CITATION: MTCC No. 1171 v Rebeiro, 2022 ONSC 503
COURT FILE NO.: CV-20-652506
DATE: 20220124

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1171, Applicant

-and-

VENETIA REBEIRO, BRADFORD REBEIRO and MARK REBEIRO, Respondents

BEFORE: FL Myers J

COUNSEL: *Jonathan Wright and. Megan Molloy*, for the Applicant

Megan Mackey and Ava S. Naraghi, for the Respondent

HEARD: January 14, 2022

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ENDORSEMENT

Background and Outcome

[1] The respondents Venetia and Bradford Rebeiro own Suite 7 in MTCC No. 1711. The Rebeiros are estranged. Currently, Venetia Rebeiro lives in the condominium unit with her elderly mother and her adult son, the respondent Mark Rebeiro.

[2] In this application, the condominium corporation seeks an order requiring the respondents to sell their unit or, alternatively, to comply with condominium's rules.

[3] This is a neighbours' dispute. It involves competing allegations principally between Ms. Rebeiro and her neighbour Emna Dhamak. Each is alleged to abuse the other with name calling, banging on a common wall, and other forms of harassment.

[4] The Rebeiros allege that they have been the targets of harassment and racist taunts and slurs from Ms. Dhamak and occupants of two other units. Ms. Rebeiro was punched in the face by a unit owner's boyfriend. The police have been involved.

[5] The condominium sides with the neighbours. It fears for Ms. Dhamak's health. The condominium wants the Rebeiros ordered out or at least ordered to comply with the condominium's rules.

[6] The respondents Venetia and Mark Rebeiro move to stay the application pending mediation and arbitration. The respondent Bradford Rebeiro is named as a necessary party because he is on title. No allegations are made against him and he was not involved in this motion.

[7] For the reason that follow, this application is stayed pending mediation and arbitration as required by s. 132(4) of the *Condominium Act, 1998,* S.O. 1998, c. 19.

[8] I agree completely with Dunphy J. who discussed condominium neighbours' disputes in *TSCC 2204 v. Panagiotou,* 2021 ONSC 8199 (CanLII).

> [13] This fiasco has gone on long enough. The root of the problem is the ill-advised decision to escalate this dispute to an "on the meter" legal level with an ever-increasing conveyer belt of demands for legal fees instead of deescalating it through mediation as the Legislature plainly intended to occur.

[9] I also agree with and adopt his assessment at para. 1 of the *Panagiotou* decision,

> [1] This motion and proceeding should never have happened.

The Basic Facts

[10] In light of the finding that this application should not be in court, I will not make findings of fact. There is a big credibility issue facing Ms. Rebeiro. There is no evidence at all from Ms. Dhamak and no evidence supporting the allegation that her heath or safety is at risk. Moreover, it is clear that the condominium corporation has chosen sides. But it is not at all clear whether it has made a fair assessment.

[11] I could not decide this application on a written record even if it was appropriate for the matter to be here. It is infused with "she said/she said" credibility issues.

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[12] The cause of the dispute between Ms. Rebeiro and Ms. Dhamak is not clear. Ms. Rebeiro claims Ms. Dhamak got angry with her when the board of directors, of which she was then a member, denied Ms. Dhamak compensation in relation to flood damage inside her unit. Ms. Dhamak apparently says that Ms. Rebeiro became angry with her when a ladder fell and made noise to which Ms. Rebeiro objected.

[13] Whether Ms. Dhamak seeks revenge for the refusal of compensation or Ms. Rebeiro seeks revenge for noise, the situation has spiralled out of control.

[14] Ray Williams is the current President of the condominium corporation. He tried to conduct an informal mediation between the two neighbours. He summed up the situation this way in cross-examination,

> You know, the amount of energy and time that has been spent on this dispute like I'm doing it right now from my office, it's -- it's an unbelievable situation. It's almost like a comic -- it's almost like a tragic comic situation. It's almost like I'm on some kind of TV show because this should not be -- **this should not reach this kind of level because it's so simple to fix**. [Emphasis added.]

[15] Mr. Williams provided some details for his assessment of the situation

> Well, I haven't been to many of their, you know, disputes. I've seen some videos. I've heard a lot of F-U-C-K words come between them on video. I -- I saw -- the only time I really saw them exchange these kind of unpleasant words were in that meeting towards the end. You know, it was about an hour meeting. I would say two minutes of it was quite manageable and not -- not really horrible, but the last ten minutes was just an absolute -- it completely disintegrated.
>
> 86. Q. What words did you hear Emna use against Venetia Rebeiro?
>
> A. Oh, I can't recall. I mean they were just - I mean they were exchanging what they ... I guess they normally exchange because there's a lot of animosity between these two neighbours, a lot. There's a lot of slurs related to their -- the grandchildren of Emna. There are accusations that the grandchildren use slurs. There are accusations that No. 60 use slurs. I mean there's -- there's just so much accusation and counter accusation. **What I can say is what I heard, was both -- both parties levelled very, very nasty language against each other**.

