CITATION: Leeds Standard Condominium Corp. No. 41 v. Fuller, 2019 ONSC 3900
COURT FILE NO.: CV-18-600425
DATE: 20190624

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Leeds Standard Condominium Corporation No. 41,	)	Antoni Casalinuovo, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	Nadia Authier, for the Defendants
Simon Fuller, Tall Ships Landing Developments Inc., and the Corporation of the City of Brockville	)	
	)	
Defendants	)	
	)	**HEARD:** April 26, 2019

REASONS FOR DECISION

NISHIKAWA J.

Overview

[1] The Tall Ships Landing Development is located at 15 St. Andrew Street, Brockville, Ontario (the "Development"). The Development consists of a residential condominium, commercial and restaurant space, a marina, parking, and a maritime experiential learning centre known as the Aquaterium. Only Phase 1 of the Development has been completed. Construction of Phase 2 and Phase 3 has not yet commenced. As detailed further below, the parties have become embroiled in litigation.

[2] The Defendants, Tall Ships Landing Developments Inc. ("TSL") and Simon Fuller, (together, the Defendants) bring this motion to stay the proceeding commenced by the Plaintiff, Leeds Standard Condominium Corporation ("LSCC 41"), in favour of arbitration. In the alternative, the Defendants seek to strike portions of the Statement of Claim (the "Claim") as frivolous, vexatious and an abuse of process or seek further particulars.

[3] LSCC 41 brings a cross-motion to convert an application that it previously commenced into an action and to consolidate it with this action.

[4] The Defendant, the City of Brockville (the "City"), takes no position on the motions.

[5] For the reasons that follow, I grant the Defendants' motion to stay the proceeding. As the action is stayed, it is not necessary to rule on the Defendants' motion to strike or for further particulars, or LSCC 41's motion to convert and to consolidate.

Factual Background

The Parties

[6] The Plaintiff, LSCC 41, is a condominium corporation created on December 9, 2014.

[7] The Defendant, TSL, is the owner and developer of the Development. TSL was the declarant of the condominium and continues to own a number of residential units, which it is marketing for sale.

[8] The Defendant, Mr. Fuller, is the President of TSL and was a director of LSCC 41 from December 2014 until April 2018 when he was disqualified from continuing to serve on the Board by a by-law passed by the Board.

[9] The Defendant City is the owner of the Aquaterium, a marine-themed park located at the development.

The Relevant Agreements

[10] The parties entered into two separate agreements registered on title relating to the joint use and sharing of costs for certain facilities, improvements and amenities.

The Shared Amenities Agreement

[11] The Shared Amenities Agreement (the "SAA") provides for the mutual use and cost sharing of the Shared Amenity Areas located in the Development, which include guest suites, hot pools, a swimming pool, fitness room, outdoor terrace, washroom and change facilities, among other things. The parties to the SAA are LSCC 41, on behalf of the residential unit owners, and TSL, as owner of the amenity structure and owner of the Phase 2 and 3 lands.

The Shared Facilities Agreement

[12] The Shared Facilities Agreement (the "SFA") provides for the sharing and use of the infrastructure, excluding the Shared Amenity Areas. The parties to the SFA are LSCC 41, TSL as the Amenity Owner, TSL as the Retail Owner, TSL as the Marina Owner, TSL as the Retained Lands Owner, and the City as the Aquaterium Owner. Leeds Standard Condominium

Corporation No. 42 (“LSCC 42”) is also a party to the SFA, on behalf of the owners of the parking units at the development.

[13] The SFA allocates the costs for shared building services and facilities to one or more of the parties based on calculations set out in the SFA.

[14] Both agreements contain the identical dispute resolution clause (the “ADR Clause”). Section 18.1 of the SAA and SAA requires the parties to use their best efforts to resolve any disputes between them and to resort to legal proceedings “only as a last resort.” Section 18.2 states:

> 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.
>
> (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.
>
> 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.

The Proceedings

The SAA Application

[15] On September 14, 2016, LSCC 41 issued a Notice of Application (Court File No. CV-16-5604585, the "SAA Application") pursuant to ss. 113 and 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "*Condominium Act*"), seeking various relief against TSL in connection with the SAA, including its termination. In the SAA Application, LSCC 41 alleges that the SAA is oppressive, unfairly prejudicial and unfairly disregarded the interests of LSCC 41.

[16] TSL was not aware of the SAA Application until a reference to it appeared on a status certificate requested for a unit in the condominium. TSL was not served with the SAA Application until February 2017. LSCC 41 has not pursued the SAA Application, despite TSL's requests that it do so. In July 2018, LSCC 41 brought a motion to strike the SAA Application for delay, but later adjourned the motion *sine die*.

