CITATION: Senchire v. Summerhill Property Management, 2016 ONSC 3630
COURT FILE NO.: CV-14-511552
DATE: 2016/06/03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Charles Senchire & Sharanazar Lahashmi, for the applicant(s)

AND:

Summerhill Property Management, Metropolitan Toronto Condominium Corp. No. 856, Pirabaharan Paralingam, Sond Gurcharan and Jeyakumar Mahala, for the respondent(s)

BEFORE: Justice S. Dunphy

COUNSEL: *Charles Senchire & Sharanazar Lahashmi*, in person

Eduardo F. Lam, for the respondents

HEARD:

ENDORSEMENT

[1] The applicants are owners of two residential units in the respondent Metropolitan Toronto Condominium Corporation No. 856. In addition to having had one parking space (each) allocated to their residential unit, they each own an additional "Parking Unit" that they (or their predecessor in title) elected to purchase when the condominium was initially built. This application arises out of a dispute the applicants had with the MTCC 856 on the narrow question of whether the Parking Units they own ought to be allocated a portion of common expenses under the Declaration governing the MTCC 856 or whether, as they submit, such expenses ought to be allocated to all residential owners pro rata to the share of expenses allocated to the residential units only. As a result of this dispute, the applicants sought access to various elements of financial and other information regarding MTCC 856 that they believed they had a right to but were being deprived of.

[2] At the hearing of the application, I dismissed the application with reasons to follow. These are those reasons. In addition, I reserved the matter of costs that I shall deal with in these reasons as well.

Overview and Procedural History

[3] The applicant Mr. Charles Senchire is the owner of Unit #305 in MTCC 856 while his co-applicant Ms. Sharanazar Lahashmi is the owner of Unit #1403. Both co-applicants were

formerly members of the Board of Directors of MTCC 856 as well until they were removed by a special meeting of members called after this litigation was commenced.

[4] The respondent Summerhill Management Corporation is the current property manager of MTCC 856. The three individual respondents are directors of MTCC 8566.

[5] MTCC 856 is a condominium corporation located at 2901 Kipling Avenue in Toronto. It was created as a result of a declaration (the "Declaration") dated October 31, 1989 by Kipling Park Developments Limited. The condominium corporation contains 150 Residential Units and 60 Parking Units. In addition to the 60 Parking Units, the development also contains 150 parking *spaces* allocated one to each of the 150 Residential Units plus a further 35 Visitor Parking spaces at ground level.

[6] Each residential unit had a single parking spot allocated to it as identified in the Declaration and on the title deed to each unit. In addition, when the residential units were initially sold, the sixty parking units were available to be purchased. Fifty-one of the sixty available parking units were purchased by various current residential unit holders or their predecessors in title. It appears that nine of the sixty Parking Units are currently owned by MTCC 856, whether because they were never sold or because they were subsequently re-acquired is not clear.

[7] In order for the issues on this application to be clear, it will be necessary to distinguish between "Parking Units", being the 60 designated Parking Units referenced in the Declaration and "parking spaces", being the 150 parking spaces allocated one to each of the 150 residential units in the condominium. Both applicants are owners of their respective residential unit, the parking space allocated to such unit plus a second Parking Unit being one of the sixty owned Parking Units.

[8] The applicants both claim they were not previously charged a separate allocation of common expenses for their second parking spots (i.e. the Parking Unit owned by each). They claim that this dispute arose when new management (the respondent Summerhill Property Management) came on board a few years ago. They are each being charged approximately $50 per month for their Parking Units.

[9] The historical practice of not assessing Parking Units with common expenses was not something that the affidavit of either applicant deposed to. They made the claim in oral argument but provided me with no admissible evidence of this prior practice. The respondent MTCC 856 took no objection to the assertion. I accepted the applicant's assertion provisionally – if it were material to the outcome of the case, I should have asked for more formal proof or a more formal admission from the respondents. As it turns out, the Declaration itself is the governing document and prior practice – if demonstrated – would not be sufficient to alter the legal rights prescribed by it prospectively.

[10] In the applicants' mind, common expenses are for common elements such as elevators, the party room, grounds maintenance and the like. They strongly believe they should only be charged for the common expenses set forth opposite their individual residential unit number in

the Declaration. Their Parking Units do not use the elevator or party room and should not be assessed for those and similar expenses.