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[16] He also acknowledged that someone also left dog excrement on the Rebeiros' driveway.

[17] But, Mr. Williams confirmed that the condominium corporation sides with Ms. Dhamak. He explained,

> You have four neighbours in a dispute. No. 62 has a dispute with No. 7. No. 60 has a dispute with No. 7. No. 9 has a dispute with No. 7. The only common denominator, ma'am, is No. 7. It is -- it belies any kind of credibility, reasonable credibility that everybody else is wrong and unit 7 is right. When you add the fact that Venetia herself explained to me how infuriated she was at those children who were on that driveway that day, on the day she's accusing of them riding a bike, hurling racial epithets at her, she's really upset with these children and it was a -- it was not a very nice incident.

[18] On August 11, 2019, the boyfriend of a neighbour punched Ms. Rebeiro in the head when he was drunk ostensibly because he did not like where she had placed her garbage bins. He was arrested and charged with assault.

[19] The condominium corporation wrote to both neighbours with a warning. However, it charged Ms. Rebeiro $686 for legal fees for the letter because, it said, she provoked the incident by the placement of her garbage bins in breach of corporation's rules. The neighbour whose boyfriend had struck Ms. Rebeiro was not charged any legal fees in relation to the letter sent to her.

[20] The condominium also accused Ms. Rebeiro of driving her car at a high speed in breach of its rules. It said it had the incident on video. It has yet to produce the video however, despite requests.

[21] Mr. Rebeiro did not help herself in her sworn evidence before the court. In her affidavit, she categorically denies banging on her common wall with Ms. Dhamak. She swore under oath,

> I did not ever bang on the wall as alleged. For most of the day I am working. When I am not working or spending time with and caring for my mother, I am studying. I do not have the time or interest to engage in this type of behaviour all day and all night long. The allegation is untrue.

[22] However, in cross-examination, she not only admitted to banging on the wall, she acknowledged having positively asserted that it is her right to do so.

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> 356 Q. Okay, and you're saying, and I'm going to put it to you that you're saying that, "I can do what I want within the walls of the unit and no one has a right to stop me" because Mr. Williams put it to you earlier in the email chain, "You said in our resolution meeting that you will not stop banging on the walls adjourning" it says adjourning but I believe it means adjoining, "Unit 9 or playing your loud music." Instead, you prefer the occupant of Unit 9 to buy another property. And that matches up well, in my opinion, and I'm going to put it to you that your response there is to say, "Well, I'm not agreeing to stop the banging or to stop the loud music because I'm an owner, not a renter, and I can do what I like within the walls of my unit.
>
> A. Correct.

[23] Mr. Williams also heard banging in Ms. Dhamak's unit coming from Ms. Rebeiro's unit. This certainly proves the legal truism "it takes two to tango".

[24] Mark Rebeiro lives in the unit with his mother. He is a university student. The applicant alleges that he kicked a soccer ball against a wall, uses profanity, called a child a name, and played loud music.

The Statutory Scheme

[25] The condominium asks for relief under s. 134 of the *Condominium Act, 1998* due to breaches by the respondents of ss. 117 and 119 of the statute.

[26] Section 117 says,

> **117** No person shall permit a condition to exist or carry on an activity in a unit or in the common elements if the condition or the activity is likely to damage the property or **cause injury to an individual**. [Emphasis added.]

[27] Subsections 119 (2) and (3) are relied on in relation to Mark Rebeiro and say,

> **119 (2)** An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.
>
> **(3)** A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have

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> the right to require that a person who is required to comply with this Act, the declaration, the by-laws and the rules shall do so.

[28] Subsection 134 (1) provides for a court proceeding to enforce compliance with the statute, the condominium's declaration, by-law and rules as follows,

> **134 (1)** Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

[29] However, subsection 134 (2) imposes a precondition on an application under this section,

> **134 (2)** If the mediation and arbitration processes described in section 132 are required, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

[30] Subsection 132 (4) describes when mediation and arbitration are required by imposing an arbitration agreement into every condominium declaration,

> (4) Every declaration shall be deemed to contain a provision that the 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 in accordance with clauses (1) (a) and (b) respectively. [Emphasis added.]

