CITATION: Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137, 2021 ONSC 2575
COURT FILE NO.: CV-20-00650095-0000
DATE: 20210407

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mensula Bancorp Inc.

AND:

Halton Condominium Corporation No. 137

BEFORE: Vermette J.

COUNSEL: *Jason Squire* and *Lucy Sun,* for the Applicant

Megan Mackey, for the Respondent

HEARD: March 26, 2021

ENDORSEMENT

[1] This is an application to set aside part of an arbitration award pursuant to section 46 of the *Arbitration Act*, 1991, S.O. 1991, c. 17 ("***Arbitration Act***").

Factual Background

[2] The Respondent, Halton Condominium Corporation No. 137 ("**HCC 137**"), is a condominium corporation located in Oakville, Ontario, with 82 residential units ("**Dwelling Units**") and 166 parking units (both residential and commercial) ("**Parking Units**").

[3] The Applicant, Mensula Bancorp Inc. ("**Mensula**"), is the owner of 43 Parking Units located within HCC 137. Mensula also separately owns a commercial property immediately to the west of HCC 137 ("**Stone Granary**"). Employees of Mensula who work at the Stone Granary use Mensula's Parking Units. Mensula also leases some of its Parking Units.

[4] The 43 Parking Units owned by Mensula are located on Level 1 of the parking garage. When parking on Level 1, pedestrian egress to the street is by way of a stairwell at the east end of the parking garage which leads to Navy Street. For their part, residents of the residential condominium park on Levels A and B of the parking garage and enter the residential condominium by stairs and a hallway and/or by elevator.

[5] By using stairs located on the west side of the parking garage on Level 1, it is possible to access the residential condominium through a hallway and an elevator to HCC 137's lobby and residential floors. It is also possible to access the residential condominium by using the Navy Street

stairs. However, these possible access points to the residential condominium have been locked and, consequently, they have been unavailable to users of Mensula's Parking Units.

[6] Since November 2019, Mensula has been seeking access to the common elements of HCC 137, including the lobby and the stairwell at the west end of the parking garage, for the purpose of ingress and egress to its Parking Units. Such access would provide a more convenient route to the Stone Granary for the employees of Mensula. Mensula's requests for access have been denied by HCC 137.

HCC 137's Declaration

[7] HCC 137's declaration ("**Declaration**") registered pursuant to the *Condominium Act*, 1998, S.O. 1998, c. 19 ("***Condo Act***") identifies the units that are Dwelling Units and Parking Units, and includes the following definitions, among others:

> I. INTRODUCTORY
>
> The terms used herein shall have ascribed to them the definitions contained in the Act, unless the Declaration specifies otherwise or unless the context otherwise requires, and in particular:
>
> (a) Common Elements means all the Property except the Units.
>
> […]
>
> (f) Owner means the Owner or Owners of the estate or estates in, a Unit, but does not include a mortgagee unless in possession.
>
> […]
>
> (h) Unit or Units means both a Dwelling Unit and a Parking Unit, unless the Unit is otherwise identified as being specifically a Dwelling Unit or Parking Unit. Unit means a part or parts of the land included in the Description, and designated as a Unit by the Description and comprises the space enclosed by its boundaries and all material parts of the land within this space in accordance with the Declaration and the Description.
>
> […]
>
> (l) Recreational Facilities comprises the recreation centre on Level 3 designated in the Description as R-1 which contains an exercise room, pool, saunas, party room, and all other recreational facilities and amenities together with any and all fixtures, equipment and furnishings situate therein which are or may at any time be used

in connection with the use, operation, enjoyment and/or maintenance thereof.

[…]

[8] The Declaration also includes provisions dealing with common elements and their use:

5. Common Interest and Common Expenses

Each Owner shall have an undivided interest in the Common Elements as a tenant in common with all Owners and shall contribute to the Common Expenses in the proportions set forth opposite each Unit number in Schedule "D" attached hereto. The total of the proportions of the common interest shall be one hundred per cent (100%).