[17] In the spring of 2017, LSCC 41, at Mr. Fuller's initiative, struck a task force or committee (the "Task Force") to discuss and address disputes that had arisen among TSL as Amenity Owner and the unit owners of LSCC 41. The parties dispute the scope of the Task Force's mandate. LSCC 41's position is that the Task Force's purpose was to resolve issues relating to both the SAA and the SFA. However, the documents generally refer to it as the "SAA

Task Force" and pertain to potential amendments to the SAA. The Task Force was ultimately unsuccessful at achieving a resolution and was eventually disbanded in the fall of 2017.

[18] LSCC 41 seeks to convert the SAA Application into an action and consolidate it with this proceeding.

The Action

[19] LSCC 41 then commenced this Action in June 2018 (the "Action"). In the Statement of Claim, LSCC 41 seeks a declaration that the Defendants are or threaten to be oppressive, unfairly prejudicial and/or unfairly disregard the interests of LSCC 41. LSCC 41 also seeks, among other things, damages for breaches of contract and "duty of care", disclosure of documents, and the renegotiation of the SFA and SAA.

[20] The Defendants served a demand for particulars, to which LSCC 41 responded in September 2018. The Defendants are not satisfied with LSCC 41's response and have also brought a motion to strike the Action as frivolous, vexatious and an abuse of process or for further particulars.

The Brockville Application

[21] On December 6, 2018, TSL commenced an oppression application against LSCC 41 in Brockville, seeking a declaration that the property manager was properly retained. TSL also sought mandatory orders for the transfer of information required for the operation and maintenance of the SFA and for LSCC 41 to pay its share of the expenses, among other things (the "Brockville Application.") In the Brockville Application, it was LSCC 41 who brought a motion to stay the application in favour of arbitration, arguing that the dispute fell within the scope of the ADR Clause. The parties subsequently resolved the issue of the appointment of the property manager. The balance of the Brockville Application was stayed by Mew J. on April 24, 2019: *Tall Ships Landing Developments v. Leeds Standard Condominium Corporation No. 41,* 2019 ONSC 2600.

Issues

[22] The motion and cross-motion raise the following issues:

(a) Should this court stay this Action in favour of arbitration?

(b) If the Action is not stayed:

(i) Should the Claim should be struck as frivolous, vexatious and/or an abuse of process or should LSCC 41 be required to provide further and better particulars?

(ii) Should this court dismiss the Action as duplicative of the SAA Application or stay the Action in favour of the SAA Application?

(iii) Should this court strike LSCC 41's claim for damages for diminution in value of the units?

(c) Should the SAA Application be converted into an action?

(d) If so, should the SAA Application as converted be consolidated with this Action?

Analysis

Should the Action be Stayed in Favour of Arbitration?

[23] The general power of a court to stay a proceeding is provided for by s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Furthermore, r. 21.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits a defendant to move for a stay of proceedings where the court has no jurisdiction over the subject matter of an action or where there is another proceeding pending between the same parties in respect of the same subject matter.

[24] Section 7 of the *Arbitration Act*, S.O. 1991, c. 17 (the "*Arbitration Act*"), states:

Stay

(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment.

[25] The Court of Appeal has articulated a five-part framework to consider a motion to stay a court proceeding on the basis of an arbitration clause:

(i) Is there an arbitration agreement?

(ii) What is the subject matter of the dispute?

(iii) What is the scope of the arbitration agreement?

(iv) Does the dispute arguably fall within the scope of the arbitration agreement?

(v) Are there grounds on which the court should refuse to stay the action?

Haas v. Gunasekaram, 2016 ONCA 744, 62 B.L.R. (5th) 1 at para. 17.

[26] The *Arbitration Act* operates to limit the court's intervention and signals that courts are to take a "hands off approach" to matters governed by the *Arbitration Act*: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, at para. 56.

[27] As the Defendants note, courts strongly favour the enforcement of arbitration agreements, particularly where the scope of an arbitration clause is broad and comprehensive, as it is here: *Haas*, at para. 40. Where the parties have employed broad wording, arbitration clauses are interpreted generously so as to favour arbitration over litigation: *Dancap Productions Inc. v. Key Brand Entertainment Inc.*¸ 2009 ONCA 135, 55 B.L.R. (4th) 1 at para. 38, *Mantini v. Smith Lyons LLP*, (2003) 64 O.R. (3d) 505 (C.A.).