[31] Ms. Rebeiro asserts that this application is, at its core, a dispute over breaches of the condominium's declaration, by-laws, and rules. Therefore, the applicant is required to proceed to mediation and arbitration rather than coming to court.

[32] In *Mckinstry and Dempster v. York Condominium Corporation No. 472 and Verrier* (2003), 2003 CanLII 22436 (ON SC), at para. 19 Jurianz J (as he then was) held that where a dispute concerns a breach of the *Condominium Act, 1998* itself, as opposed to a breach of the declaration, by-laws, or rules of the condominium corporation, ss. 132 (4) and 134 (2) do not require mediation or arbitration.

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[33] The condominium corporation submits that its claim is based on breaches of ss. 117 and 119 of the act and therefore this is not just a dispute over breaches of the condominium's declaration, by-laws, and rules. Its legal letters to Ms. Rebeiro make it clear however, that the bases for claiming that ss. 117 and 119 apply, are the noise, arguments, garbage bin placement, name calling, and other breaches of the declaration, by-laws and rules of the condominium allegedly committed by the respondents.

[34] How do I distinguish whether the claim is under the statute or the condominium's internal documents?

[35] In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2021 ONCA 360 (CanLII), the Court of Appeal dealt with a similar argument. Section 135 of the *Condominium Act, 1998* allows a party to come to court to seek a remedy if she, he, or it is being "oppressed". A condominium corporation claimed it was being oppressed by another condominium corporation. The responding party argued that despite the relief being claimed under the statutory oppression remedy, the issues should be resolved by arbitration pursuant to an arbitration agreement between the two entities.

[36] At para. 25, the Court of Appeal held,

> [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 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. [Emphasis added.]

[37] And at para. 28,

> [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

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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

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> 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.

[38] Similarly, nothing in ss. 117 or 119 prevent the resolution of issues by mediation and arbitration if they fall under the arbitration agreement imposed in s. 132 (4) of the statute.

[39] The Court of Appeal then went on to discuss how to tell whether the claim is one for arbitration for court.

[40] In para. 26, the Court of Appeal considered the fact that, like Mark Rebeiro in this case, there may be parties involved who are not party to the arbitration agreement. (In this case the condominium declaration binds only the owner Ms. Rebeiro and not Mark Rebeiro). The Court of Appeal wrote,

> [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.

[41] The Court of Appeal then went on to hold that the "core" of the issue between the parties was arbitrable and that if anything remained outside of the arbitration for an oppression remedy, the court hearing might proceed separately.

[42] In this case, there is no question that the core issues are the disputes under the condominium's documents. The assertions that ss. 117 and 119 apply are weak and clear efforts to pigeonhole the facts into statutory claims to get out of arbitration.

[43] Section 117 deals with acts that cause injury to people. As noted previously, there is no evidence from Ms. Dhamak. There is no medical evidence. The President merely asserts that she is a cancer survivor. She tells him that she

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suffers from anxiety and depression and has seen a therapist to help her cope with the situation. Mr. Williams fears for her health.

[44] As noted above s. 119 makes Ms. Rebeiro accountable for the behaviour of her son as an occupant of the unit.

[45] It is perfectly clear that this application is not about the risk of injury to Ms. Dhamak or others. Moreover, the son is a bit player either acting in response to attacks on his mother or, from the other side, doing his mother's bidding. The core of this dispute is the ongoing misbehaviour of one or both neighbours and others who have taken one side. I make no suggestion that either side is right or wrong. But I agree completely with Mr. Williams that this matter is simple to fix.

[46] The fix for neighbours' disputes, whether in condominiums or houses, is not found in an expensive, drawn out court proceeding. The court certainly can find facts and impose a remedy after an expensive trial perhaps. But, until the neighbours agree to cease hostilities, the court's decision is just a battle in an ongoing war. It becomes fodder for the next salvo.

[47] The fix is in making the parties sit down, hear each other, and realize that the only win-win is peace. As said in the movie WarGames, "The only winning move is not to play".

[48] I leave for another day or level of court whether *Mckinstry* remains good law in light of the recognition by the Court of Appeal that the "central preference" of the *Condominium Act, 1998* is for arbitration over court proceedings. Like the Court of Appeal above, I can stay this proceeding while the "core" dispute goes to mediation and arbitration. Then, if anything remains outstanding under ss. 117 or 119 after those proceedings, parties may move to lift the stay and continue this application (or to convert it to an action).

[49] Why do these cases keep happening? This proceeding is a much a "fiasco" as the one before Dunphy J. So why do condominium corporations keep coming to court with "she said/she said" neighbour disputes instead of going to mediation and arbitration as intended by the statute and which should be a quicker, cheaper, and more conciliatory way to resolve these kinds of disputes.

