CITATION: Leeds Standard Condo Corporation No. 41 v. Fuller et al., 2021 ONSC 4370
COURT FILE NO.: CV-20-84518
DATE: 2021/06/17

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE

2021 ONSC 4370 (CanLII)

RE: LEEDS STANDARD CONDOMINIUM CORPORATION NO. 41

Applicant

AND:

SIMON FULLER, TALL SHIPS LANDING DEVELOPMENTS, a division of METCALFE REALTY COMPANY LIMITED, THE CORPORATION OF THE CITY OF BROCKVILLE and LEEDS STANDARD CONDOMINIUM CORPORATION NO. 42

Respondents

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: Antoni Casalinuovo and Jonathan Wright, for the Applicants (Leeds 41)

Nadia J. Authier, for the Respondents, Fuller and Tall Ships Landing (TSL)

John D. Simpson, for the City of Brockville (the City)

No one appearing for LSCC No. 42 (Leeds 42)

HEARD: March 30, 2021

DECISION AND REASONS

[1] This is an appeal from an arbitrator's decision. Specifically, the applicant takes issue with a ruling by arbitrator, Leslie Dizgun, defining his jurisdiction.

[2] For the reasons that follow, I am dismissing the appeal and remitting the matter back to the arbitrator to complete the hearing.

Context and Analysis

[3] Leeds 41 is one of the condominium corporations in the Tall Ships Landing development in Brockville. I am advised that Leeds 41 is the residential condominium tower while Leeds 42 is a separate condominium consisting primarily of parking spaces. The development includes the two condominiums, a hotel, a restaurant, a marina, a science and discovery centre (the Aquatarium)

and other facilities. The relationship is governed by a Shared Facilities Agreement (SFA) and Shared Amenities Agreement (SAA). The operation of those agreements and the expenses allocated to the owners of the residential condominium units have become the subject of a dispute. Leeds 42 did not appear and takes no position on this matter.

[4] The parties to the SFA and the SAA are the applicant, Leeds 42, the developer (TSL) and the City of Brockville. TSL is the developer and declarant and Mr. Fuller is its principal. The SFA and SAA are integral parts of the Tall Ships development and at the time those agreements were put in place, Mr. Fuller was the signing officer for all of the parties other than the city. Those agreements provide for access and maintenance of shared infrastructure such as elevators and storage, for property management services and for sharing of costs.

[5] The board of the applicant condominium corporation believes that the structure of the agreements and the manner in which they are operated and applied are unfair to the unit owners. Leeds 41 believes that Mr. Fuller and TSL have abused their position, acted against the interests of Leeds 41 and its unit owners and contrary to the expectations of the condominium corporation that it would be dealt with fairly under the agreements. The applicant argues that the allocation of expenses under the agreements has been unfair and oppressive and it seeks relief. As I will describe, this dispute has been ongoing for several years and has spawned various pieces of litigation.

[6] There are two or three important features of the legal landscape. Firstly, the governing legislation is the *Condominium Act, 1998* as amended.[1] Without delving deeply into condominium law, it is important to remember that a condominium corporation is governed by a board of directors elected by the unit owners. Typically, upon registration, the board is controlled by the declarant which owns the majority of the units, but once the units have been sold, the declarant loses control. In this case, the corporation was created in 2014 and the turnover meeting was held in September of 2015. Once an independent board is in place, the Act provides certain rights to challenge steps taken in the name of the condominium corporation prior to that date.

[7] For example, s. 43 provides that as soon as the declarant ceases to be the majority owner, there will be a meeting of the owners to elect a new board. S. 111 of the Act provides that the new board may, by resolution on 60 days notice, terminate a management agreement put in place by the corporation when it was controlled by the declarant if it does so within 12 months following the election of the first independent board.

[8] S. 113 of the Act deals with agreements such as the SFA and the SAA, which the Act refers to as "agreements for the mutual use, provision or maintenance or the cost-sharing of facilities or services" put in place before the election of the first board under s. 43. S. 113 provides that the condominium corporation may "within 12 months following the election" of the new board bring a court application to "amend or terminate" the agreement if the court is satisfied that the statutory test has been met. Under that test, the condominium corporation must persuade the court that the disclosure statement did not clearly and adequately disclose the provisions of the agreement and

[1] S.O. 19998, c. 19 as amended to February 1, 2021 Leeds 41 was created on December 9, 2014.

