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Case Name:

York Region Condominium Corp. No. 889 v. York Region Condominium Corp. No. 878

RE: York Region Condominium Corporation Number 889 and York Region Condominium Corporation No. 872, Appellants, and York Region Condominium Corporation Number 878, Respondent

[2008] O.J. No. 1743

Court File Nos. 07-CV-344046PD3 and 07-CV-344542PD3

Ontario Superior Court of Justice

A. Pollak J.

Heard: May 1, 2008.
Judgment: May 5, 2008.

(26 paras.)

Counsel:

Mark H. Arnold, for the Appellant.

Marko Djurdjevac, for the Appellant York Region Condominium Corporation Number 872.

Carol Dirks, for the Respondent York Region Condominium Corporation No. 878.

ENDORSEMENT

1 **A. POLLAK J.**:-- The Appellants are seeking an Order setting aside the arbitral award of arbitrator Stephen R. Morrison (the "Arbitrator") in an arbitration proceeding pursuant to s. 132 of *The Condominium Act, 1998* and pursuant to a Reciprocal Agreement (the "Agreement") dated in 2000 between the parties to the Appeals.

2 Reasons for Judgment of the Arbitrator dated September 21, 2007 (the "Reasons") and Supplementary Reasons for Judgment are dated October 25, 2007 ("Supplementary Reasons"). The Appellants appeal pursuant to s. 45(2) of *The Arbitration Act, 1991* on the grounds that the Arbitrator has committed errors of law.

3 The facts and background of the Issues placed before the arbitrator are set out in arbitrator Morrison's Reasons.

4 The Respondent York Region Condominium Corporation Number 878 (the "Apartment Condominium") commenced arbitration proceedings pursuant to the Agreement.

5 The Apartment Condominium, pursuant to the agreed to procedure submitted the relief requested in its claims in a Statement of Claim. The parties agree that the terms of submission to arbitration were to be governed as nearly as possible as if the action were commenced in the Ontario Superior Court of Ontario pursuant to the *Rules of Civil Procedure*.

6 York Region Condominium Corporation Number 872 (the "Townhouse Corporation") and York Region Condominium Corporation Number 889 (the "Commercial Condominium") brought Motions before the arbitrator to strike out certain portions of the Statement of Claim and to obtain rulings on questions of law which arose out of the Statement of Claim with the intent of disposing of all or part of the proceedings pursuant to Rule 21.01(a) and 21.01(3) of *The Rules of Civil Procedure*:

(a) 21.01(a) provides that a party may require a determination before trial of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in substantial savings of costs;
(b) 21.01(3) provides that a party may request a judge to dismiss an action on the ground that the Court has no jurisdiction over the subject matter of the action.

The arbitrator struck out certain portions of the Statement of Claim, but refused to strike out other portions. The Appellants appeal the refusal of the Arbitrator to strike out the other portions.

7 The parties are agreed that on an Appeal regarding a question of law pursuant to *The Arbitrations Act*, the standard of review is correctness. On page 7 of the Reasons the Arbitrator summarizes the claims of the Apartment Condominium with respect to the issue of the cost-sharing schedule and in particular, at page 8, in the first full paragraph, the Arbitrator summarizes the nature of the complaint of the Apartment Condominium with respect to the cost-sharing schedule.

8 The relief claimed by the Apartment Condominium with respect to the cost-sharing schedule is set out in the first full paragraph of page 9 of the Reasons.

9 The Appellants argued that the Arbitrator had no right as a matter of law to interfere with the allocation of the costs set out in Schedule "A" of the Agreement, for "to do so would be re-writing a binding contract agreement freely entered into by three consenting parties".

10 The Arbitrator disagreed with the Appellants and held that:

> "I do not agree that I am being asked to re-write the contract, which I agree is not within the mandate of the court or an Arbitrator. Rather, I believe that I am being asked to enforce this Reciprocal Agreement.
>
> Two alternative approaches emerge from the pleading. First, the Apartment Condominium alleges a breach of the contract terms by the responding Condominium Corporations. In particular, I am being asked to find that the responding Condominium Corporations are exercising their majority position to the disadvantage of the Apartment Condominium in a manner inconsistent with their "commitment to work together in good faith in a spirit of co-operation for the benefit of the community of the unit holders ... in a manner similar to the result that would have been achieved had the Shared Facilities been common elements of one condominium corporation and had the members of the Shared Facilities Committee been the Board of Directors of a single corporation".

11 The Arbitrator further held that:

> "although the definition of Proportionate Share merely empowers rather than requires the parties to make an adjustment to the cost allocation schedule, <u>if it appears that they are refusing to exercise that power for an improper purpose or in a manner that constitutes a breach of their duties under that contract, in those circumstances, the choice of the word "may", rather than "shall", may constitute a distinction without a difference</u>.
>
> Since the allegations in the Statement of Claim would support the conclusion that the Respondent Condominium Boards are not complying with the Agreement in this respect, it would remain for me to determine what remedies were then available to correct such a breach? It is not plain and

> obvious to me that the combination of a declaration relating to inequities in the existing schedule coupled with an award of damages related to past overpayments arising out of those inequities would not be appropriate remedies that would meet the needs of the Apartment Condominium. If the combined Boards refuse to take action based on the declaratory relief, that might open other avenues of relief to the aggrieved party."

