Case Name:

York Condominium Co. No. 359 v. Solmica Chemical International Inc.

Between
York Condominium Corporation No. 359,
Plaintiff/Respondent, and
Solmica Chemical International Inc.,
Defendant/Appellant

[2005] O.J. No. 6268

Court File No. 02-CV-230382CM1
Ontario Superior Court of Justice

T.P. Herman J.

Heard: January 14 and April 15, 2005.
Judgment: May 4, 2005.

(39 paras.)

Counsel:

Brett D. Moldaver, for the Plaintiff/Respondent.

Gerald Grupp, agent for the Defendant/Appellant.

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1 **T.P. HERMAN J.**:-- The Appellant, Solmica Chemical International Inc. seeks leave to appeal the Award of the Arbitrator, the Honourable Sydney L. Robins and seeks to set the Award aside. The arbitration dealt with the issue of whether the replacement of the windows and window frames (collectively referred to as the windows) by York Condominium Corporation No. 359 (YCC) was unlawful and in contravention of YCC's by-laws. The Arbitrator also considered whether Solmica, the registered owner of Unit 6 in the condominium, and Mr. Kenedy, the resident of the unit and the sole officer, director and shareholder of Solmica, were required to allow access to the premises for the purpose of replacing the windows.

2 The Arbitrator decided that the replacement of the windows was lawful and ordered that Solmica and Kenedy permit the condominium to enter the premises and install the new windows.

Request for Adjournment

3 At the beginning of the hearing of this application, Solmica requested an adjournment in order for me to consider a separate application for the production of documents relating to the replacement of the windows. That application was served on respondent's counsel the day before this hearing commenced.

4 I decided not to grant the adjournment for two reasons. The first is that this matter was adjourned on December 10, 2004 to January 14, 2005 on the basis of an agreement between the parties that the adjournment would be peremptory to Solmica. The second is that, in view of the appellant's grounds for his application for leave, the content of the documents or whether those documents existed is not pertinent to the application for leave to appeal. The appellant submits in his application for leave to appeal that the Arbitrator erred in refusing to require the respondent to produce the full CMS report and failed to draw a negative inference from the respondent's failure to produce reports on the deterioration of the windows and the failure to introduce in evidence documents referred to in the evidence of Steven Woodhouse. Therefore, it is not the content of the documents that is germane to this application but the fact that the documents were not produced at the arbitration hearing.

Procedural History

5 YCC replaced the windows on all the units of the building except Mr. Kenedy's unit. Mr. Kenedy refused to permit access to the premises. YCC therefore moved before Lax J. and obtained an order that the following be referred to arbitration: "whether the replacement of all of the windows in the Applicant [YCC] was unlawful and in contravention of the Applicant's by-laws since there was no vote of owners approving the replacement."

6 Solmica appealed Lax J.'s order to the Divisional Court. The appeal was dismissed. Solmica then applied to the Court of Appeal for an order permitting late filing of a Notice of Appeal from Lax J.'s order.

7 At the outset of the arbitration hearing, Solmica requested an adjournment pending the disposition of its application before the Court of Appeal. The Arbitrator refused the adjournment "in the interest of expediting this long-delayed matter." He indicated that he would not issue an award until after the pending application had been disposed of. The Court of Appeal dismissed Solmica's application and the Arbitrator issued his decision.

The Arbitrator's Decision

8 It was Solmica's position at the arbitration that there was no authority to replace the windows in the absence of a Board resolution and a vote of all the unit holders. The key issue before the Arbitrator was whether the replacement of the windows was a repair or maintenance or, in the alternative, an addition, alternation or improvement.

9 Where the condominium corporation has an obligation to repair or maintain units or common elements and it does so using materials that are "as reasonably close in quality to the original as appropriate in accordance with current construction standards," the work is deemed not to be an "addition, alteration or improvement" (section 97(1), *Condominium Act, 1998*, S.O. 1998, c. 19). If, however, the work is an addition, alteration or improvement, there are various procedural requirements that apply before the condominium can undertake the work, including the need for a resolution of the Board and, in some cases, the need for notice to the owners (section 97(2) and (3)). If the addition, alteration or improvement is substantial, at least 66 2/3 per cent of the owners must vote in favour of it (section 97(4)).

10 The Arbitrator concluded on the basis of the evidence before him that the window replacement work constituted repair and maintenance of the common elements. It was not an addition, alteration or improvement. He further concluded that the material used, while not identical, was reasonably close in quality to the original. As such, no formal notice or vote of the unit holders was required. The Board, in his opinion, acted prudently and in good faith.