[11] When the dispute over fees for the Parking Units came to the surface in 2014, the two applicants were directors of MTCC 856. They requested access to documentary information including minutes, financial statements, cheques etc. It appears that they were looking for evidence of past practices regarding such assessments as well as to justify the amounts. All or substantially all of what they requested, they had access to whether as directors or owners under the *Condominium Act 1998*, S.O. 1998, c. 19.

[12] It appears that relations between the manager and the other directors on the one and the applicants as dissident directors became strained. Unfortunately, both appear to have reached the point where communication could only take place through lawyers and legal process. The result was significant expense to both sides with little productive dialogue towards dispute resolution.

[13] The applicants originally brought this application returnable on December 15, 2014 for two main purposes: (i) to seek access to the financial information they believed they needed to press home their dispute about the charges they were being asked to pay as owners of two of the sixty Parking Units and (ii) to dispute the ability of MTCC 856 to levy those charges in the first place.

[14] The respondents responded by taking steps to remove the applicants as directors prior to the return of the application by convening a special meeting. The applicants responded with a motion for an injunction to prevent that meeting. Both may have been within their rights to react as they did, but the core dispute was unfortunately not brought any closer to resolution by this skirmish.

[15] The first round of the dispute came on for a hearing on October 24, 2014 before Myers J. The injunction motion was dismissed and a timetable for the hearing of this application was established. A number of matters were directed to be regularized, including correcting the style of cause and naming MTCC 856 as a respondent. Costs of the injunction motion were reserved to the application judge.

[16] The litigation timetable established by the order of Myers J. for the hearing of this application does not appear to have been followed for reasons that are not before me. At all events, the application finally came on for hearing before Stewart J. on October 26, 2015. At that time, Stewart J. granted an order with regard to certain matters that will be referred to below and adjourned the balance of the application. Her short endorsement reads in part:

> "MTCC 856 indicated a willingness to provide the Applicants with access to the documents they wish to view as long as they attend at Summerhill's head office for this purpose and specify the documents they wish to view including the year and date. They may have copies of such documents upon payment of the reasonable cost of photocopying. Only those documents not prohibited from disclosure pursuant to the *Condominium Act* may be viewed. This arrangement

> was declared by the Applicants to be acceptable, and an order shall go accordingly".

[17] As regards the second issue before her – the ability of MTCC 856 to assess common expenses to the owners of the Parking Units, she found as follows:

> "The material presented on this Application does not provide, in my view, any basis for concluding that MTCC 856's Bylaw No. 1 is in any way unlawful or has been applied unfairly or illegally. The common expenses charged for the 60 Parking Units are levied in accordance with the *Condominium Act* and MTCC 856's Declaration and Bylaws as separately owned condominium units. As a result, all owners are required to pay their respective share of the common expenses for the Parking Units.
>
> The balance of the Application is adjourned to a date to be set following the proposed review of documentation and without prejudice to the right of any party to file additional relevant material to address the Parking Unit disagreements, if they cannot be otherwise resolved".

[18] These two paragraphs of her endorsement were rendered verbatim in paragraphs 2 and 3 respectively of the formal order when taken out. Among the disputes before me is whether the order of Stewart J. finally resolved the matter of the ability of MTCC 856 to assess common expenses to the Parking Units with the above or merely expressed a preliminary view subject to whatever further material might be filed. I shall deal with this issue in more detail below.

[19] Shortly after the hearing before Stewart J., the applicants elected to discharge their counsel and represent themselves. They have found the task of litigating these issues quite expensive. Stewart J. directed the applicants to amend the style of cause to add any other owners of Parking Units who might wish to be added. No such amendment was made.

Issues to be decided

[20] The following issues appeared to remain in dispute at the hearing of the application before me:

a. What rights to information can the applicants demand on an on-going basis?

b. Did Stewart J. finally decide the issue of the right of MTCC 856 to levy an allocation of common expenses to the owners of the 60 Parking Units?

c. If she did not, on what basis if any can MTCC 856 require owners of Parking Units to contribute to common expenses?

d. How should costs be allocated?

Discussion and Analysis

(a) On-going access to information

[21] Whatever obstacles the applicants may have felt they faced in getting access to the information they needed to dig into the Parking Unit common expense allocation issue, the respondent MTCC 856 has at least been scrupulous in promising to comply with the *Condominium Act* when coming before the court. Stewart J. specifically so ordered on October 26, 2015 and it appeared to me on the hearing of this adjourned application that matters have proceeded since relatively smoothly.