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that the agreement "or any of its provisions produces a result that is oppressive or unconscionably prejudicial to the corporation or any of the owners".

[9] There is another section of the Act which provides a remedy for oppressive conduct. S. 135 of the Act permits an "owner, a corporation, a declarant or a mortgagee of a unit" to apply to the Superior Court of Justice for an order if the "conduct" of an owner, condominium corporation, declarant or mortgagee "threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant". In that case the court may make an order to rectify the matter.

[10] It should be noted that s. 136 of the Act provides that the remedies in the Act are not necessarily exclusive. That section reads that unless the Act "specifically provides to the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act."

[11] S. 132 of the Act requires that condominium disputes be resolved by mediation and arbitration. It contains statutory language which is deemed to be inserted in property management agreements and agreements such as the SFA and SAA. That language provides that the parties will attempt to resolve all disputes by mediation and if mediation fails, by arbitration under the *Arbitration Act, 1991*.

[12] In fact, both the SFA and the SAA contain this statutory language. S. 18.1 of each agreement provides that in the case of any disagreement concerning the application or interpretation of the agreements, the parties shall, after attempting to mediate the dispute, submit the dispute to binding arbitration.

[13] Each of the parties has attempted to bring the matter before the courts without following the ADR requirements. In April of 2015, for example, following a dispute over the appointment of a property manager, TSL brought an application in Brockville to force LSCC 41 to comply with its obligations. That application was partly resolved and ultimately stayed by Justice Mew in favour of arbitration. (See 2019 ONSC 2600).

[14] In 2016, Leeds 41 started an application in Toronto seeking to terminate the SAA (but not the SFA apparently) but did not proceed with it. In 2018 it started an action in Toronto in which it sought damages and rectification or amendment of the SFA. Leeds 41 also sought to consolidate the action and the 2016 application. At the request of TSL a motion was granted by Justice Nishikawa staying the action in favour of arbitration. (See 2019 ONSC 3900).

[15] Leeds 41 attempted to appeal the decision of Justice Nishikawa, but the Court of Appeal quashed the appeal and remitted the dispute to arbitration. (See 2019 ONCA 987). It is useful to quote the final paragraphs of that decision.

> 10 We also do not agree that the motion judge erred in ordering a stay under s. 7(1) of the *Arbitration Act*. Leeds argues that the pith and substance of its claim is oppression under s. 135 of the *Condominium Act*, and this is a statutory remedy that cannot be precluded by the arbitration clauses in the SFA and SAA. However, the motion judge considered this

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argument and determined that Leeds' claims were arguably within the scope of the arbitration clauses.

11 The motion judge correctly applied the test from *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1 (Ont. C.A.) in deciding whether to stay the proceeding in favour of arbitration. She considered Leeds' argument that its claims were, in pith and substance, oppression, and notwithstanding, determined that the claim arguably fell within the scope of the arbitration clause. To the extent that the arbitrator's jurisdiction was still arguable, it was up to the arbitrator to determine the scope of its own jurisdiction.

12 The motion judge cited the comments of Mew J., who decided a related proceeding between the same parties, that "courts should guard against allowing the mere invocation of an oppression remedy under s. 135 to avoid the consequence of an arbitration clause." She also noted that, in a different proceeding covering similar issues between the same parties, Leeds itself had taken the position that similar issues were *not* oppression and were properly submitted to arbitration.

13 We see no reason to depart from the determination of the motion judge on how to characterize the appellant's claims. Leeds has not established that the pith and substance of its claim is oppression and falls outside the scope of the arbitration clauses. As counsel for the respondents observed, Leeds still has the opportunity to raise the proper characterization of its claims in front of the arbitrator, and the arbitrator shall then determine its own jurisdiction.