[50] Sadly, the answer lies in the statute itself. The statute provides an unintended incentive for condominium corporations to inflame the dispute and then to come to court.

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[51] First, subsection 134 (5) provides that if the condominium corporation wins a dollar in damages or costs, then its full legal costs can be added to the owner's common expenses. This subsection prevents an unreasonable unit owner from foisting very substantial costs on all of the other unit owners in the condominium building. It is understood that the normal award of partial indemnity costs to a successful litigant can leave 40% or more of the successful litigant's actual costs outstanding. This subsection provides that the corporation can recover that remaining portion from the unit owner who has been held to have been in the wrong.

[52] But consider the economic incentives at play. By coming to court to obtain a damages or costs award, no matter how small, the condominium corporation understands that it gets a free legal ride. Worse still, counsel understands that the normal cost sensitivity of his or her own client does not apply. The case reports are replete with cases that note that it appears that the condominium corporation engaged in overkill and brought a bazooka to a knife fight. Maximizing costs to be paid by the unit owner is the economic incentive of s. 134 (5). Why go to mediation when you can go to court for free? By protecting the innocent owners from costs, the statute unintentionally arms the board of directors with a huge weapon and removes the usual limits imposed by clients on their own lawyers' spending.

[53] Second, as noted by Dunphy J., condominium corporations in the midst of a dispute with unit owners, send legal letters and then try to pass on the fees of their lawyer for drafting the letter. When the unit owner balks because the matter is still in dispute, the condominium corporation files a lien against the condominium unit for the amount of the fees already charged *plus* the fees incurred to file the lien. This inflames the parties and escalates the dispute. Instead of fighting over a discrete issue, there is now a new dispute about the propriety of the lien. Many a case morphs into an emotional dispute over allegations of bullying by liens with the initial issue relegated to secondary status.

[54] The statute causes this problem too. The condominium corporation's right to indemnity for its legal fees is usually set out in its declaration or by-laws. Subsection 85 (2) of the statute provides that a claim for lien expires unless it is registered against title to the unit within three months after the date of the default for which a lien is claimed. The condominium corporation therefore has to act quickly to assert and file a lien or risk losing it.

[55] Both of these economic incentives work against the central preference of the statute for mediation and arbitration. Dunphy J. expressed well the inapt results of these perverse incentives above.

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Delay

[56] Undue delay can be a defence to a request to stay a claim in favour of arbitration. See: s. 7 (2)4 of the *Arbitration Act, 1991*, SO 1991, c 17.

[57] In this case, the parties went to Civil Practice Court last winter and agreed on a hearing schedule. Cross-examinations have been held. The hearing date for this motion was originally to be the hearing date for the main application. The parties agreed to proceed with the motion instead.

[58] The condominium corporation relies upon the decision of the Divisional Court in 1908 on *Cole v Canadian Fire Insurance Co*., 15 OLR 335 for the proposition that a stay must be sought before pleading or any other step is taken in the proceeding.

[59] In this century, in *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 4448, the court held that waiting until four days before the main hearing to seek a stay for mediation and arbitration was too late. The court held that delay can amount to a form of "waiver" of the right or obligation to arbitrate.

[60] In *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (CanLII), the Supreme Court of Canada discussed the evolution of the approach to arbitration from one of antipathy to the current recognition of its preferability where sought and applicable.

> [48] Throughout the better part of the 20th century, Canadian courts displayed "overt hostility" to arbitration, treating it as a "second-class method of dispute resolution" (*Seidel*, at para. 89, per LeBel and Deschamps JJ., dissenting (but not on this point)). Courts guarded their jurisdiction jealously and "did not look with favour upon efforts of the parties to oust it by agreement" (*Seidel*, at para. 93, citing *Re Rootes Motors (Canada) Ltd. and Wm. Halliday Contracting Co.*, 1952 CanLII 304 (ON SC), [1952] 4 D.L.R. 300 (Ont. H.C.J.), at p. 304). The prevailing view was that only the courts were capable of granting remedies for legal disputes and that, as a result, any agreement by the parties to oust the courts' jurisdiction was contrary to public policy, regardless of the nature of the substantive legal issues (see Seidel, at para. 96). This judicial hostility, coupled with a lack of modern legislation supporting arbitration, inhibited the growth of arbitration in Canada (see Seidel, at para. 89, citing J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3).