[22] There were a small number of remaining disputes regarding access to information raised before me. These were more in the way of irritants than legal disputes. The applicants take objection to the fact that the documents are only being made available at the head office of the management company (Summerhill) rather than at MTCC 856's head office itself.

[23] That objection strikes me as a reasonable one. After some discussion among the parties, the respondent MTCC 856 explained that the originals of documents are kept at Summerhill's offices but agreed that *copies* of the requested documents would be made available for inspection at the management office in the condominium itself if demanded. It appears that the applicants are content to have access to copies of documents at the condominium itself and will arrange to inspect the originals at the management company's office if as and when they feel a need to have access to original documents.

[24] The respondent MTCC 856 has agreed to make copies of the financial statements and directors minutes and other documents that are subject to inspection under the *Condominium Act* available for inspection on site and to permit copies thereof to be made subject to reasonable copying expenses in accordance with existing policies. These will be made available in a timely way with reasonable advance notice.

[25] I can see no need for anything further in the way of a specific order – I do not wish to micromanage the relations between them and the existing arrangements under Stewart J's order, subject only to the tweak of making copies of documents more conveniently available at the condominium's own office seems to resolve most of the remaining irritants between the parties.

(b) Has Stewart J. already decided the right of MTCC 856 to assess common expenses to the 60 Parking Units?

[26] The short question is whether paragraph 3 of the order of Stewart J. left the *entire* issue of the "Parking Unit disagreements" open to be decided later upon further material being filed or whether paragraph 2 decided the issue of the *right* to charge common expenses subject only to the right to pursue disagreements regarding the calculation of the amount (or other matters not decided in paragraph 2).

[27] The applicants take the view that Stewart J. did not rule in a definitive fashion on the Parking Unit dispute because leave was given to file more material and to pursue it before this court if they were unable to resolve it.

[28] I cannot agree with the position taken by the applicants although I must admit that their confusion appears both genuine and reasonable.

[29] Stewart J. left only the matter of the *calculation* of the common expense allocation open for further review should they not be able to reach agreement on the basis upon which this was done. Paragraph 2 of the order on the other hand is quite clear and unequivocal as to the governing principle: "all owners of Parking Units are required to pay their respective share of common expenses for the Parking Units". The issue of the fairness or legality of the *application* of that principle under the by-laws was what she left open to be addressed with further material.

[30] The fundamental principle, namely that Parking Units are subject to an allocation of common expenses, was, in my view, clearly decided. I could not decide the issue in favour of the applicants as they wish without expressly overruling the last sentence of paragraph 2 of Stewart J.'s order. This I do not have jurisdiction to do, in my view.

[31] At all events, there has been no further evidence filed to challenge the basis of calculation of the charges for the Parking Units. The applicants have filed more argument and some cases, but no fresh evidence on that issue. A *very* late filed affidavit of another owner was filed on the eve of the hearing that simply attached copies of correspondence each side sent to MTCC 856 owners in February 2016. The correspondence contains – in summary fashion – arguments raised by both sides but no evidence. I do not consider evidence of subsequent correspondence each side has exchanged with owners to be evidence going to the merits of whether the parking charges are lawful under the Declaration.

[32] The applicants have not in fact taken issue with the amount of the common expenses charged even if their application was initially motivated in part by a desire to see the documents needed to substantiate those amounts. The only allocation claimed by the respondent MTCC 856 is .05% of the total of all common expenses per Parking Unit being the amount they claim is allocated to each Parking Unit on Schedule D of the Declaration. The applicants deny that they should have to pay .05% of the same pool of common expenses they are *already* paying as a residential unit owner. Put differently, they are not disputing the amount of common expense that are being divided among the owners so much as they are disputing how that amount is divided up amount the 150 owners. They think they and other owners of Parking Units should pay *only* the amount allocated to their Residential Unit in Schedule D with regard to the amount allocated to their Parking Unit.

[33] The order I am being asked to make is that *no* amount of common expenses can be allocated to the owners of Parking Units "as separately owned condominium units". So holding would directly contradict paragraph 2 of the order of Stewart J. dated October 26, 2015 and I have no jurisdiction to do so. Accordingly, I would find that paragraph 2 of the order of Stewart J. is now res judicata (i.e. it has already been decided) and it is not open to me to re-visit that

issue. I can see no order that I could make in answer to the applicants' claim that would not contradict paragraph 2 of her order.

(c) Is MTCC 856 entitled to allocate common expenses to owners of Parking Units as separate condominium units?