14 In conclusion, the motion to quash is granted. There is no appeal from the motion judge's decision to stay the proceeding below under s. 7(1) of the *Arbitration Act*, because it is barred by s. 7(6) of the *Act*. There was no denial of natural justice, and no error in the motion judge's decision to stay the proceeding in favour of arbitration, that would render s. 7(6) inapplicable.

[16] This led to the parties agreeing to appoint Mr. Leslie Dizgun as an arbitrator. There was a preliminary issue raised concerning the jurisdiction of the arbitrator and on May 19, 2020 the arbitrator released his ruling on that matter.

[17] The underlying concern of Leeds 41 seems to be driven by its view that the agreements themselves and the manner in which they are applied by TSL are oppressive and unfair. It seeks access to the rights and remedies provided under s. 135 of the Act and as noted above, that section provides for an application to the Superior Court of Justice. The applicant argued that this question could therefore not be the subject of arbitration. As will be seen from the language of the Court of Appeal excerpted above, the courts at both levels rejected the idea that s. 135 provided an automatic right to avoid arbitration of a dispute covered by the arbitration clause simply by invoking the section.

[18] Mr. Dizgun considered the arguments of the parties and rendered a careful decision in which he concluded that he had jurisdiction to determine the questions put to him including the

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question of whether or not the conduct of TSL towards the applicant was oppressive. The key points in his ruling may be summarized as follows:

a. The dispute before him related only to the SFA and not the SAA

b. The proper parties to the dispute are the parties to the SFA and therefore not Mr. Fuller in his personal capacity

c. Any claim to set aside the agreements under s. 113 is statute barred because that remedy must be sought within 12 months.

d. S. 135 of the Act is permissive insofar as it provides a route to bring an oppression application before the SCJ, but it is not exclusive and it does not preclude an arbitrator from making findings that conduct is oppressive when the matter is properly before the arbitrator.

e. The scope of the ADR provision in the SFA is extremely broad, including any disputes or matters which may arise in respect of the shared facilities.

f. The pith and substance of the dispute relates to the shared facilities and the operation of the SFA. As such the dispute is arbitrable and the arbitrator may determine if the conduct of a party is oppressive within the meaning of s. 135 when rendering a decision.

The policy underlying the condominium legislation is to encourage ADR including arbitration and to utilize the courts as a last resort. This same policy favours the general deference to arbitral clauses in contracts. Parties bound to an arbitral process should not be lightly allowed to avoid it. For this reason, the question of jurisdiction is first and foremost a question for the arbitrator.

Procedure and Standard of Review

[19] Although two judges and the Court of Appeal have directed the parties to proceed with arbitration, the first task of the arbitrator was to rule on his jurisdiction. As set out in paragraph 13 of the decision of the Court of Appeal, excerpted above, the question of jurisdiction remained an open question to be argued before the arbitrator pursuant to s. 17 (1) of the *Arbitration Act*.[2] That Act requires any challenge to jurisdiction to be raised at the earliest opportunity and permits the arbitrator to deal with challenges to jurisdiction either as part of the award or as a preliminary question.[3] Here, Mr. Dizgun elected to make a preliminary ruling and pursuant to the *Arbitration Act*, a party wishing to challenge the ruling must apply to the court within 30 days.[4]

[2] *Arbitration Act, 1991*, S.O. 1991, c. 17 as amended to March 22, 2017
[3] See s. 17 (5) and 17 (7) of the *Arbitration Act, 1991*.
[4] S. 17 (8) of the *Arbitration Act, 1991*

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[20] It is for this reason that the applicant is once again before the court seeking to appeal the preliminary ruling despite the fact that Arbitrator Dizgun has not yet conducted the arbitration or heard evidence on the merits.