[28] This court must also be mindful of the "competence-competence principle," pursuant to which, in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 at para. 84. The Court of Appeal has similarly stated that "where it is unclear if the arbitrator has jurisdiction, it is preferable to leave the issue to the arbitrator": *Ciano Trading & Services C.T. & S.R.L. v. Skylink Aviation Inc.*, 2015 ONCA 89 at para. 7.

[29] The exception to the competence-competence principle is where a "challenge to the arbitrator's jurisdiction is based solely on a question of law, or one of mixed fact and law that requires for its disposition only superficial consideration of the documentary evidence in the record": *Dell Computer*, at para. 84. See also *Seidel v. Telus Communications Inc*., 2011 SCC 15, [2011] 1 S.C.R. 531, at para. 4.

Does the Dispute Fall Within the Scope of the Arbitration Clauses?

[30] Section 132 of the *Condominium Act* requires the parties to submit disputes between them to mediation and arbitration. The purpose of this provision is to enable disputes arising within a condominium community to be resolved through the more informal processes of mediation and arbitration: *McKinstry v. York Condominium Corp. No. 472*, 2003 CarswellOnt 4948 (S.C.J.), at para. 19.

[31] Where the agreement in issue contains its own dispute resolution clause, the court must first assess the subject matter of the dispute and the scope of the contractual arbitration clause.

[32] LSCC 41 characterizes the dispute as arising from TSL's oppressive conduct. LSCC 41 submits that the dispute falls outside the scope of the dispute resolution clause because s. 135 of the *Condominium Act* permits a party to commence an action for oppression in the Superior

Court. TSL characterizes the dispute as contractual, arguing that all of LSCC 41's complaints are ultimately about cost sharing under the Agreements.

[33] In my view, Mew J.'s analysis in the Brockville Application is equally applicable here. In that case, Mew J. stated as follows:

> - In determining whether to grant a stay, the question is whether it is at least arguable that the dispute is arbitrable;
>
> - 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; and
>
> - 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.
>
> *Tall Ships Landing*, 2019 ONSC 2600, at paras. 26-28 (internal quotations and citations omitted). See also, *Metropolitan Toronto Condominium Corporation No. 965 v. Metropolitan Toronto Condominium Corporation No. 1031*, 2014 ONSC 5362, at paras. 18-20 ["*MTCC 965*"].

[34] In order to determine whether the subject matter of the dispute falls within the scope of the arbitration clause, a court must determine the "pith and substance" of the subject matter of the dispute: *Haas*, at para. 21. In the Brockville Application, Mew J. found that the pith and substance of the proceeding related to issues of compliance or noncompliance with the SFA.

[35] In this case, I find that the pith and substance of the dispute relates either to the Defendants' alleged non-compliance with the SFA and SAA, or to the fairness of the terms of the SFA. The bulk of the allegations in the Claim relate to breach of contract. LSCC 41 disagrees with the allocation of its proportionate share of the Shared Facilities costs, a matter that is governed by the SFA and therefore falling within the scope of the ADR Clause. Schedules "C" and "D" of the SFA address the allocation of shared costs and provide the parties with a right to request a review of the cost sharing formulas. The schedules further state that: "[t]he resolution of disputes with respect to the cost sharing shall be in accordance with the mediation and arbitration provisions of this Agreement." On cross-examination, the President of LSCC 41, Doug Bellevue, admitted that LSCC 41 had not requested a review of the cost sharing allocations pursuant to this provision and that it was using this Action to do so.

[36] The remaining allegations in the Claim relate to the fairness of the terms of the SFA and SAA. Under the "Oppression" heading, LSCC 41 alleges that "the manner in which both agreements are drafted and have been carried out amounts to a clear breach of section 135 of the Act" and that certain obligations in the SFA "are drafted in such a way that is clearly oppressive

against LSCC 41[.]" On cross-examination, Mr. Bellevue, stated that the "agreement is oppressive and abusive, it's one-sided, and it's to the benefit of the developer, to Mr. Fuller."

[37] To the extent that the dispute relates to the fairness of the SFA, LSCC 41 ought to have brought an application under s. 113 of the *Condominium Act*, which permits any party to an agreement for mutual use, provision or maintenance, or the cost-sharing of facilities or services, to make an application to the Superior Court within one year of the turnover meeting. While LSCC 41 commenced an application in relation to the SAA, LSCC 41 brought no application in relation to the SFA within the required time period. In fact, LSCC 41's counsel stated in the spring of 2017 that LSCC 41 had no issues with the SFA and that it would not be bringing an application.