[34] In the event that I am wrong in my interpretation of Stewart J's order, I have gone on to consider the substantial dispute regarding the Parking Unit fees under the Declaration on its merits.

[35] The Declaration defines the word "Unit(s)" as "Residential Units and Parking Units collectively". The term "Parking Units" is defined to mean the 30 units on level A and the 30 units on Level B. These are distinct from the 150 parking spaces allocated one to each Residential Unit.

[36] There are thus two types of units in this condominium corporation, Residential Units and Parking Units. Each type of Unit is *a* Unit while collectively they comprise all Units discussed in the Declaration. There are 150 Residential Units and 60 Parking Units described.

[37] Paragraph5 of Article 1 is entitled "common interest and common expenses" and reads as follows:

> "Each owner shall have an undivided interest in the common elements as a tenant-in-common with all other 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 interests shall be 100%."

[38] The items that are properly to be included as common expenses are set forth in Article 2. No dispute as to this calculation has been brought before me. As owners of Residential Units the applicants are already being assessed common expenses in the proportion set forth opposite their unit number in Schedule D and have taken no issue with the amount of that assessment or the total amount of common expenses from which it is derived.

[39] Schedule D to the Declaration contains a listing of all 150 Residential Units. Opposite each unit number is a percentage applicable to that unit. The total of the percentage amounts allocated to all 150 units adds up to 97%. The applicants disputed the math, so I double checked it. It is accurate.

[40] The last entry on the list in Schedule D reads: "Parking units: 60 @ .05%" with an entry of 3% being carried into the column entitled "percentage of common interest and contribution to common expenses" (the same column where the undisputed individual percent allocation to each of the 150 Residential Units is recorded).

[41] In short, Schedule D allocates a total of 97% of common interests and 97% of contribution to common expenses to the 150 Residential Units and a total of 3% (at the rate of .05% per Parking Unit) to the 60 Parking Units. The total allocation is thus 100% for both.

[42] The applicants take the view that their Parking Units should not have to contribute anything at all towards common expenses. Their basis for taking this position is the fact that these charges were, apparently, not allocated to the parking units until relatively recently in practice. As well, they point to the fact that the Parking Units cannot be conveyed separately from the Residential Units, suggesting that the common expense allocation set opposite their unit must therefore be the only amount that they should have to pay. In this connection, they note that parking spaces can similarly not be sold separately from the Residential Unit and yet have no common expenses separately charged to them, being included in the charge allocated to each Residential Unit.

[43] While I can fully appreciate that the historical practice of the MTCC 856 prior to the new management company coming on board may have caused confusion, it is the terms of the Declaration itself that I must apply. Each of the 60 Parking Units is a separate Unit in MTCC 856 exactly as the 150 Residential Units are also Units. While the 150 Residential Units have parking spaces allocated to them, the 60 Parking Units were separately sold and are separately owned. As is evident, only a portion of Residential Unit owners own a second parking space by virtue of owning a Parking Unit. The declaration clearly allocates responsibility for contributing to common expenses to owners of all Units, both Residential and Parking Units.

[44] The amounts allocated are very clearly set forth in schedule D. Once the aggregate amount of common expenses is established in accordance with the Declaration and Bylaws, MTCC 856 has no option but to allocate those expenses exactly in the manner prescribed by Schedule D. Were the applicants' position to be accepted, only 97% of common expenses would be allocated to the Residential Units leaving 3% unfunded. Obviously, that cannot have been the intent of the Declaration nor is it consistent with common sense or the words used.

[45] It is my view that the terms of the Declaration and the attached schedules are quite clear on their face. Obviously, it would have been preferable if the drafters of Schedule D had listed each of the 60 Parking Units by their level and number in the same way that all 150 Residential Units are set forth instead of lumping them together in a single entry. The draftsman clearly sought to save a few keystrokes by reason of the fact that there was no variation in the amount of percentage allocation to each Parking Unit whereas the Residential Units vary by unit number (and size). Notwithstanding the drafting shortcut, I can find no ambiguity in the document and must apply it as it reads on its face.

[46] Accordingly, I would agree with the position taken by the MTCC 856 that it is both entitled and required to allocate .05% to each parking unit. No other outcome would provide for the allocation of 100% of common expenses.

