration clause in an agreement: *MTCC No. 965 v. MTCC No. 1031*, 2014 ONSC 5362, at para. 18.

[29] In pith and substance the application before me addresses issues of compliance or noncompliance with the SFA. While Mr. Fuller's affidavits make all sorts of negative comments about the manner in which LSCC 41 and its representatives have conducted themselves, and relief is sought in the form of a compliance order under s. 134 of the *Condominium Act* (which is also the preserve of this court), Mr. Fuller himself puts it best in paragraph 135 of his 22 February 2019 affidavit in which he says that "[t]he present Application raises very discreet issues: who is to manage the Shared Facilities and whether LSCC 41 is bound by the management agreement".

[30] With respect to the allegations against EOPMG and Mr. Budde, counsel for the applicant concedes that if LSCC 41 prevails on the "discreet issues", as Mr. Fuller terms them, the claims against EOPMG and Mr. Budde would fall.

[31] Where it is doubtful whether claims against individuals who are not parties to an arbitration agreement would be sustainable once claims that are arbitrable have been resolved by arbitration, the arbitration should be allowed to proceed: *Novatrax International Inc. v. Hägele*

Landtechnik GmbH, 2016 ONCA 771, 2016, 132 O.R. (3d) 481, 271, 410 D.L.R. (4th) 36, at para. 25.

[32] Indeed even if, after resolution of the "discreet issues" between the applicant and LSCC 41, claims against EOPMG or Mr. Budde were to remain, I would venture to suggest that, as a practical matter, they might not be worth pursuing from a cost-benefit point of view.

[33] The determination of whether or not to grant a stay is, ultimately, a matter involving the exercise of discretion, in which I am required to balance the principle of deferring to the parties' agreement on ADR against the (undesirable) possibility of a multiplicity of proceedings.

[34] Having weighed what appeared to me to be the relevant factors, I come down in favour of ADR.

[35] I trust that the parties will now use their best efforts to negotiate in good faith, failing which they will mediate and only if mediation fails, obtain a determination of the "discreet issues" by an arbitrator. If, after the exhaustion of the ADR process, there is anything left that can only be dealt with by this court, I will remain seized of the application to deal with what remains.

[36] Having so decided, it is only necessary for me to briefly address other issues raised on the motion.

[37] I do not accede to the respondents' argument that this application is an abuse of process. While there might well be overlap between issues raised in this application and those pleaded in the application and action brought by LSCC 41, those other proceedings predate the current application and would not have anticipated the discreet issues arising in relation to the appointment of a new Facilities Manager or the allegations of oppression made by the applicant against LSCC 41 (in the action LSCC 41 makes allegations of oppression against TSL; indeed TSL has not yet delivered a statement of defence). Nor is the bringing of an application in the face of the ADR provisions necessarily an abuse of process. The appropriate remedy in such circumstances is to seek a stay of proceedings.

[38] Finally, while I take at face value the expressed desire by TSL to obtain a timely resolution of the discreet issues it has raised, I take considerable comfort from the fact that Bendale is now installed as the Facilities Manager and that LSCC 41 accepts the validity of that appointment and acknowledges that a shared facilities management agreement has been properly entered into with Bendale on behalf of the Facilities Committee, of which it is a member.

[39] After I had informed the parties of my decision on a motion, I heard submissions on costs.

[40] The respondents claim costs of the motion and of the application, including the attendance before Abrams J. on 2 January 2019, on a full indemnity basis. They argue that such a scale is appropriate given that, if successful, the applicant would have sought costs on a similar scale, relying on a provision of the SFA which, arguably, requires LSCC 41 to fully indemnify TSL for any costs which it incurs in certain circumstances.

[41] The total of fees and disbursements claimed on this basis amount to $94,797.63.

[42] The respondents also draw attention to two offers to settle. The first, made on 13 December 2018, offered to "drop hands" if a properly constituted shared facilities meeting was called to appoint a qualified property management company. However, that offer also contained other terms, including that Mr. Fuller should be replaced as TSL's representative for each entity owned by TSL on the shared facilities committee. The second offer, which replaced the first offer, was made on 19 March 2019, and offered to go out of the application, with costs on a partial indemnity costs basis, if the offer was accepted after 21 March 2019.

[43] The applicants argue that the first offer to settle is of no consequence, given some of the terms that it included and its ultimate replacement. As to the second offer, the applicant argues that it is premature to address costs of the application as a whole, because all of the material assembled in respect of the merits of the application can be recycled for use on any arbitration that takes place as a result of my decision on the motion. Accordingly, the applicant takes the position that the only costs that should be dealt with at this time are those pertaining to the motion and the attendance before Abrams J. It would then be open to the arbitrator to deal with any other issues of costs.

[44] I acknowledge that there is a possibility that the very substantial materials prepared for this application could be deployed at any arbitration that takes place. Whether or not there is such an arbitration will depend on the outcome of the good-faith negotiations between the parties and, if those negotiations fail to resolve the outstanding issues, the mediation. Furthermore, there will inevitably be the need, in relation to the arbitration, to repeat some of the work covered by the parties in their preparations for argument on the merits of the application.

[45] Accordingly, my costs award will deal with the motion, the attendance before Abrams J. and an amount to reflect time spent in connection with this application that will not be captured by any award of costs that may be made by an arbitrator.

[46] As I am remaining seized of this matter, if the arbitration does not go ahead, or for some other reason, the parties cannot obtain any further value from the work they have done in connection with this application, the parties are at liberty to apply to me for the balance of the costs that I would have awarded had I dealt with costs of the entire application at this time.

[47] I am not persuaded that this is a case for full indemnity or even substantial indemnity costs. I am, however, persuaded that my disposition of costs should reflect the court's disapproval of the failure of the applicant to accede to the reasonable request by the respondents for an adjournment of the return date of 2 January 2019 which the applicant had unilaterally selected.

[48] Having taken that into account as well as the other factors that I am required to consider under rule 57.01, and having had the benefit of reviewing the costs summaries prepared by the applicant in the event that the applicant had succeeded (and, hence, the reasonable expectations of the applicant), I fix the costs of the motions before Abrams J. and the respondents' motion before me, together with costs which might not otherwise be recoverable as costs of an arbitration between the parties, at $30,000, inclusive of applicable taxes and disbursements. For the avoidance of doubt, any disbursements incurred with respect to production of the application records or the books of authorities and factums delivered in connection with the application on its merits, are not included in this figure.

[49] As previously indicated, I will, if requested, and in due course, deal with any outstanding issues of costs that are not resolved by any arbitration that may take place.

Graeme Mew J.

Released: 25 April 2019

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