Kumer v. Metropolitan Toronto Condominium Corp. No. 775

Ontario Judgments

Ontario Superior Court of Justice

J.A. Ramsay J.

Heard: November 16, 2020.

Judgment: February 16, 2021.

Court File No.: CV-19-00629250-0000

[2021] O.J. No. 986 | 2021 ONSC 1181

IN THE MATTER OF an Appeal Pursuant to the Arbitration Act, 1991, S.O. 1991, C.17, Section 45 AND IN THE MATTER OF the Condominium Act, 1998 BETWEEN Irving Kumer and Nancy Kumer, Appellants, and Metropolitan Toronto Condominium Corporation No. 775, Respondent

(83 paras.)

Counsel

Ronald Moldaver, for the Appellants.

David Elmaleh, for the Respondent.

J.A. RAMSAY J.

1 The appellants Irving Kumer and Nancy Kumer ("the appellants") seek to set aside and reverse the arbitral award of Arbitrator H. Michael Kelly, Q.C., dated September 19, 2019. The Arbitrator was selected under the *Condominium Act, 1998*. The arbitrator was tasked with determining whether the appellants had "erected" screens on exclusive use common element property at the Metropolitan Toronto Condominium Corporation No. 775 ("MTCC") complex without the consent of the condominium Board of Directors ("Board") contrary to the Declaration and Rules of MTCC.

2 In his Reasons for Decision, the Arbitrator noted that at the arbitration the focus of MTCC was that the appellants had not applied to the Board for permission before erecting the screen, and the focus of the appellants was that the Board's enforcement of the Declaration and the Rules was unreasonable.

3 The Arbitrator decided in favour of MTCC and directed that the appellants remove the plastic screens and refrain from installing them in the future without the Board's prior approval.

4 The Arbitrator awarded costs to the respondent MTCC in his decision released December 6, 2019, which is being cross appealed by MTCC.

5 MTCC submitted the dispute to arbitration under the *Arbitration Act, 1991*, *S.O. 1991, c.17*, and section 132(1)(b) of the *Condominium Act, 1998*, c. 19, following the prescribed 60 days elapsing after the dispute was submitted to a mediation and the failure of the appellants to select a mediator.

6 The parties executed an arbitration agreement dated April 5, 2019 ("the agreement"). The agreement included the following clause: "*The parties have agreed on the Arbitrator and acknowledge their belief in the Arbitrator's competency to resolve the issues in dispute*."

7 Paragraph 5 of the agreement states: "*The Parties agree that the Award is final, binding, and subject to appeal on questions of law, or mixed fact and law*".

8 The agreement therefore ousts the application of section 45(1) of the *Arbitration Act*, which provides that a party may only appeal an award of an arbitrator to the Superior Court of Justice on a question of law, with leave.

9 Sections 45(2) and (3) of the *Arbitration Act*, which provide that the parties may appeal an award on a question of law, a question of fact or on a question of mixed fact and law if the arbitration agreement so provide, would apply.

10 Pursuant to the arbitration agreement, either party may appeal questions of law or mixed fact and law, without leave.

The Parties

11 MTCC is a condominium corporation located on Lower Village Gate in Toronto. The Declaration for the corporation was registered on May 16, 1988 with the Land Registry Office for the Land Titles Division of Toronto (No. 66), pursuant to the *Condominium Act*.

12 The appellants are the owners of a condominium unit in the MTCC complex.

The Dispute

13 The dispute between the parties concerns the attachment of plastic screens or lattices (the "screens") by the appellants to metal fences that surrounds the exclusive-use common-area patio at the front of their unit.

14 There is no dispute that the patio forms part of the common element of MTCC or that the appellants had exclusive use of the patio.

15 There is no dispute that the appellants did not have the consent of MTCC's board to affix or install the screens to the patio fences. The appellants took the position that they had not "erected" the screens.

16 MTCC's Notice of Arbitration asked the Arbitrator to answer three questions:

i. Whether the appellants were in violation of MTCC's declaration and rules in erecting the screens on the common elements without the consent or approval of MTCC.

ii. Whether MTCC was entitled to an order requiring the appellants to comply with the declaration and rules.

iii. Whether MTCC was entitled to costs on a full indemnity basis to enforce compliance.