[…]

III COMMON ELEMENTS

1. Use

Subject to the provisions of the Act, the Declaration and the By-laws, and any Rules passed pursuant thereto, each Owner has the full use, occupancy and enjoyment of the whole or any part of the Common Elements, except as herein otherwise provided.

2. Exclusive Use Common Elements

Subject to the provisions of the Act, the Declaration, the By-laws and any Rules passed pursuant thereto, the Owner of each Dwelling Unit shall have the exclusive use of those parts of the Common Elements as set out in Schedule "F" attached hereto.

Only Owners and tenants of a Dwelling Unit, their household and invited guests shall be entitled to the use of and enjoyment of the Recreational Facilities subject to the Rules passed pursuant to the Act. An Owner or tenant of a Parking Unit shall not be entitled to the use of the part of the Common Elements used for recreational purposes, unless the Owner or tenant of the Parking Unit also owns a Dwelling Unit or is a tenant of a Dwelling Unit.

3. Restrictive Access

Without the consent in writing of the Board, no Owner shall have any right of access to those parts of the Common Elements used from time to time as a management office, utilities areas, Building

> maintenance or storage areas, operating machinery, or any other parts of the Common Elements used for the care, maintenance or operation of the Property.
>
> Provided however, that this paragraph shall not apply to any mortgagee holding mortgages on at least ten per cent (10%) of the Units, which mortgagee shall have a right of access for inspection upon forty-eight (48) hours notice to the Building manager.

HCC 137's By-Law No. 6

[9] By-law No. 6 of HCC 137 establishes procedures with respect to the mediation and arbitration of disputes described in sections 125 and 132 of the *Condo Act*.

[10] Sections 1.1 and 4.11 of By-law No. 6 read as follows:

> **1.1 Disputes**
>
> Disputes relating to the breach, termination, existence, validity, performance, interpretation or enforceability of any of the agreements listed in Section 132(2) of the *Act* or Disputes arising in connection with the documents referred to in Section 125 of the *Act*, **other than those which must be resolved in the Courts or those which may be resolved in the Courts unless the Parties agree to submit their dispute to mediation and arbitration**, shall be addressed and resolved in accordance with the provisions of this By-law. [Emphasis added.]
>
> **4.11 Powers of the Arbitrator**
>
> (a) Subject to Article 4.11(b), the arbitrator shall have the discretion to determine all procedural matters, including but not limited to those relating to evidence, witnesses, documents and interpreters, and may require the Parties to attend at a preliminary meeting, which may be held by teleconference, to discuss and determine any procedural matters that, in the discretion of the arbitrator, should be determined prior to the commencement of the arbitration hearing.
>
> (b) The arbitrator may make whatever award he/she considers just having regard to the dispute, the interest of the Parties, the *Act*, the regulations, the agreement, the declaration, the by-laws and the rules and may do one or more of the following:
>
> (i) order an amendment to any document in dispute between the Parties, said amendment to be effective as between the Parties to the arbitration;

(ii) order a Party to do something;

(iii) order a Party to refrain from doing something;

(iv) order a Party to pay money as damages, compensation or reimbursement; and

(v) any other order as may be permitted by the *Arbitration Act*.

The Arbitration

[11] On March 23, 2020, Mensula served a Notice to Arbitrate on HCC 137 pursuant to By-law No. 6 and section 132 of the *Condo Act*. Section 132 provides, among other things, that every declaration shall be deemed to contain a provision that a condominium corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration. The relief sought in the Notice to Arbitrate included an order that HCC 137 provide access for Mensula and its agents and invitees to the common elements of HCC 137 for purposes of accessing and using Mensula's Parking Units, as set out in the Declaration.

[12] The arbitrator was asked to determine three issues in the arbitration: (1) whether Mensula ought to have access to the common elements of HCC 137, and the scope of that access, if allowed; (2) whether HCC 137 had failed to properly maintain the common elements appurtenant to Mensula's Parking Units; and (3) whether the conduct of HCC 137 constituted oppression pursuant to section 135 of the *Condo Act*.

[13] The arbitrator found in favour of HCC 137 with respect to the first issue, and in favour of Mensula with respect to the other two issues. This application is only concerned with the arbitrator's decision on the first issue.

