COURT OF APPEAL FOR ONTARIO

CITATION: Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636, 2021 ONCA 360
DATE: 20210528
DOCKET: C66825

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Huscroft, Nordheimer and Harvison Young JJ.A.

BETWEEN

Toronto Standard Condominium Corporation No. 1628

Applicant/Responding Party

(Respondent)

and

Toronto Standard Condominium Corporation No. 1636, Soho Grand Condominiums Inc. and Soinco Limited

Respondents/Moving Parties

(Appellants)

Allan Sternberg and Emily Hives, for the appellants

Carol A. Dirks, Rachel Fielding and Ronald Davis for the respondent

Heard: April 29, 2021 (by video conference)

On appeal from the order of Justice Lorne Sossin of the Superior Court of Justice, dated March 22, 2019, with reasons reported at 2019 ONSC 1827.

REASONS FOR DECISION

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[1] The appellants appeal from the order of the motion judge dismissing the appellants' motion to stay this application in favour of arbitration.

BACKGROUND

[2] The respondent in appeal is a 136-unit residential condominium located at 350 Wellington St. West. The appellant, Soho Grand Condominiums Inc. ("Soho"), registered the condominium on October 1, 2004. Soon thereafter, on November 12, 2004, Soho registered the appellant, Toronto Standard Condominium Corporation No. 1636 ("TSCC 1636"). TSCC 1636 has 55 residential units and is located at 348 Wellington St. West. TSCC 1636's units were never sold to outside purchasers. All of the units have always been owned by either Soho or by the appellant, Soinco Limited ("Soinco").

[3] The respondent in appeal and TSCC 1636 are physically integrated. They share some facilities not only with each other, but also with another Soho condominium.

[4] The respondent in appeal and Soho entered into a cost-sharing agreement dated October 6, 2004 (the "Reciprocal Agreement"), wherein they agreed to contribute to the costs of the operation and maintenance of defined Common Facilities on a 69 per cent (the respondent in appeal's share) and 31 per cent (Soho's share) basis. The Common Facilities include visitor parking units, bicycle spaces, and service areas for either or both of the corporations, such as the lobby,

elevators, stairwells, mechanical rooms, garbage rooms, loading areas, electrical rooms, telephone rooms and a transformer vault.

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[5] TSCC 1636, upon its creation on November 12, 2004, assumed all of Soho's rights and obligations under the Reciprocal Agreement. Recital (h) to the Reciprocal Agreement provided for this step. It reads:

> [I]t is acknowledged that [Soho] is entering into this Agreement on behalf of [TSCC 1636] with respect to its respective lands and portions of the Building on the express understanding that as soon as its condominium corporation is registered as a separate condominium corporation, [TSCC 1636] shall thereupon automatically assume all covenants and obligations of [Soho] contained herein with respect to such lands contained within such condominium corporation, as if it were an original party hereto, and concomitantly, [Soho] shall thereupon be automatically forever released and relieved from any further obligations and/or liabilities arising under this Agreement and/or any successor agreement hereto with respect to same.

[6] TSCC 1636 manages and operates the Common Facilities under the Reciprocal Agreement. Soinco owns the three units in TSCC 1636 (the "Rooms") which are at the heart of the dispute between the parties. The Rooms consist of a CACF Room[1], a service/garbage room, and a change room. The common expenses for the Rooms form part of the Common Facilities Costs in the Reciprocal Agreement.

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[1] Central Alarm and Control Facilities

[7] The dispute between TSCC 1636 and the respondent in appeal relates to the amounts due under the Reciprocal Agreement for the use of the Rooms. TSCC 1636 alleges that, as of October 31, 2018, the respondent in appeal owes $362,290.88, inclusive of HST and interest, for its proportionate share of the costs relating to the use of the Rooms. The respondent in appeal denies that it is responsible for this amount.