Positions of the Parties

17 The position of the parties is best summarized at paragraph 4 of the decision of the Arbitrator. As for the position of MTCC, the Arbitrator stated:

> *"MTCC 775 seeks an Order that the Owners of Unit 10, MTCC 775, be required to immediately remove, and not restore in the future without MTCC 775's consent, the plastic screens lattices that the Owners have attached to the ground-level metal fence that surrounds the exclusive-use, common-area patio, at the front*

> *of the Owners' Unit. MTCC 775 asserts that the screen erection without Board approval violates the Declaration and the Rules."*

18 With respect to the appellants' position, the Arbitrator stated:

> "*The Owners deny that their conduct constitutes a breach of the Declaration or any applicable valid Rule of MTCC 775, and oppose the relief sought by MTCC 775. The Owners contend that the relief sought by MTCC 775 is simply far below reasonable and should not be approved by the Arbitrator*."

19 The appellants argue that "the Arbitrator erred in finding that the Corporation, through the Board, in light of sections 7(5), 10, 11(2) and 116 of the *Arbitration Act* ("reasonable" use of the common elements "subject to the declaration"), acted reasonably in enforcing the provision of the Declaration that required an Owner to seek approval of or permission from the Board prior to the hanging of the screens/hedge, in circumstances where it is manifest that:

(a) the permission request would have been denied as found by the Arbitrator (during oral submission counsel for the appellant conceded that the Arbitrator did not make this finding).

(b) the screening/hedging is permitted by the Act and is manifestly a "reasonable use".

Standard of Review

20 The appellants did not specify the standard of review in their factum or relied on any case law on this appeal.

21 MTCC, on the other hand, relies on the decision of Justice Perell in *Toronto Standard Condominium Corporation No. 2256 v. Paluszkiewicz*, *2018 ONSC 2329*, at para. 74, and states that the standard of review for decisions of arbitrators is the reasonableness standard on questions of fact, questions of mixed fact and law and questions of law, unless the question of law is a general question of law that transcends the specific regime or that is both of central importance to the legal system as a whole and also outside the adjudicator's specialized area of expertise. However, Justice Perell did not set out the standard of review applicable in that case.

22 MTCC did not expressly specify whether the question raised on this appeal is one that would involve a standard of correctness or a reasonableness standard but is relying on a reasonableness standard.

23 The case law has not been consistent in its application of the standard of review of an arbitrator's decision made pursuant to the *Condominium Act*.

24 If MTCC's position is correct, the case law establishes that if the reasonableness standard applies, a determination of a question of law of mixed fixed will be reasonable if it falls within a range of possible, acceptable outcomes: *The Dominion of Canada General Insurance Company* v. *Unifund Assurance Company*, *2018 ONCA 303* (Ont. C.A.); *The Dominion of Canada General Insurance Company* v. *State Farm Mutual Automobile Insurance Company*, *2018 ONCA 101* (Ont. C.A.) at para. 56; *Dunsmuir* v. *New Brunswick*, *2008 SCC 9* (S.C.C.) at para. 47.

25 In *90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No*. 815, *2015 ONSC 336*, at para.44, Smith J. held that the appropriate standard of review of an arbitrator's decision rendered pursuant to the *Condominium Act* is correctness, and indicated that the Supreme Court of Canada's decision of in *Creston Moly Corp*. v. *Sattva Capital Corp.*, *2014 SCC 53* (S.C.C.) ("*Sattva*") is distinguishable as the appeal does not arise from a commercial arbitration.

26 In *Simcoe Condominium Corp. No. 78* v. *Simcoe Condominium Corp. Nos. 50 et al*, *[2006] O.J. No. 605* (S.C.J.), Belobaba J. initially inquired into the nature of the question before him before concluding it was a question of law. He noted: "*Because the appeal concerns a question of law and there is no greater expertise in the arbitrator*

than the court in the interpretation of the Condominium Act and related caselaw, the standard of review is correctness" (para. 26).

27 However, Justice Perell appears to use reasonableness standard of review, which is being relied upon by MTCC, in *Toronto Standard Condominium Corp. No. 2256 v. Paluszkiewicz*.