[14] The arbitrator rejected HCC 137's argument that its hallways and lobbies were used for recreational purposes and that, as a result, owners of Parking Units were not entitled to use them based on article III 2 of the Declaration (reproduced in paragraph 8 above). He found that the primary purpose of these common elements was not recreational.

[15] The arbitrator set out as follows what he thought the real issue was in the case:

> 37. The true *lis* between Mensula and HCC 137 is that between Mensula's argument that it should have pedestrian ingress and egress rights through the residential condominium, and HCC 137's argument that the pedestrian access Mensula already has through the Navy Street stairs is sufficient and was specifically contemplated in the Declaration by way of the Easement provided for in Schedule "A".

[16] The arbitrator then engaged in a contractual interpretation exercise of the Declaration, after citing some of the principles outlined by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("***Sattva***"). His reasons on this issue read as follows:

44. **On its face, paragraph 1, under section III, of the Declaration, "Use", provides for a broad right of use of the common elements. However, that Use, when interpreted plainly means that Mensula, its employees, and visitors, may make use of all parts of the residential condominium, all of its hallways, lobby, etc ., other than the recreational facilities and the restricted common elements.**

45. In my view, this leads to an absurd result **because it could never have been intended** that the owner or tenants of these 43 parking units could simply wander through the residential building for no known purpose. **This would be antithetical to the very purpose of the Declaration** which is to frame sensible rules governing community living. Mensula implicitly acknowledges this by limiting its actual relief to access to points of ingress and egress, through the residential condominium. This request also requires that HCC 137 make alterations to its current security systems, and its parking elevator, which currently also provides access to residential floors above the Lobby.

46. The problem I have with that proposition is that the Declaration makes no express reference to access to these points of ingress and egress; that as a matter of physical fact, these doors are locked equally against all unit owners, including dwelling unit owners; and the Declaration does make explicit reference to specific access.

47. Schedule "A" of the Declaration provides for a right of way over Part 13, the Navy street stairs, which is granted to HCC 137, and, therefore, its owners. The only unit owners it applies to or it is necessary for is the owner of the 43 parking units in the commercial garage, now Mensula. The dwelling unit owners who own parking units in HCC 137 have no need for such an easement or right of way.

48. In my view, in the main, it reflects an intention to provide for and in fact ensure pedestrian ingress and egress for the owner of the 43 parking units within HCC 137, but located in the commercial garage. This is further supported by reference to this easement in the Reciprocal Agreement between HCC 137 and HCC 199. It goes as far as to contemplate the termination of the Reciprocal Agreement and the continued survival of this Easement as well as others (Exhibit 2a, B2).

49. The Board of HCC 137 came to the same view, and as it is obliged to do weighed the interests of the dwelling unit owners to privacy, and security, with the interests of Mensula in a more convenient route to and from the Stone Granary (see: *McKinstry, as quoted below*). Although I may have preferred more consideration by the Board, and a more fulsome response to Mensula's complaint, I find the Board's decision to be reasonable, and one with which I agree (see also: *London Condominium Corporation No. 13 v. Awaraji, 2007 ONCA 650, Canlii, at para 6; 3716724 Canada Inc. v. Carleton Condominium*

> *Corporation No. 375, 2016 ONCA, Canlii, at para 55*). Accordingly, I find the Board's decision reasonable and also correct.
>
> 50. In my view, this accords with a common sense and reasonable interpretation of the Declaration in its context, and given the surrounding circumstances at the formation of the Declaration.
>
> […]
>
> 53. The Use provision, unlike some other provisions of the Declaration, refers only to "each Owner", and makes no reference to tenant, guest, or visitor. **Although para IV, 1,(c) refers only to "Unit", it cannot be read sensibly except to refer to a dwelling unit.** It is highly unlikely that a parking unit owner would invite anyone to "their unit", or include "all residents, tenants, and visitors to their unit" ... Therefore, "owner" only refers to an owner and not a tenant of the parking unit. **This is also an example of where the Declaration clearly has inconsistencies in the application of the word "Unit" that need to be reconciled in a common sense interpretation of the Declaration.**
>
> […]
>
> 55. In summary, I find that Mensula is not entitled to the access relief it is seeking from HCC 137. I find that the Easement provided for at Schedule "A" of the Declaration provides for the reasonable use governed by section 116 of the Act. [Emphasis added.]