11 The residents had been informed of the commencement of the window replacement program. No residents, except Mr. Kenedy, objected and all the residents, except Mr. Kenedy, permitted the contractor to enter the units so that the new windows could be replaced. The windows for Mr. Kenedy's unit have been purchased and are being held in storage.

Appeal of Arbitration Award

12 Section 45(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 provides for an appeal from an award of an arbitrator. Solmica submits that section 45(1) does not apply because the arbitration was not conducted as a result of an arbitration agreement; rather, it was conducted pursuant to an order of Lax J. that the dispute be arbitrated.

13 Section 2(3) provides that the Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act. Section 132(1) of the *Condominium Act, 1998* provides that agreements are deemed to contain a provision to submit a disagreement to mediation and, if a mediator has not obtained a settlement, to arbitration under the *Arbitration Act, 1991*. Section 134(1) provides for the right on an application to the Superior Court of Justice for an order enforcing compliance with the Act where the mediation processes and arbitration processes have not succeeded in obtaining compliance. In this case, Solmica refused to agree to arbitration and YCC therefore moved before Lax J. for an order.

14 This was, therefore, an arbitration conducted in accordance with the provisions of the *Condominium Act, 1998* and section 45(1) of the *Arbitration Act, 1991* applies.

15 That section provides that a party may appeal on a question of law, but the court shall grant leave only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

Importance of the Matters and the Effect on the Rights of the Parties

16 What is involved is the replacement of windows in a 22-unit condominium. The windows have already been replaced in all the units except for Mr. Kenedy's. The replacement was paid for out of YCC's reserve fund. The evidence is that all the unit holders except for Solmica were in favour of their replacement.

17 Solmica submits that important matters are at stake and a determination would have a significant effect on the rights of the parties for the following reasons:

* this is an important issue for all the unit owners because a large amount of money was spent;
* if the money had not been spent on replacing the windows, the maintenance fees could have been reduced;
* had the maintenance fees been reduced, it would have increased the saleability of the units;
* the replacement windows reduced the interior light and value of the property;
* if the award is overturned, other unit holders will be able to claim damages from YCC's board of directors;

18 While I appreciate that Mr. Kenedy feels that the replacement of the windows is a matter of importance, it is not, in my view, an important issue such that it justifies an appeal nor is a determination of this matter something that will significantly affect the rights of the parties. The evidence is that all the unit holders except Mr. Kenedy were in support of the repairs. All the windows have already been paid for, and all the windows except those in Mr. Kenedy's unit have been replaced.

19 As noted by Ground J. in *Denison Mines Ltd. v. Ontario Hydro* (2002), 61 O.R. (3d) 291 at 295 (Sup. Ct.), the phrase "will significantly affect" in section 45(1) of the *Arbitration Act, 1991* implies a future impact. There is no evidence of a future impact in this case. All of the windows except for Mr. Kenedy's have been replaced. They have already been paid for. The replacement of the windows was a discrete event. Even were Solmica to be successful in an appeal, it would not have a significant future impact on the parties or on their future relationship.

20 Notwithstanding my conclusion that leave should not be granted because the matters do not justify an appeal and a determination will not significantly affect the rights of the parties, I will consider whether there are questions of law in issue.

Questions of Law

21 An appeal lies only if there are questions of law in issue. Iacobucci J. set out the distinction between questions of law, questions of fact and questions of mixed law and fact in *Director of Investigation and Research v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 at 12 (S.C.C.) as follows:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

22 Noting that it was difficult to know exactly where the line should be drawn between fact and law, Iacobucci added at 13 that:

> ... in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

23 The decision of the Arbitrator in this case rests on a particular set of circumstances, that is, the replacement of windows in a particular condominium building, and whether that replacement constituted a repair or an alteration or improvement. The Arbitrator's determination is primarily fact-based. It is not a dispute involving a general proposition that amounts to a principle of law.

(i) Quality of Replacement Materials

24 Solmica submits that the Arbitrator erred in determining that the replacement of windows was done using material that was reasonably close in quality to the original as is appropriate to current construction standards without the respondent having provided evidence of what the current construction standards were.

25 The Arbitrator found that the materials used were reasonably close in quality to the original. This, in my opinion, is a determination of fact or, at most, one of mixed fact and law, in that the Arbitrator applied the test in section 97(1) of the *Condominium Act, 1998* to his factual findings.