28 In *Sattva*, which involved a commercial arbitration, Rothstein J. indicated, at para.105, that judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in that both involve a court reviewing the decision of a non-judicial decision-maker. Rothstein J. further noted:

> "*Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the Dunsmuir framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards*."

29 Rothstein J. went on to state, at para. 106:

> "*Dunsmuir and the post-Dunsmuir jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue... (In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise*..."

30 In *Teal Cedar Products Limited* v. *British Columbia*, *2017 SCC 32* at para. 75, Justice Gascon reiterated that decisions of arbitrators under review under the *Arbitration Act*, "almost always" attract the reasonableness standard as articulated in *Sattva*.

31 Nordheimer J.A, speaking for the majority on an appeal from an application from a judge refusing to grant an order amending the declaration in the case of *Metropolitan Toronto Condominium Corporation No. 590* v. *The Registered Owners and Mortgagees of Metropolitan Toronto Condominium Corporation No*. 590, *2020 ONCA 471*, at para. 14 noted the difference between contracts contemplated by *Sattva* and a declaration under the *Condominium Act*. He explained that condominium declarations are special contracts prescribed by statue. He stated:

> "*Questions of law attract a standard of review of correctness: Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at para 8*.
>
> *In reaching that conclusion, I am aware of the caution expressed in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 54, against courts too readily finding extricable questions of law when engaged in contractual interpretation. Here, though, while a declaration under the Condominium Act could be characterized as a contract, is not the type of private contract negotiated between two parties, to which the comments in Sattva were directed. A declaration is a special form of contract, the structure of which is prescribed by statute. It must adhere to certain statutory requirements. Indeed, the Condominium Act provides, in s. 7(5), that, if there is any conflict between the statute and the declaration, the statute prevails*."

32 In the recent Supreme Court of Canada decision of *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, *2019 SCC 65*, the court held that there is a presumption that a "reasonableness" standard applies, rebuttable in cases of constitutional questions, questions of law of central importance to legal system as a whole, and jurisdictional questions, the latter mentioned attracting a standard of correctness. *Vavilov* involved judicial review of an administrative decision.

33 Neither side relied on *Vavilov*. And while neither *Sattva* nor *Teal Cedar* are mentioned in *Vavilov*, this court is guided by the recent Ontario Court of Appeal decision of *Metropolitan Toronto Condominium Corp. No. 590* v. *Metropolitan Toronto Condominium Corp. No. 590 (Registered Owners and Mortgagees of)*, although it involved judicial review of a judge's decision, and the earlier decision of *90 George Street Ltd*. v. *Ottawa-Carleton Standard Condominium Corp. No. 815*, in determining the appropriate standard of review of review.

34 The issue before the Arbitrator was whether the appellants had erected screens on the exclusive use common element area without the consent of MTCC in violation of the *Condominium Act*, the Declaration and the Rules. The Arbitrator was required to be correct in his interpretation of the *Condominium Act* and in his award of costs (*Housen* v. *Nikolaisen*, at para. 8.)

Decision of the Arbitrator

35 The Arbitrator had, at his disposal, access to diagrams showing the layout of the entire complex, and photographs of the appellants' patio at the front of their unit, and the permanent metal fence. Prior to rendering his decision, the Arbitrator conducted a site visit in May 2019, "*to familiarize (himself) with the patio layout, the nature of the screen, and to tune into the aesthetic feel of the condominium complex*." He therefore had firsthand knowledge of the screens in question.

36 The appellants were ordered to remove plastic hedges that formed the screens/lattices on the fencing located in the area in front of their unit. It is not in dispute that the fencing formed part of the common elements, that the appellants had exclusive use, nor is it in dispute that the appellants did not seek the Board's consent prior to placing the screens.

37 Despite the various issues raised in the notice of appeal, the Arbitrator noted in his decision that at the arbitration the condominium's position was that the appellants did not apply to the condominium's Board for permission before erecting the screen and the focus of the appellants' position was that the enforcement of the Declaration and the Rules was unreasonable.

38 The appellants conceded that no consent was obtained from the Board before the screen was erected but argued on this appeal that the placement of the screens was permitted by the *Condominium Act* and was a "reasonable use" of the exclusive use common elements by them.