The Parties' Positions

[17] Mensula's position is that the part of the arbitration award that relates to the access issue should be set aside based on three grounds set out in subsection 46(1) of the *Arbitration Act*:

> (a) the arbitrator exceeded his jurisdiction pursuant to s. 46(1)3 of the *Arbitration Act* (and s. 109 of the *Condo Act*);
>
> (b) the arbitrator did not treat Mensula equally or fairly pursuant to s. 46(1)6 of the *Arbitration Act*; and
>
> (c) the procedure followed in the arbitration did not comply with the *Arbitration Act* pursuant to s. 46(1)7.

[18] Given my view of this case, I will only deal with the first ground advanced by Mensula.

[19] With respect to the first ground, Mensula's position is that the arbitrator exceeded his jurisdiction by re-writing and introducing new terms to the Declaration absent any statutory or contractual provision that he could do so. Mensula submits that its rights under the Declaration are plain and clear: each Owner has the full use, occupancy and enjoyment of the whole or any part of

the Common Elements, except for Recreational Facilities. It argues that the arbitrator exceeded his jurisdiction when he rejected the plain meaning of the Declaration as "absurd" and effectively amended the explicit definitions in the Declaration, thereby extinguishing Mensula's rights under the Declaration as a tenant-in-common. Mensula submits that as a result of the arbitrator's re-writing of the Declaration, the rights of Parking Unit Owners are changed from almost total use rights to the Common Elements into virtually no use rights. Mensula also relies on section 109 of the *Condo Act* and states that only the Superior Court of Justice has the jurisdiction to amend the Declaration if it is satisfied that the proposed amendment is necessary or desirable to correct an error or inconsistency that appears in the Declaration or that arises out of the carrying out of the intent and purpose of the Declaration.

[20] HCC 137's position is that there is no basis under 46(1)3 to set aside the award. It submits that the parties agreed to arbitrate whether Mensula, as owner of Parking Units, should have access to common elements in residential areas, and that the arbitrator decided that it should not have such access after considering the governing legislation, the Declaration and the history of the building. According to HCC 137, it is clear on the face of the award that the arbitrator interpreted the Declaration and did not amend it, and that he simply found that the Declaration and the *Condo Act* together did not grant to Mensula access to the residential corridors.

Discussion

a) Section 46(1)3 of the Arbitration Act and the Arbitration Agreement in this Case

[21] Section 46(1)3 of the *Arbitration Act* provides that on a party's application, the court may set aside an arbitration award based on the following ground: "The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement."

[22] The Court of Appeal discussed the requirements of section 46(1)3 in *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254. It stated:

> [25] Although the court cannot apply s. 46(1)3 without having regard to an arbitrator's decision, the court's authority to set aside an arbitration award under that subsection depends on the mandate the arbitration agreement confers on the arbitrator to resolve a particular dispute. In order to succeed on an application to set aside an arbitration award, an applicant must establish either that the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the arbitration agreement.
>
> [26] For example, if an arbitration agreement provides that an arbitrator shall resolve a particular question and the arbitrator does so, the court has no authority to set aside the award on the basis that the arbitrator's decision is unreasonable or incorrect. If, however, in the course of resolving the particular question remitted the arbitrator asks and answers an additional second question, the award may be set aside – not because the arbitrator's answer to the second question is unreasonable or incorrect, but because the arbitrator had no authority to reach <u>any</u> conclusion on the second question at all.

> [27] In short, s. 46(1)3 requires that arbitrators act within the bounds of the authority granted by the arbitration agreement pursuant to which they are appointed – no less, but no more. Section 46(1)3 is not an alternate appeal route and must not be treated as such. [Emphasis in the original.]