[21] There are currently two schools of thought with respect to the correct approach to judicial review of an arbitrator's decision on his or her jurisdiction. In the *Sattva* decision, the Supreme Court of Canada held that in the context of commercial arbitration, aspects of the *Dunsmuir* framework should be applied and the standard of review even on a question of law should be "reasonableness".[5] Subsequently the Supreme Court revisited *Dunsmuir* in the *Vavilov* decision and concluded that there should be a difference between a judicial review standard and the standard where the legislature has provided for a statutory appeal mechanism.[6] In the latter case, the *Housen v. Nikolaisen* standard applies and questions of law will be reviewable on a correctness standard.[7]

[22] The *Vavilov* standard has been applied to appeals of arbitral awards by this court in certain decisions whereas other judges have held that *Vavilov* does not apply to commercial arbitrations.[8] In this case, if it was necessary for me to decide the issue, I would be inclined to apply a correctness standard to the issue of jurisdiction. S. 17 (7) and (8) do not use the word "appeal". Rather, the statutory language states that if the arbitrator rules on the objection as "a preliminary question", a party "may within 30 days after receiving notice of the ruling, make an application to the court to decide the matter." [9] This language infers a correctness standard, but I do not have to decide that question because I consider the decision by Mr. Dizgun to be both reasonable and correct.

[23] I do not agree with Leeds 41 when it argues that the arbitrator improperly limited the remedies available to the arbitrator by adopting a contractual analysis. Firstly, the arbitrator concluded that he did have the jurisdiction to apply s. 135. Secondly, as a new decision from the Court of Appeal makes clear, an arbitrator will have the jurisdiction to consider the same relief if the relief is part of the dispute in question that properly falls within the terms of the arbitration provision. The arbitrator's approach to the question will now be informed by that decision.

[24] Subsequent to the hearing, the Court of Appeal released its decision in *TSCC No. 1628 v. TSCC No. 1636.*[10] I was on the point of releasing these reasons before this decision was brought to my attention, but now having read it, I am confirmed in my view that the arbitrator was correct in his determination. Indeed, the new decision puts this beyond doubt. With respect to the question of whether s. 135 occupies the field, the Court of Appeal had this to say:

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[5] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 @ para. 106 citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. See *Intact Insurance Co. v. Allstate Insurance Co. of Canada*, 2016 ONCA 609 in which the Court of Appeal applied this rule to insurance arbitration.
[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65
[7] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235
[8] For example, see *Allstate Insurance v. TD Home & Auto Insurance*, 2020 ONSC 6969 @ para. 15 reaches the opposite conclusion on this point to *Allstate Insurance Company v. Her Majesty the Queen*, 2020 ONSC 830
[9] A decision from which there is no appeal. See s. 17 (8) and 17 (9) of the *Arbitration Act, 1991*
[10] *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2021 ONCA 360 released on May 28, 2021

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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."

[25] The arbitrator was therefore correct in holding that he had jurisdiction to deal with the dispute and in doing so to consider whether there was oppression within the meaning of s. 135 of the Act. As made clear by the decision cited above, this also provides the arbitrator with a range of oppression remedies should any of those be necessary. This question may never arise of course. After all, if the arbitrator either finds that there is no substance to the applicant's complaints or alternatively finds entirely in its favour, the nuances of this particular jurisdictional ruling may turn out to be of no significance. There is no doubt that the dispute itself is arbitrable.

[26] I would point out the unfortunate fact that the parties have now been before three judges of this court and the Court of Appeal arguing over procedure and are no closer to resolution of the dispute on its merits. As I have described above, the applicant was obliged to bring the preliminary ruling back before the court if it wished to challenge it but there was an alternative. The parties could have requested the arbitrator to rule on jurisdiction as part of the award or they could have asked to reserve objections until later under s. 17 (6). The *Rules of Civil Procedure* as well as various standards of good advocacy require counsel to collaborate at a procedural level to ensure litigation is efficient, effective and proportionate. I encourage them to take all steps that are available to them to bring this matter to a final resolution as soon as they can in the most efficient and effective manner possible.

Summary & Conclusion

[27] For the reasons set out above, the appeal is dismissed. The dispute is referred back to Mr. Dizgun to complete the arbitration process.

[28] The respondents are presumptively entitled to costs of this motion, but there may be factors such as offers to settle of which I am not aware. As is my usual practice, I encourage counsel to resolve the question of costs, but otherwise they are to obtain a date from my office to speak to the matter or a timetable for the exchange of written submissions.

Mr. Justice C. MacLeod

Date: June 17, 2021

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No one appearing for LSCC No. 42 (Leeds 42)

DECISION AND REASONS

Regional Senior Justice Calum MacLeod

Released: June 17, 2021