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[8] The Reciprocal Agreement contains an arbitration clause which reads, in part:

> The validity, construction and performance of this Agreement shall be governed by the laws of the Province of Ontario and any dispute that may arise under this Agreement shall be determined by arbitration by a single arbitrator to be agreed upon by the parties within thirty (30) days of written notification by any of the parties of a request for arbitration.

[9] The respondent in appeal paid its proportionate share of the costs relating to the Common Facilities under the Reciprocal Agreement for the fiscal years 2005-2008 and 2015-2018. TSCC 1636 asserts that the respondent in appeal remains in default of paying its share of the costs for the years, 2009-2014.

[10] The respondent in appeal disputes that it owes any monies under the Reciprocal Agreement. Indeed, the respondent in appeal submits that it is entitled to be repaid monies it has paid to TSCC 1636 towards common expenses for the Rooms under the Reciprocal Agreement. The respondent in appeal says that, in 2004, Soho controlled both the respondent in appeal and TSCC 1636. The

respondent in appeal alleges that Soho engineered the Reciprocal Agreement with TSCC 1636 and orchestrated having the respondent in appeal sign it. It also alleges that Soho hid the fact of the origin of the Reciprocal Agreement from the respondent in appeal when the condominium building was turned over to the owners of the units.

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[11] Given the dispute over the monies owing, TSCC 1636 advised the respondent in appeal that it would be proceeding to have the matter arbitrated. That process began with the dispute proceeding to mediation. There is disagreement as to whether the mediation was undertaken in compliance with s. 132(1) of the *Condominium Act, 1998*, S.O. 1998, c. 19. In any event, the mediation was not successful.

[12] After the unsuccessful mediation, TSCC 1636 indicated that it would proceed to arbitration over the dispute. The respondent in appeal disagreed and, on September 27, 2018, it commenced this application. In its Notice of Application, the respondent in appeal sought various forms of relief including a declaration that any common expenses attributable to the Rooms do not form part of the Common Facilities Cost within the meaning of the Reciprocal Agreement; a declaration that Soinco, as the owner of the Rooms, is solely responsible to pay the common expenses of the Rooms to TSCC 1636; and an order requiring the appellants to reimburse the respondent in appeal for any monies paid towards the common expenses of the Rooms.

[13] The respondent in appeal also sought various alternative forms of relief, including “an Order that the conduct of the [appellants] is oppressive, unfairly prejudicial or unfairly disregards the interests of the [respondent in appeal] pursuant to Section 135 of the *Condominium Act, 1998*”.

[14] In response to the Notice of Application, the appellants brought a motion to stay the application in favour of arbitration. The respondent in appeal resisted that motion on two principal grounds. First, the respondent in appeal asserts that its application involves parties who were not signatories to the Reciprocal Agreement and, as a result, the issues outlined in its application are not subject to the arbitration clause in the Reciprocal Agreement. Second, the respondent in appeal says that it is seeking remedies that may not be available through arbitration, including remedies for oppression under s. 135 of the *Condominium Act, 1998*; for providing material information that was false, deceptive, or misleading, under s. 133 of the *Condominium Act, 1998*; and other related remedies.

THE DECISION BELOW

[15] The motion judge dismissed the appellants’ motion for a stay. In doing so, the motion judge acknowledged that there were elements of the dispute that could be addressed through arbitration as arising under the terms of the Reciprocal Agreement. However, the motion judge found that the essence of the claim was Soho's allegedly oppressive conduct. He said, at para. 57 of his reasons:

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> More specifically, the pith and substance of this dispute relates to allegations that Soho imposed a disproportionate burden on TSCC 1628 through the Reciprocal Agreement, as well as the consequences that flowed from this allegedly oppressive conduct.

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[16] The motion judge noted that the respondent in appeal had conceded that certain of its claims are arbitrable, including the interpretation of the Reciprocal Agreement as to whether "common expenses" of the Rooms are properly a Common Facilities Cost, and the applicable limitation period for the claims by TSCC 1636 against the respondent in appeal.