Findings of Fact Made by the Arbitrator

39 The Arbitrator noted that the appellants "*did not regard the attachment process as being equivalent to an erection of a screen. Consequently, in their view, this was not a situation where consent of the Board should be viewed as a condition precedent under either the Declaration or the Rules*."

40 The Arbitrator went on to make the following findings of facts after the site visit, reviewing diagrams, reviewing written submissions and hearing submissions of counsel for the appellants and MTCC:

41 He noted that:

> "*In each of the condominium units in the side-by-side row, the permanent patio fence is metal and is attached to, and sits on top of, a patio-perimeter brick base, approximately 1.5 feet high, and approximately one foot wide. On the inner side of the brick base is a wood planter box filled with earth and plants. The Condominium Board, recognizing the need for some patio privacy and aesthetic enhancement, has planted the plants therein, and allows some planting by the relevant Owner. As well, the unit owners are generally permitted by the Board to place easily removable, unattached, modest plant-bearing containers on the patio to enhance patio beauty*"

42 He found that the appellants did not follow the procedural protocol set out in the Declaration and in the Condominium Rules, ie. applying to the Condominium Board for approval before proceeding to erect the screen.

43 The Arbitrator found that the Board met in on June 26, 2018 and discussed the plastic floral trellis/screens erected and fastened to the patio fence by some owners. He found as a fact that "*the Board decided that it was in the best interests of the community at large for the Board to enforce Articles 11(1), 11(25), and IV(2) of the Condominium Rules, which supported their decision to decline permission to erect plastic screens/trellises on the fences surrounding exclusive use patios*."

44 The Arbitrator found that three or four other condominium owners sought permission to attach screens to the fence, after the fact, and were denied. There was no evidence before the Arbitrator regarding the nature of the other proposed attachments by the other owners, which were denied.

45 The Arbitrator found that the Board wrote to the appellants three times, twice in June 2018 and again in July 2018, advising them to meet with the Board to request the Board's permission to continue with the already-erected screen. The appellants did not do so. The Arbitrator noted that: "*For some reason, not specifically articulated, the Owners felt that the Board would not act reasonably*."

46 The Arbitrator found that MTCC, through its management, attempted to enforce the appellants' compliance with the Declaration and the Act with numerous letters to the appellants. The appellants secured the screens with a chain and a lock after MTCC requested its removal.

47 The Arbitrator considered that the MTCC had to consider the possibility of other requests from owners and the possibility of a wide assortment of patio- fence attachments which may result "not only in significant rise in common-area upkeep costs, but also a significant adverse effect on the aesthetic aroma of the Complex". The Arbitrator made note of the possible "exposure to significantly increased ongoing common-area maintenance costs, such as the need to remove the screen in order to paint or repair the fencing, the need to clean the screen, or the need to police the method of attachment".

48 In assessing the duty and responsibility of MTCC to all owners, (implicitly under the Act, Declaration and the Rules) the Arbitrator indicated that:

> *"The Condominium Board has the duty to, et. al., assess fairly and thoroughly any potential negative impact of the proposed change upon the Condominium, as a whole, and ongoing, and ensure that common area maintenance costs remain reasonable, liability exposure is not negatively impacted, and aesthetic quality/identity of the Condominium as a whole, is not betrayed."*

Analysis

49 In *Carleton Condominium Corp. No. 279* v. *Rochon* (1987), 1987 CanLII 4222 (ON CA), the Court of Appeal stated, at para. 37: "A condominium corporation is a creature of statute and has no greater authority than as set out in the *Condominium Act*."

50 The appellants argue that as tenant in common of the exclusive use common elements they are equally entitled to possession and use of the fencing. They further argue that pursuant to section 116 and 117 of the *Condominium Act*, of the Act each owner may make reasonable use of the common elements.

51 Section 11(2) of the *Condominium Act* provides that: "The owners are tenants in common of the common elements and an undivided interest in the common elements is appurtenant to each owner's unit". This is not in dispute. The common elements are owned and managed by the condominium corporation, a corporation of which the unit owners are shareholders. "Thus, it is the owners and not the corporation who own the common elements": *Cheung* v. *York Region Condominium Corporation No*. 759, *2017 ONCA 633*, *139 O.R. (3d) 254* at para. 70.