[23] While the parties entered into an "Agreement to Arbitrate and Terms of Appointment Re: Arbitration" with the arbitrator in May 2020, the arbitration was commenced by Mensula's Notice to Arbitrate dated March 23, 2020. The Notice to Arbitrate states that the matter is referred to arbitration pursuant to HCC 137's By-law No. 6 and section 132 of the *Condo Act*. Thus, By-law No. 6 and, to the extent necessary, section 132 of the *Condo Act* represent the parties' "arbitration agreement" in this case. They establish the arbitrator's jurisdiction.

[24] As set out above, section 1.1 of By-law No. 6 expressly excludes from its scope disputes that must be resolved in the courts or disputes that may be resolved in the courts unless the parties agree to submit their dispute to mediation and arbitration.

b) Amendments to a Declaration vs. Interpretation of a Declaration

[25] A declaration can be amended in only four ways, as set out in sections 107 to 110 of the *Condo Act: Metropolitan Toronto Condominium Corporation No. 590 v. Registered Owners*, 2019 ONSC 4484 at para. 50 (rev'd on other grounds: 2020 ONCA 471). Section 107 outlines the procedure to follow to amend the declaration with the owners' consent. Sections 108 and 110 set out discrete procedures for changing a corporation's address for service (section 108) and for applying to the Director of Titles to correct errors or inconsistencies that are apparent on the face of the declaration (section 110). Finally, section 109 provides that a condominium corporation or an owner may make an application to the Superior Court of Justice for an order to amend the declaration. The court may make an order to amend the declaration if it is satisfied that the amendment is necessary or desirable to correct an error or inconsistency that appears in the declaration or that arises out of the carrying out of the intent and purpose of the declaration.

[26] Thus, disputes that require an amendment or correction to a declaration because of an error or inconsistency are disputes that must be resolved in the courts, unless they fall within the situations contemplated in sections 107, 108 and 110 (which is not the case here). As such, these disputes are excluded from the scope of HCC 137's By-law No. 6.

[27] This brings us to the main issue in this case: did the arbitrator simply engage in an interpretation exercise within the scope of his jurisdiction, as alleged by HCC 137, or did the arbitrator go beyond a contractual interpretation exercise and in effect amend the Declaration to correct what he thought was an error or inconsistency in the Declaration, thereby exceeding his jurisdiction, as alleged by Mensula?

[28] While the line between contractual interpretation and correction/amendment may be blurry at times, this line does exist. For example, rectification is different from contractual interpretation and is subject to specific rules. The Supreme Court of Canada has stated that rectification must be used "with great caution" because "a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": see *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56

at para. 13. This cautious approach to rectification is consistent with the approach to contractual interpretation outlined in *Sattva*, particularly the warning that "surrounding circumstances" can only be used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words: see *Sattva* at paras. 57, 60.

[29] In light of section 109 of the *Condo Act* and the case law that applies it, the line between contractual interpretation and correction/amendment is particularly important in the context of a condominium declaration and it cannot be ignored. Imposing limits on what can be accomplished through contractual interpretation with respect to a condominium declaration is consistent with the fact that a declaration under the *Condo Act* is not a private contract negotiated between two parties, but, instead, a special form of contract that must adhere to certain statutory requirements: see *Metropolitan Toronto Condominium Corporation No. 590 v. The Registered Owners and Mortgagees of Metropolitan Toronto Condominium Corporation No. 590*, 2020 ONCA 471 at para. 15. One such statutory requirement is that the declaration must contain "a specification of all parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners" (subsection 7(2)(f) of the *Condo Act*). A declaration is the equivalent of the constitution of a condominium corporation. Purchasers rely on the rights and interests contained in the declaration in forming their decision to purchase their condominium units: *Metropolitan Toronto Condominium Corporation No. 590 v. Registered Owners*, 2019 ONSC 4484 at paras. 47-48; rev'd on other grounds: 2020 ONCA 471. This explains, in part, why amendments to a declaration are ineffective until they have been registered: see subsections 107(7), 109(4) and 110(4) of the *Condo Act*.