[17] At the same time, the motion judge noted that the respondent in appeal said that other issues were not arbitrable, namely, whether Soinco is solely responsible for paying the common expenses to TSCC 1636; whether Soinco should reimburse the respondent in appeal for common expenses paid by it for the Rooms to date; whether the percentage contribution applicable to the Rooms should be altered; whether the conduct of the appellants was oppressive; and whether Soho had made material statements or provided material information that was false, deceptive, or misleading, under s. 133 of the *Condominium Act, 1998*.

[18] In the end, the motion judge concluded, at para. 75:

> While an arbitration could deal with some aspects of this dispute, and while other aspects remain contingent on how narrow or broad an arbitrator sees the jurisdiction of the arbitration clause in the Reciprocal Agreement and s. 132 of the [*Condominium Act, 1998*], it is apparent that what I have concluded are the core or essential aspects of this application would need to proceed to this court to

> be resolved, as they arise under s. 135 of the [*Condominium Act, 1998*].

[19] The motion judge found that the entire matter should proceed in the form of the application before the court and dismissed the motion for a stay.

ANALYSIS

(1) The arbitration clause

[20] In our view, the motion judge erred in the conclusions that he reached. In fairness to the motion judge, part of the error arose from the fact that the motion judge did not have the benefit of the decision in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, when he reached his decision. In *TELUS*, the Supreme Court of Canada made it clear that a court did not have discretion to refuse to stay claims that were dealt with in an arbitration agreement. In language that has particular application to the case here, Moldaver J. said, at para. 76:

> More fundamentally, Mr. Wellman's interpretation sits at odds with the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others.

[21] The dispute as it exists between the respondent in appeal and TSCC 1636 is clearly covered by the very broad language of the arbitration clause, that is, “any

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dispute that may arise under this Agreement". The motion judge, therefore, should have stayed that portion of the application instituted by the respondent in appeal.

[22] On this point, the respondent in appeal makes a late effort to rely on s. 7(2) of the *Arbitration Act, 1991*, S.O. 1991, c. 17, which permits a court to refuse to stay a proceeding on certain bases, including that the arbitration agreement is invalid based on unconscionability: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. (4th) 179, at paras. 3-4, 52-53 and 98.

[23] We would not give effect to this submission. For one, the point was not raised and argued before the motion judge. For another, we do not see any basis upon which it could be said that the arbitration clause in this case is unconscionable.

(2) The oppression claim

[24] We also do not agree with the motion judge that the "pith and substance" of the dispute is the asserted oppression claim. Rather, the core dispute is with respect to the interpretation and application of the Reciprocal Agreement. Indeed, it would appear that, if the issues relating to the Reciprocal Agreement are ultimately determined in favour of TSCC 1636, there would be little left to the claims being advanced by the respondent in appeal.

[25] In our view, courts should generally be cautious in their approach to oppression claims of the type asserted here. In particular, courts should be wary

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of allowing such claims to overtake, and potentially distort, the dispute resolution process that lies at the heart of the *Condominium Act, 1998*, a central aspect of which is a preference for arbitration over court proceedings. In other words, courts should be alert to the possibility that persons, who are party to an arbitration agreement, are attempting to avoid that process by "piggybacking" onto claims made against others: see e.g. *MTCC No. 965 v. MTCC No. 1031 and No. 1056*, 2014 ONSC 5362, at para. 18; see also *TELUS*, at paras. 76, 98.

[26] In considering this issue, the motion judge erred in his interpretation of the oppression section of the *Condominium Act, 1998*. Assuming that any aspect of the dispute between the parties falls within the scope of s. 135 of the *Condominium Act, 1998*, a question that we do not determine here, we do not agree with the motion judge that such a claim can only be determined by a court.[2] In his reasons, the motion judge said, at para. 40: “Further, as set out in s. 135(1), applications under this provision can only be brought before this Court.”

[27] Section 135(1) reads:

> An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section.

[2] The issue as to the scope and application of s. 135 of the *Condominium Act, 1998* was not argued before us.