52 Pursuant to section 17(1) of the *Condominium Act*, the "objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners". Section 17(2) of the *Condominium Act* provides that the corporation has the "duty to control, manage and administer the common elements". The Arbitrator acknowledged this stating:

> "*The Condominium Corporation must manage and maintains the common areas for the benefit of the Unit owners, protect the overall aesthetic impact of the Complex and the consequent market value of the condominium units, address and ensure the safety of the owners and visitors, and where feasible, enhance the quality of the permitted usage of the patios by the owners of the units, and monitor the potential exposure of all units to future increased maintenance costs, Property value is potentially well-secured by that vigilance*. "

53 Although he did not expressly refer to the provisions of the statute, the Arbitrator was alive to the relevant provisions. In arriving at his decision, the Arbitrator noted, among other factors, the duty of the condominium corporation to manage and maintain the common areas to safeguard "*the overall aesthetic impact of the Complex and the consequent market value of the condominium units", "to carefully monitor the potential exposure of all units to future increased maintenance costs. Property value is potentially well-secured by that vigilance*." He further took into consideration the potential for other unit owners seeking permission to attach "a wide assortment of patio-fence attachments which could involve not only significant rise in common-area upkeep costs, but also a significant adverse effect on the aesthetic aroma of the Complex", and also considered the potential for increased ongoing maintenance, removal and policing of the attachment.

54 Counsel for the appellants argue that the court must consider the governing statute, the *Condominium Act*, as well as the Declaration and the Rules to determine whether the use by the appellants was "reasonable", and, during oral submissions, whether the "erecting" of the screens was in violation of the Declaration and the Rules. I agree.

55 The appellants started with s. 116 of the Act. Section 116 of the Act expressly states that:

> "*An owner may make reasonable use of the common elements subject to this Act, the declaration, the by-laws and the rules*."

56 However, contrary to the appellants position, the examination does not end there. Section 116 explicitly states that the right of the appellants "to may make reasonable use of the common elements" is subject to the Act, the declaration, the by-laws and the rules. Section 19 (1) of the Act states that owners (the appellants) and occupiers of units must comply with the condominium corporation's declarations and rules.

57 Moreover, the right of the appellants to make any alternation to the common elements is governed by s. 98 of the Act. A unit owner may not make alternations or improvements to the common elements, unless approved by the condominium board, or as agreed to between the owner and the condominium corporation. Section 98(1) of the Act provides that:

> (1) An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) the board, by resolution, has approved the proposed addition, alteration or improvement;
>
> (b) the owner and the corporation have entered into an agreement that,
>
> (i) allocates the cost of the proposed addition, alteration or improvement between the corporation and the owner,
>
> (ii) sets out the respective duties and responsibilities, including the responsibilities for the cost of repair after damage, maintenance and insurance, of the corporation and the owner with respect to the proposed addition, alteration or improvement, and

(iii) sets out the other matters that the regulations made under this Act require;

(c) subject to subsection (2), the requirements of section 97 have been met in cases where that section would apply if the proposed addition, alteration or improvement were done by the corporation; and

(d) the corporation has included a copy of the agreement described in clause (b) in the notice that the corporation is required to send to the owners.

58 Section 98(2) of the *Condominium Act* provides that no notice or approval is required if the proposed addition, alteration or improvement is to a part of the common elements that the owner has exclusive use of, "if the board is satisfied on the evidence that it may require that the proposed addition, alteration or improvement,

(a) will not have an adverse effect on units owned by other owners;

(b) will not give rise to any expense to the corporation (emphasis added);

(c) will not detract from the appearance of buildings on the property;

(d) will not affect the structural integrity of buildings on the property according to a certificate of an engineer, if the proposed addition, alteration or improvement involves a change to the structure of the buildings; and

(e) will not contravene the declaration or any prescribed requirements (emphasis added).

59 Since the appellants never met with the board, despite the three invitations advanced, the appellants did not comply with s. 98(2) of the Act. The section contemplates that some evidence be presented to the board despite the indication that no notice or approval is required. The appellants submitted that it was not a reasonable requirement that they must apply for permission to attach the screens when it was certain that the MTCC would not grant permission and they would be required to arbitrate the refusal. That is not the test, and having not applied to the board beforehand, despite three invitations to meet, the appellants can only speculate on what the MTCC's response would have been.