[38] In *Simcoe Vacant Land Condo. Corp. No. 272 v. Blue Shores Developments Ltd.*, 2014 ONSC 187, aff'd 2015 ONCA 378, Morgan J. found that the agreement at issue was an agreement for the "the mutual use, provision or maintenance or the cost-sharing of facilities or services", as described in s. 113 of the *Condominium Act*. Pursuant to s. 113, a legal challenge to the terms of the agreement had to be commenced within 12 months of the turnover meeting for any of the Applicant condominium corporations. Accordingly, Morgan J. held that any claim relating to the fees charged by Blue Shores had to be framed as a claim for breach of the provisions of the agreement rather than as a challenge to the terms of the agreement itself.

[39] In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2019 ONSC 1827, Sossin J. dismissed the defendants' motion to stay an oppression application on the basis that the applicant was challenging the legal effect of the agreement itself, which the applicant alleged resulted in a disproportionate burden, and not just the interpretation of the agreement apportioning the costs of common facilities. In that case, however, it does not appear that s. 113 of the *Condominium Act* was raised. In addition, as there were two parties who were not parties to the agreement at issue, creating uncertainty about the arbitrator's jurisdiction to order relief against them.

[40] To the extent that LSCC 41's claims relate to the fairness of the terms of the SFA and SAA, it was required to proceed under s. 113 of the *Condominium Act*. While LSCC 41 properly commenced an application in relation to the SAA, it failed to commence an application to challenge the SFA within the required time.

[41] While LSCC 41 alleges oppressive conduct by TSL and Mr. Fuller, other than its complaints about the effect of the SFA's terms, it has failed to particularize oppressive conduct by the Defendants.

[42] The relief sought by LSCC 41 in this Action further demonstrates that the dispute relates to compliance with the SFA and SAA or to the fairness of the terms of the SFA. LSCC 41 seeks damages for: overpayment of expenses in relation to the SFA and SAA; the increased amount of LSCC 41's proportionate share of costs due to the delay in development of the other phases; breaches of contract and duty of care; and oppression in connection with LSCC 41's desire to renegotiate the allocation of shared costs under the SFA. Moreover, LSCC 41 seeks an order

requiring that the parties to the SFA and SAA meet and confer for the purposes of negotiating two new agreements within six months of such order, failing which their dispute must be submitted to arbitration in accordance with s. 132 of the *Condominium Act*. This suggests that LSCC 41's issues are with the terms of the SAA and SFA, which should have been the subject of an application under s. 113, or with the Defendants compliance with those terms, which would fall within the scope of the ADR Clause.

[43] The fact that LSCC 41 seeks an order compelling arbitration in the event that renegotiation fails is an acknowledgement by LSCC 41 that arbitration would be a more appropriate way to resolve the parties' dispute. To allow the parties to proceed with this Action only to submit the dispute to arbitration at a later stage would not be an inefficient allocation of judicial resources. It is also worth noting that in the Brockville Application, LSCC took the opposite position, that the matters raised by TSL were not oppression and should be submitted to arbitration.

[44] Finally, I reject LSCC 41's argument that the Task Force struck in the spring of 2017 fulfilled the requirements of the ADR Clause. While Mr. Bellevue and Paul Bennett, a member of the Task Force appointed by TSL, stated that the parties agreed that the Task Force fulfilled the ADR requirements of the Agreements, at no time was the ADR Clause invoked by any party. LSCC 41 acknowledged that it has failed to comply with any of the preconditions to commencing an action required by the ADR Clause, such as the appointment of a technical consultant, mediation and arbitration. The ADR Clause states that ADR in accordance with the clause is a condition precedent to commencing an action.

Are there Grounds to Refuse a Stay?

[45] Subsection 7(5) of the *Arbitration Act* anticipates that when an action contains claims that are subject to an arbitration claim and claims that are not, the court may grant a partial stay, but only where it is reasonable to separate the matters dealt with in the agreement from other matters. When a partial stay is not reasonable, the proceedings will not be bifurcated: *Wellman v. Telus Communications Co.*, 2017 ONCA 433, 138 O.R. (3d) 109.

[46] In this case, there are no grounds on which to grant a partial stay. All of the parties to this action, other than Mr. Fuller, are parties to the SFA. Mr. Fuller has indicated that he will attorn to the jurisdiction of the arbitrator. If anything, the circumstances support the granting of a stay, since the Brockville Application has also been stayed in favour of arbitration, and it would be more efficient and productive to have the parties' disputes, which arise from the same two agreements, determined together.

[47] Accordingly, I find that it is at least arguable that the dispute falls within the scope of the ADR clause and it should be left to the arbitral tribunal to determine its jurisdiction to hear LSCC 41's claims. As there are no grounds upon which to refuse a stay, the motion to stay the proceeding is granted.