(d) <u>How should costs be allocated?</u>

[47] This case has generated three "main" attendances at court in addition to some subsidiary ones. The parties appeared before Myers J. on the injunction application, before Stewart J. on the initial return of this Application and before me. In addition, two appearances before the Registrar were necessitated to settle the form of the orders given by Myers J. and Stewart J. due

to the fact that the applicants had dismissed their counsel and would not agree to the proposed forms of order. Both Myers J. and Stewart J. referred the matter of costs of the appearances before them to me as the judge hearing the application.

[48] Both sides submit that they should receive costs. How ought I to proceed?

[49] When all is said and done, the applicants brought this application to settle what for them was an issue of principle. They believe common expenses are being improperly allocated. They think this was done correctly in the past and they think that new management – with the agreement of the rest of the Board (other than the applicants who were formerly on the Board – is acting unfairly. Their views are strongly – and I have no doubt sincerely – held. As it turns out, I disagree with them as did Stewart J.

[50] The amount at issue in this case is just over $50 per month for each of them at present – approximately $600 per year per Parking Unit. While there are 150 Residential Units, only 51 of these possess an additional Parking Unit (as opposed to the single parking *space* allocated to each). The amount at issue for the respondent MTCC 856 was thus approximately $30,600 per year in total expenses that would have to be covered by all 150 owners collectively or allocated to these 51 owners individually depending upon the outcome of the issue raised. Each of the two individual applicants, on the other hand, had only about $600 per year at issue.

[51] The respondents say that they have been largely successful in this application. The motion for an injunction was dismissed and the core of the application – the common expense charges to the Parking Units – has also been resolved in their favour. They have filed an outline of costs for the entire proceeding (including before Myers J. and Stewart J.) of $24,611.88 on a partial indemnity basis as compared to a "full rate" of $29,855.08. The "full rate" reflects a discount on counsel's hourly rate offered to MTCC 856. All figures are inclusive of disbursements and HST.

[52] The applicants had no outline of costs. They submit that they started this application when they were directors and were acting for the benefit of all. Unfortunately, the other 49 Parking Unit owners did not volunteer to join in the litigation or contribute to its expenses.

[53] In my view, success has been somewhat divided on this application although the respondents have clearly one the main point. The applicants brought the application to obtain access to the information they needed to press home their "main" dispute about the Parking Unit issue. While the respondent has eventually come to a reasonable accommodation on access, it is apparent that the initial response to this brewing dispute was to treat the applicants as a hostile camp and a reasonable compromise on access to information was only reached in court rather than outside of it. While the respondents were entitled to call a meeting to remove the applicants from the Board, it is hard not to view that is having been a somewhat vindictive reaction to a genuine dispute about a view honestly held.

[54] The applicants were unsuccessful on the motion before Myers J., but he did not award costs at that time. His decision not to do so means at the very minimum that my assessment of

costs of that step in the proceeding should be done from the perspective of the entire application and not merely measuring success on that narrow motion.

[55] The applicants have not been without their share of the blame for the costs run up in this litigation. They initiated the claim and added directors personally. They refused to co-operate in settling the forms of order, requiring the respondents to attend before the Registrar in person on two occasions.

[56] In short, I view the magnitude of costs to have been aggravated somewhat by the conduct of both and I view both to have had a measure of success, even if the respondents had the greater level of success.

[57] The Parking Unit issue was – at least in the applicants' minds - akin to a class action suit. Their personal stake in the outcome was relatively slight. Indeed, the partial indemnity fees claimed by the respondents are equivalent to more than *twenty years* of parking fees if divided equally between the two applicants (each of whom owns one Parking Unit).

[58] There is no answer that appears to me to be fully satisfactory. I must strive to determine a fair and reasonable outcome having regard to all of the criteria Rule 57.01 of the *Rules of Civil Procedure* mandates me to review. The principle of indemnity is a significant criterion, but it is by no means the only one.

[59] After due consideration of all of the circumstances, I find that I must give somewhat greater weight to the quasi-class action nature of the proceeding from the applicants' perspective, the failure of the respondents to have headed the access to information issues off early by timely admissions while not losing sight of the aggravating fact of the applicants' non-cooperation in settling the orders. I have determined to fix costs in the amount of $7,000 all-inclusive payable by the applicants to the respondents on a several basis (i.e. $3,500 each).

Disposition

[60] I dismissed the application at the hearing of the motion with costs reserved. I have now fixed those costs at $7,000 payable as to $3,500 by each of the applicants to the respondents.

S.F. Dunphy J.

Date: June 3, 2016