60 Section 7(4)(b) of the Condominium Act provides that:

> 7 (4) In addition to the material mentioned in subsection (2) and in any other section in this Act, a declaration may contain,
>
> (b) conditions or restrictions with respect to the occupation and use of the units or common elements;

61 Pursuant to section 17 (3) of the Act, MTCC is obliged to enforce the declaration and rules.

62 Article V(4)(b) of the Declaration provides as follows:

Article V(4)(b) of the registered "Declaration Made Pursuant to The Condominium Act" by Village Gate In Lower Forest Hill Limited states as follows:

> ***No alteration***, *work, repairs, decoration, painting, maintenance, structure, fence*, ***screen***, *hedge* ***or erection of any kind whatsoever*** *("the Work") shall be performed, done*, ***erected*** *or planted within or in relation to the common elements*, (***including any part thereof over which any owner has exclusive use***), ***except*** by the Corporation ***or with its prior written consent*** or as permitted by the by-laws or rules (emphasis added).

63 Therefore, in accordance with article V(4)(b) of the Declaration, the appellants was required to obtain prior written consent of MTCC before making any alteration, whatsoever, unless permitted to do so by the by-laws or rules.

64 Article II(1) of the Rules provides as follows:

> "No object whatsoever shall be left or placed on the common elements except as allowed by these rules in respect of exclusive use areas."(emphasis added)

65 Article IV(2) of the Rules provides as follows:

> No alteration, work, repairs, decoration, add-ons (e.g. door knockers, door bells, locks), painting, maintenance, structure, fence, screen, hedge or erection of any kind whatsoever shall be performed, done, erected or planted within or in relation to the common elements including exclusive use areas (including window and door frames), except by the Corporation or CMC or with its prior written consent or as permitted by these rules.

66 Article I(14) of the Rules provides as follows:

> Where a breach of a rule is on account of a resident's item of personal property placed on common elements (including on exclusive use areas), the property manager shall advise the resident of the matter and provide an appropriate timeframe for the resident to remove such item. If the item is not then removed by the resident, the property manager shall have the right to remove the item, store it for an appropriate period of time and then, if unclaimed by the resident, to dispose of the item.

67 On a plain reading of the Rules, by erecting or placing the screens on the exclusive use common element patio fence, the appellants were in breach of the Rules.

68 On the available evidence, the appellants never met with the board. The appellants also argue that it was not necessary for them to seek permission as the Board would have denied their requests as it had done for the other owners. The Arbitrator, however, noted that the evidence did not address the specific description or nature of the requested attachments proposed by those other owners. And, contrary to the arguments advanced by the appellants, there is no finding made by the Arbitrator that the Board would have refused the request had the appellants first sought permission.

69 The Arbitrator found:

> ...that the exclusive-use patio, being part of the common elements owned collectively by the unit owners but under the control of the MTCC 775 Board, cannot be altered (either structurally or esthetically) by any unit owner (including any unit owner who has exclusive use of the patio in front of his/her unit) without the consent of the Condominium Board. The unit owner must apply to the MTCC 775 Board for permission to affect any structural or physical or aesthetic change to the patio. And the Condominium Board must act reasonably and fairly in addressing the wishes of the Condominium Unit Owner, while at the same time protecting the safety, comfort, and financial interests (including level of common expenses impacting the Complex), and aesthetic and market values of all the other condominium units in the Complex.

70 The Arbitrator found that although the appellants have exclusive use of the patio, MTCC had control over and was responsible for the maintenance of the common elements, and had "full control over, inter alia, "erection of screens" on the common elements".

71 The Ontario Court of Appeal has held that the statutory purpose of the Condominium Act is consumer protection providing predictability and certainty to those purchasing a condominium, enabling them to make informed financial decisions (Lexington on the Green Inc. v. Toronto Standard Condominium Corp. No. 1930, *2010 ONCA 751*, *102 O.R. (3d) 737* at paras. 49, 51; Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp., *2014 ONCA 724*, *46 R.P.R. (5th) 1*).