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> [49] It was against this backdrop that, in 1991, the Ontario legislature enacted the *Arbitration Act*, which was based on the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada a year earlier (online) (see J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at pp. 1-9 to 1-15). The purpose and underlying philosophy of the *Arbitration Act* was discussed by Blair J. (as he then was) in *Ontario Hydro v. Denison Mines Ltd.,* 1992 CarswellOnt 3497 (WL Can.) (Gen. Div.):
>
> > The *Arbitration Act, 1991* came into effect on January 1, 1992. It repealed the former *Arbitrations Act*, R.S.O. 1980 c. 25, and enacted a new regime for the conduct of arbitrations in Ontario . . . . It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
> >
> > In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a "presumptive" stay of court proceedings in favour of arbitration. [paras. 8-9]

[61] There is no doubt that the law has evolved since 1908 and even since 2010. The issue of delay is a difficult one to deal with in principle. If the parties have agreed to arbitrate or are deemed to have done so, it is not just their preference, but the law's distinct preference that they do so. Moving in court may be inappropriate or less appropriate for any number of reasons – perhaps because it fails to respect the parties' autonomy or because it fails to respect the Legislature's view that the subject matter of the dispute is best resolved through an alternative form of dispute resolution.

[62] But, where a party brings the proceeding in the less preferable venue of a courtroom and the other party delays in moving to stay the action, the underlying reasons for the preference for arbitration do not change. Arbitration remains preferable. But what is at issue is a supervening risk that the moving party is abusing the process by delaying, running up the other parties' costs, perhaps benefiting from some delay in the outcome, or otherwise causing unfair prejudice to the applicant.

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[63] In my view, the question is not so much one of waiver or taking a fresh step, but, as set out in the s. 7 (2) of the *Arbitration Act, 1991*, whether the intervening delay is “undue”. It seems to me that the prejudice caused by delay is undue when it outweighs the benefit of proceeding to arbitration over the court.

[64] In this case, the condominium corporation may have thought it had a technical right to come to court if it could squeeze the case into ss. 117 and 119 of the *Condominium Act, 1998*. But it knew or ought to have known that the statute both preferred and required mediation and arbitration of the underlying issues. There is no evidence of any weight indicating that the issues in this application truly involve a risk of injury to people. And, as noted above, the issues surrounding the son are completely linked to the outcome among the protagonists.

[65] It is certainly true that some number of months have gone by that could have been better utilized in mediation and then arbitration (if necessary). Moreover, some costs have been incurred on affidavits and cross-examinations. These costs may be thrown away. But it may be that the parties will be able to use the affidavits and transcripts in their mediation and arbitration proceedings.

[66] Mediation and especially arbitration can take as long as a court case and be just as expensive. But, the parties have it within their power to agree to a much quicker, cheaper process and one that leverages costs already incurred.

[67] In the circumstances of this action, I do not see any prejudice to the condominium corporation that would lead me to classify Ms. Rebeiro’s motion as having been delayed unduly. It remains a matter that needs rational discussion leading to a final settlement more than an adversarial outcome that will just serve as a way station along the route to the next battlefield.

Order

[68] If this application came to Civil Practice Court for scheduling today, in light of Justice Dunphy’s decision and the Civil Practice Court decision in *TSCC 1630 v. Vallik*, 2021 ONSC 5570 (CanLII), I doubt that the application hearing would be scheduled without consideration of the need for a stay in favour of mediation and arbitration at the court’s own motion.

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[69] In my view, mediation and arbitration are required and there is no basis to refuse the stay sought by the respondents for that purpose. Accordingly, the application is stayed pending the outcome of mediation and arbitration pursuant to the arbitration agreement deemed by s 132 (4) of the *Condominium Act, 1998*.

[70] The respondents succeeded on this motion. They are entitled to partial indemnity for their costs of the motion fixed at $6,300 all-inclusive. However, the question of whether the rest of the costs of the application to date have been thrown away needs to await the outcome of the mediation and arbitration. If they were thrown away, a strong argument exists for the costs of the application incurred after the application was issued and served to be payable by the respondents. Had the respondents moved on a more timely basis, the application still would have been issued and served with a supporting affidavit. The potentially wasted costs come after the initial mandatory steps. However, if the respondents succeed in full in an arbitration, it may be that the litigation was always stillborn and an argument exists that even though costs may have been wasted, it is just that the respondents should not have to pay them or that they should be entitled to their costs.

[71] I view the more likely outcome to be the simple fix - that the parties finally find a way to speak to each other through their capable and experienced counsel who will lead them to a way to end their hostilities. The costs best resolved in the settlement.

[72] Costs of the motion are to be paid by the applicant to the respondents fixed in the amount of $6,300 all-in. The rest of the costs of the application are reserved to the judge who deals with this matter after the mediation and arbitration required by the condominium corporation’s declaration.

FL Myers

Date: January 24, 2022

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