[30] Without expressing any view with respect to the reasonableness of the arbitrator's conclusions regarding errors and consistencies in the Declaration, I am of the opinion that the arbitrator crossed the line between interpretation and correction/amendment in this case. While the issue of Mensula's access to the common elements of HCC 137 was properly before him, he was not satisfied with the answer provided by the plain language of the Declaration, and he purported to deal with and correct what he thought were errors and inconsistencies in the Declaration. In doing so, he decided a matter that was beyond the scope of the arbitration agreement in this case because the correction of errors and inconsistencies in the Declaration is a matter for the Superior Court of Justice under section 109 of the *Condo Act*.

[31] In my view, it is clear on the face of the arbitrator's reasons that the arbitrator "crossed the line" and engaged in the type of analysis that is required under section 109 of the *Condo Act*, as the emphasis in paragraph 16 above shows. Among other things:

a. In paragraph 44 of his decision, the arbitrator held that, pursuant to the plain language of the Declaration, Mensula had a right to make use of all common elements of HCC 137, other than the recreational facilities and the restricted common elements.

b. In paragraph 45, the arbitrator stated that this result could never have been intended and was antithetical to the very purpose of the Declaration. This is, in effect, a finding of "an error or inconsistency […] that arises out of the carrying out of the intent and purpose of the declaration": see section 109(3)

of the *Condo Act* and *Caras & Callini Group Ltd. v. Peel Standard Condominium Corporation No. 837*, 2011 ONSC 7565 at paras. 40-42.

c. In paragraph 53, the arbitrator expressly finds that the Declaration "clearly has inconsistencies in the application of the word 'Unit'". He then purports to correct these inconsistencies by reconciling them "in a common sense interpretation of the Declaration".

d. The clear effect of the arbitrator's "interpretation" is to broaden the scope of section III of the Declaration and the categories of common elements that cannot be used by all owners, but in a way that is not specified in the Declaration.

[32] Thus, the arbitrator identified what he thought were errors and inconsistencies in the Declaration. Instead of deciding the issue of access raised by Mensula based on the text of the Declaration and pointing the parties to other avenues if they wished to have the Declaration corrected and amended, the arbitrator purported to make unregistered corrections and amendments to the Declaration through a contractual interpretation exercise and the use of "surrounding circumstances". However, as stated above, "surrounding circumstances" can only be used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words: see *Sattva* at paras. 57, 60.

[33] In light of the foregoing, and pursuant to s. 46(1)3 of the *Arbitration Act*, I conclude that the arbitration award in this case contains a decision on a matter that is beyond the scope of the parties' arbitration agreement, i.e. the correction of errors or inconsistencies in the Declaration, which is a matter for the Court under section 109 of the *Condo Act* and, therefore, a matter outside the scope of HCC 137's By-law No. 6.

Conclusion

[34] The arbitrator's award as it relates to the issue of Mensula's access to the common elements of HCC 137 is set aside. The parties did not make submissions on whether the matter should be sent back to the same arbitrator or to a new arbitrator to be appointed. If the parties cannot agree on this point, they can arrange for a case conference with me.

[35] Mensula is entitled to its costs of the application. The parties filed bills of costs before the hearing. They agree that the appropriate scale for the costs of this application is partial indemnity. HCC 137's bill of costs is in the amount of $8,083.33, and Mensula's bill of costs is in the amount of $20,854.37. The main reasons for the difference between the two amounts are the number of hours spent by counsel and their hourly rates. Because of the lack of particularity in Mensula's bill of costs, notably the absence of a breakdown of the time spent on the different tasks by the two lawyers involved, it is difficult to assess factors such as the potential duplication of work by timekeepers and the overall management of the litigation file to ensure that the time claimed is reasonable.

[36] Taking the foregoing into account, I find that the fair and reasonable award of costs in favour of Mensula is in the all-inclusive amount of $17,000.00. In my view, this is an amount

that HCC 137 should reasonably have expected to pay in the event that it was unsuccessful on the application given, among other things, the importance of the issues for the parties and a similar discrepancy in the costs incurred by the parties at the arbitration level. The costs are to be paid by HCC 137 within 30 days.

VERMETTE J.

Date: April 7, 2021