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[28] The language of s. 135(1) is permissive, not mandatory. It contemplates that, in certain circumstances, it may be necessary to have resort to the Superior Court of Justice to obtain relief. However, s. 135(1) does not oust the jurisdiction of an arbitrator to consider the same relief, if that relief is part of the dispute in question that properly falls within the terms of the arbitration provision or within the terms of s. 132. In this case, we have already noted the broad language of the arbitration clause. There is nothing, in our view, that would preclude an arbitrator, acting under the authority of that arbitration clause, from considering the alleged oppressive conduct advanced by the respondent in appeal, at least as it relates to the actions of TSCC 1636.

[29] In saying that, we are aware that the dispute, at least insofar as the oppression claim is made, includes parties that may not technically be parties to the arbitration process. We say technically because it is not entirely clear, from the relationship between the parties and their status, whether they might fall within the ambit of the arbitration clause, or otherwise be subject to arbitration under s. 132 of the *Condominium Act, 1998*. We repeat that the emphasis in the *Condominium Act, 1998*, through s. 132, is on the resolution of various different forms of disputes by way of arbitration. On that point, we note that both Soho and Soinco appear to be "owners" and thus may be subject to the arbitration process mandated by s. 132.

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[30] In any event, we have already said that the core issue involves the dispute between TSCC 1636 and the respondent in appeal regarding the proper application and interpretation of the Reciprocal Agreement. Subject to our observations as to the possible application of the arbitration process to Soho and Soinco, there is nothing that prevents the issues, as between those two parties and the respondent in appeal, from proceeding in the Superior Court of Justice while the arbitration is ongoing, subject to any motion that might be brought for a stay of that proceeding on other grounds. We would also note the possibility that, rather than have parallel proceedings going on, Soho and Soinco might voluntarily agree to be part of the arbitration proceeding. None of these different considerations detract from the central point that the dispute between TSCC 1636 and the respondent in appeal must proceed to arbitration.

[31] On this point, we do not agree with the motion judge that this case “bears resemblance” to the dispute in *Deluce Holdings Inc. v. Air Canada* (1992), 98 D.L.R. (4th) 509 (Gen. Div.). In that case, the arbitration clause was a very narrow one, relating solely to the value of the shares. As Blair J. noted, at p. 527, “[t]here is no general ‘resort to arbitration’ clause in the event of any dispute arising in connection with the Agreement”. It was that fact that clearly led Blair J. to refuse to stay the proceeding. In this case, as we have already noted, there is a very broad arbitration clause.

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(3) The fresh evidence

[32] Finally, we must address the motion brought by the respondent in appeal to file fresh evidence. The respondent in appeal sought to adduce evidence of conduct by the appellants that it asserts demonstrates their continued "dominance" over the respondent in appeal.

[33] The fresh evidence consists of an affidavit from a member of the Board of Directors of the respondent in appeal. The affidavit alleges that its property manager has improperly transferred certain monies from the accounts of the respondent in appeal to TSCC 1636 at the direction of an officer of Soho. The affidavit also alleges that the legal fees being incurred by the appellants are being improperly charged to the facilities budget for the buildings. Further, there are allegations regarding improper restrictions on the use of the service elevator and of improper renovations to the loading dock.

[34] We would not admit the fresh evidence. It does not meet the test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Specifically, none of this evidence is relevant to the issue as to the applicability of the arbitration clause nor could it be expected to have affected the result on that issue. This evidence may be relevant to the dispute between the parties, but it is not relevant to the proper process for resolving that dispute.

CONCLUSION

[35] The appeal is allowed and the order below is set aside. In its place, an order is granted staying the application as it relates to the issues between TSCC 1636 and the respondent in appeal.

[36] The appellants are entitled to their costs of the appeal in the agreed amount of $20,000, inclusive of disbursements and HST. As also agreed, the costs award below of $15,000 is reversed to be in favour of the appellants.

"Grant Huscroft J.A."
"I.V.B. Nordheimer J.A."
"A. Harvison Young J.A."

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