72 The case law establishes that there is a strong presumption of validity of the Declaration: Walia Properties Ltd. v. York Condominium Corporation No. 478 *(2007), 60 R.P.R. (4th) 203* (Ont. S.C.) at para. 10, varied *2008 ONCA 461*, *67 R.P.R. (4th) 161*.

73 The Arbitrator rejected the appellants argument that screens, which were removable, did not constitute an "erection" or an "alteration to the common elements", therefore not requiring approval of the Board.

74 MTCC included a definition of the word "erect" from Merriam-Webster dictionary in their factum as follows:

* to put up by the fitting together of materials or parts
* to fix in an upright position
* to cause to stand up or stand out
* to direct upward
* set up, establish
* to draw or construct (something, such as a perpendicular or figure) upon a given base

75 The appellants did not rely on any caselaw on this appeal. The appellants, however, urged the court to interpret the statute as inferring that they are permitted "reasonable use of property", which they own, and which does not impact the health, safety, value or any other material interest of any other owner. The Arbitrator found that the action taken by the appellants may in fact open the floodgate and result in additional maintenance and increase monthly maintenance costs or the comfort and value of the Complex.

76 MTCC relies on Seto v Peel Condominium Corporation No. 492, *2015 ONSC 6785* (CanLII) (signage erected), Metropolitan Toronto Condominium Corp. No. 702 v. Sonshine *(1989), 8 R.P.R. (2d) 183* (Ont. D.C.), canopy erected; and MTCC No. 985 v. Vanduzer, *2010 ONSC 900* (gazebo erected). These cases are all fact specific. The Arbitrator had an opportunity to inspect the patio and was in the best position to decide whether the screens were "erected".

77 Although the Arbitrator did not expressly state that the appellants were in breach of the Act, the Declaration and the Rules, it is implied in his analysis and his conclusion. The Arbitrator made no error in directing that the screens be removed and not be reinstalled without prior board approval. The appellants were in breach of the Condominium Act, the Declaration and the Rules.

Cross Appeal on Costs

78 Both sides made submissions in writing to the Arbitrator. MTCC sought full indemnity costs of $34,386.84. The appellants had submitted that there should be no costs, or alternatively, if costs were awarded, such costs should not exceed $7,500.00. The Arbitrator awarded costs of $16,000.00 to MTCC.

79 Counsel for MTCC conceded that costs are in the discretion of the Arbitrator.

80 MTCC relies on an email of the appellants as to what they anticipated the legal fees to amount to and submits, absent a finding that the costs were excessive or not within the reasonable contemplation of the parties, it was a fundamental error of law to reduce the quantum sought by MTCC 775. MTCC also relies on s. 131 of the Courts of Justice Act, the Rules of Civil Procedure and the jurisprudence on costs on the Rules to support its position on costs. No authority has been provided for the proposition that the Courts of Justice Act, the factors considered under rule 57.01 or the jurisprudence for matters commenced in the Superior Court of Justice are applicable to arbitration proceedings under the Arbitration Act. MTCC also argues that the scale of costs on a full-indemnity scale is warranted based on Articles II(2) and XIII(5) of the Declaration, By-Law No. 9 and Article I(13) of the Rules.

81 The arbitration agreement is silent on costs. Pursuant to s. 54 of the Arbitration Act legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration may be awarded. The Declaration is in fact silent as to recovery of costs, in the case of breach, on a "full-indemnity scale". It is trite law that the Declaration is the constitution. The Rules do refer to costs on a "full-indemnity scale".

82 There are no dockets or supporting evidence to support the amount claimed by MTCC for full indemnity costs. It is not clear how this court, on review, can determine what time was spent, what work was done, and whether it was reasonable. The reasons for decision on costs are sparse and there is no indication as to what scale costs was awarded on. However, MTCC acknowledging that costs are in the discretion of the Arbitrator who had an opportunity to hear the proceedings and consider the evidence filed and any steps taken and determine what amount, if any, was reasonable for costs to be borne by the unsuccessful party. I see no reviewable error in his award of the costs.

83 I would therefore dismiss the cross appeal on costs.

J.A. RAMSAY J.

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