(ii) Repair or Alteration?

26 It is Solmica's position that the Arbitrator erred in determining that the replacement of the windows did not fall within section 97(3) of the *Condominium Act, 1998*, which deals with an addition, alteration or improvement.

27 The Arbitrator's conclusion that the replacement was a repair and not an addition, alteration or improvement is, in my opinion, a determination of mixed fact and law, in that he made findings of fact with respect to the replacement of the windows and applied the legal definitions in section 97 to those findings in order to reach his conclusion.

(iii) Failure to Record Minutes or Pass a Resolution

28 Solmica submits that the Arbitrator erred in failing to take into account the failure of YCC to record Board minutes or to pass a resolution to authorize the replacement of the windows. However, having concluded that the replacement was a repair or maintenance, there was no requirement to record board minutes or to pass a resolution. Again, this was a matter of mixed law and fact.

(iv) CMS Report

29 The CMS report was a study of the condominium's reserve fund, as required by section 94 of the *Condominium Act, 1998*. It was conducted after the replacement of the windows. YCC presented in evidence an excerpt from the report that related to the windows. The rest of the report was not before the Arbitrator.

30 Solmica has several concerns with respect to this report: the Arbitrator refused to require the respondent to produce the full report and relied, instead, on an excerpt; he did not assess the prejudice that Solmica may have suffered in not having the full report; he prejudged the contents of the report; and he did not adjourn the proceedings in order to obtain the report.

31 The Arbitrator concluded that the balance of the reserve fund study was not relevant to the proceedings because it did not deal with the windows. The part of the report that was presented in evidence was the part that referred to the windows. The Arbitrator did not refer to any portion of the report in his decision.

32 Solmica submits that the Arbitrator's actions constitute a denial of natural justice. It cited the case of *Bensuro Holdings Inc. v. Avenor Inc.*, [2000] O.J. No. 1188 at para. 8 (Sup. Ct.) as authority for the proposition that where documents have a "semblance of relevancy," they should be disclosed. Also cited was the dissent of Laskin J.A. in *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 at 501 (C.A.), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 348, in which he stated that a failure of disclosure could constitute a breach of natural justice and therefore a jurisdictional error. He was satisfied that disclosure of the report in question was "sufficiently important to the fairness and appearance of fairness" such that refusal to disclose was a breach of the duty to act fairly. However, Finlayson J.A. (Brooke J.A. concurring) indicated at 490-491 that it was not clear that a refusal to order production of documents constituted a denial of natural justice.

33 The denial of natural justice is reviewable as a matter of law. However, not every rejection of evidence is a denial of natural justice. As noted by Lamer C.J.C. in *Université du Québec à Trois-Rivières v. Larocque* (1993), 101 D.L.R. (4th) 494 at 508 (S.C.C.) in the context of a grievance arbitration:

> A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding leading unavoidably to the conclusion that there has been a breach of natural justice.

34 The Arbitrator's decision with respect to the rest of the CMS report stems from his determination that it was not relevant to the matter before him. This determination, in my opinion, is a matter that is mixed fact and law, that is, he applied the legal test of relevance to the factual evidence before him. The possibility of a breach of natural justice does not arise in view of the determination that the rest of the report was not relevant.

(v) Failure to Draw Negative Inferences

35 Solmica submits that the Arbitrator erred by failing to draw negative inferences from the following: the CMS report was prepared after the decision to replace the windows was made; YCC failed to produce any reports on the deterioration of the windows; and YCC failed to introduce documents referred to in the evidence of Steven Woodhouse.

36 The Arbitrator was in the best position to assess the relevance and sufficiency of the evidence before him. He was satisfied that there was sufficient evidence to conclude that the replacement of the windows constituted repair or maintenance. This is not, in my opinion, solely a matter of law, but is one of mixed fact and law, that is, applying legal principles to the facts.

Conclusion

37 It is therefore my conclusion that the issues raised are not of sufficient importance to justify granting leave to appeal nor will their determination significantly affect the rights of the parties. In addition, there are no questions of law at issue.

38 Solmica's application for leave to appeal and to set aside the Award is therefore dismissed.

39 If the parties cannot come to an agreement with respect to the disposition of costs, they may make brief written submissions to me. YCC's submissions should be provided within 15 days of the release of this decision and Solmica's submissions should be provided within 15 days thereafter.

T.P. HERMAN J.

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