Motion to Strike

[48] As I have found that the action should be stayed in favour of arbitration, it is not necessary or appropriate for me to rule on the Defendants' motion to strike or the motion for particulars, which were raised in the alternative.

[49] TSL submits that I could also exercise my discretion to order that the SAA Application be stayed in favour of arbitration. However, TSL did not bring a motion to stay the SAA Application, which TSL acknowledges was properly commenced under s. 113 of the *Condominium Act*. At the hearing, LSCC 41 characterized the SAA Application as a "springboard" to this Action and argued that it is intertwined with the issues in this Action. It may well be that it would be more efficient and productive to address the issues in dispute in the SAA Application, some of which overlap with this Action, along with the matters proceeding to arbitration. Nonetheless, the SAA Application is not before me and I decline to make an order regarding the SAA Application.

Motion to Convert and Consolidate

[50] While LSCC 41 commenced the SAA Application as an application pursuant to s. 113 of the *Condominium Act*, and then separately commenced this Action, it now seeks to convert the SAA Application into an action and to consolidate it with this proceeding. LSCC 41 has inexplicably brought its motion to convert the SAA Application in this Action and not in the SAA Application.

[51] LSCC 41's motion to convert the SAA Application into an action was a preliminary step to consolidating it with this Action. As I have determined it appropriate to stay the Action, it is not necessary to determine the motion to convert the SAA Application into an action.

[52] I note, however, that s. 113 of the *Condominium Act* specifically provides for a proceeding to be commenced by application to provide an efficient manner to resolve mutual use and cost-sharing agreements. Where an application is statutorily authorized, there is a *prima facie* right to proceed by application. The court should not convert a statutorily prescribed application into an action unless material facts are in dispute and the court cannot properly resolve the material facts without the benefit of a trial: *Sekhon v. Aerocar Limousine Services Co-operative Ltd.*, 2013 ONSC 542, at para. 49.

Conclusion

[53] Based on the foregoing, the Defendants' motion to stay the proceeding in favour of arbitration is granted with costs to the Defendants.

Costs

[54] Counsel for both parties submitted costs outlines at the hearing. As both parties had made offers to settle the motion, I did not review the cost outlines or offers until after making a

determination on the motions. The Defendants' partial indemnity costs total $48,399.63. The Plaintiff's partial indemnity costs total $23,870.83. Both amounts include HST and disbursements.

[55] Pursuant to the *Courts of Justice Act*, s. 131(1), the Court has broad discretion when determining the issue of costs. The overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the circumstances, rather than an amount fixed by actual costs incurred by the successful litigant: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.). Rule 57.01(1) of the *Rules of Civil Procedure* sets out the factors to be considered by the court when determining the issue of costs.

[56] I have considered these factors, as well as the principle of proportionality in R. 1.01(1.1) of the *Rules of Civil Procedure*, while keeping in mind that the court should seek to balance the indemnity principle with the fundamental objective of access to justice. Both parties sought various relief in their motions. The Defendants were successful on the motion to stay. The issues were important to both parties, because of the amounts claimed by the Plaintiff in the Action. Both parties' counsel spent considerable time on the motions, producing voluminous records and conducting cross-examinations. As Mew J. noted in the Brockville Application, some of this material could be used in the arbitration. It strikes me that the parties ought to have been able to resolve some of the issues on this motion. The multiplicity of proceedings between the parties and the acrimonious relationship between them is concerning and not in keeping with the statutory scheme or the ADR Clause in their agreements.

[57] In respect of the Defendants' offer to settle, in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (C.A.), 2009 ONCA 722, at para. 40, the Court of Appeal stated, in the context of a defendant's offer: "Apart from the operation of Rule 49.10, elevated costs should *only* be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made." (Emphasis in original). See also: *Mabe Canada Inc. v United Floor Ltd.*, 2016 ONSC 5794; *Shewchuk v Blackmont Capital Inc.*; 2015 ONSC 7861; *Harte-Eichmanis v. Fernandes*, 2012 ONSC 2079. I have found no reprehensible behavior in the conduct of the proceeding that would warrant substantial indemnity costs from the date of the Defendants' offer, which was only made on April 15, 2019.

[58] Based on the foregoing, I fix total costs on a partial indemnity basis at $35,000.00, inclusive of disbursements and HST. This includes costs incurred in the preparation of the costs submissions.

NISHIKAWA J.

Date: June 24, 2019

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Leeds Standard Condominium Corporation No. 41,

Plaintiff

– and –

Simon Fuller, Tall Ships Landing Developments Inc., and the Corporation of the City of Brockville

Defendants

REASONS FOR DECISION

Nishikawa J.

Released: June 24, 2019