12 At page 11 of the decision, the Arbitrator concludes that:

> "I have little doubt that, as Arbitrator operating under the terms of this Agreement as supplemented by *The Arbitration Act, 1991* and in particular s. 31 thereof, have the jurisdiction and the authority to make the declaration requested, to adjust the schedule and if appropriate to award damages with respect to past overpayments, if based on the evidence presented to me I can prove that such relief is warranted".

13 The Arbitrator further stated at page 12 of his Reasons that:

> "I may find that all parties have made every good faith effort to resolve this dispute, but have simply been unable to find common ground. That will not necessarily end the matter, however, as the evidence may persuade me that nonetheless, inequity exists. Or, I may conclude that the Respondent Corporations have acted in bad faith in their dealings with the Apartment Condominium, but that based on the evidence presented, the current cost allocation does not merit amendment or adjustment."

14 The Arbitrator in his Reasons held that he had jurisdiction to grant the relief requested in paragraph 1(c), 1(d), and 1(e) of the Statement of Claim which set out the relief as follows:

> "(c) An Order that the allocation of the Proportionate Shares contained in Schedule "A" of the Reciprocal Agreement be adjusted or amended to correct any disadvantage or onerous impact on YRCC 878 which is not shared by YRCC 872 and YRCC 889;
>
> (d) Further, or in the alternative, an Order appointing an expert to report to the arbitrator on any adjustment, or amendment of the allocation of the Proportionate Shared contained in Schedule "A" of the Reciprocal Agreement to correct any disadvantage or onerous impact on YRCC 878 which is not shared by YRCC 872 and YRCC 889;
>
> (e) An Order direction YRCC 872 and YRCC 889 to reimburse YRCC 878 for all monies paid by it in excess of the adjusted or amended Proportionate Shares determined in paragraphs c and/or d above in the amount of $700,000.00 or such other amounts as are proven at the arbitration hearing, together with pre-judgment and post-judgment interest in accordance with the Courts of Justice Act."

15 I agree with the Appellants that the Arbitrator erred in law in determining that he has jurisdiction to award the relief requested by the Apartment Condominium set out in paragraphs 1(c), (d) and (e) of the Statement of Claim and order that these paragraphs be struck from the Statement of Claim. The Agreement between the parties clearly indicates that the "parties hereto **may**, from time to time, agree to adjust or amend the allocation of any shared cost item by a memorandum in writing, properly executed by the parties hereto, including, if the parties agree to do so, the updating and replacement of Schedule "A"".

16 The Arbitrator relies on the preamble to the Agreement to interpret the definition of "Proportionate Share" to permit the adjustment of the Proportionate Share set out in Schedule "A" if the intent of the preamble is breached. This is an error of a basic principle of interpretation of contracts that one must give effect to the plain meaning of the words chosen by the parties. The parties clearly intended that the provisions of Schedule "A" be negotiated between themselves if any amendments were to be made. There is no suggestion anywhere else in the Agreement that an Arbitrator would have the power to make a change to the Schedule on the basis of an argument that one party was in breach of the Agreement.

17 I agree with the Arbitrator in his refusal to strike out the remedy requested in paragraph 1(n) of the Statement of Claim. The Arbitrator held at page 15 of his Reasons:

> "If I were to find that any of the Condominium Corporations had acted in bad faith or unfairly in the execution of their duties under this contract, I would not need to have recourse to the oppression remedy to grant whatever relief was necessary under the contract."

The Statement of Claim does refer to the bad faith of the Townhouse Condominium and the Commercial Condominium in the execution of its duties pursuant to the Agreement between the parties.

18 The parties agreed that the Statement of Claim must be given a liberal interpretation with respect to Motions pursuant to Rule 21. Similarly, the fact that the Statement of Claim does not use the word declaratory relief but refers to an Order for certain relief, is not sufficient to constitute an error of law by the Arbitrator when he held that he has the authority to grant declaratory relief although the words declaratory relief were not used in the Statement of Claim.

19 For the reasons set out in the above paragraphs, 1(d) and 1(e) of the Statement of Claim also ought to be struck out, and I so Order.

20 Counsel for the Apartment Corporation raised the issue of a request for relief at arbitration being made with respect to the mis-characterization of certain items in Schedule "A" by the Townhouse Condominium and the Commercial Condominium. The argument that certain items have been improperly allocated to the proportionate share of Schedule "A" would be properly made before the Arbitrator and the Arbitrator would clearly have jurisdiction to determine whether items were properly characterized under the different headings of Schedule "A". The Arbitrator does not have jurisdiction to alter the percentages or categories set out in Schedule "A". The Arbitrator can however interpret whether the provisions of Schedule "A" of the Agreement are being adhered to by the parties.

21 With respect to issues regarding the "management unit" that were raised exclusively by the Townhouse Corporation, the Arbitrator held in his Supplementary Reasons that the relief sought in paragraph 2 of the Statement of Claim alleging a failure to pay a proportionate share of the expenses associated with the use of the management unit ought to remain. The Arbitrator agreed with the Apartment Condominium that the costs associated with the operation, maintenance and administration of the management unit are included within the "defined Shared Facilities Costs, which may prove more than just the share of common expenses currently associated with that unit."

22 The Townhouse Corporation argues that the Arbitrator committed an error of law in holding that the costs associated with the operation, maintenance and administration of the management unit were included in the definition of "Shared Facilities Costs". Counsel for the Townhouse Corporation did not support that allegation either in his Factum or during oral argument. I do not agree that the Arbitrator committed an error of law in this regard.

23 The Townhouse Condominium also argued the fact that the owner of the management unit was not a party to the proceedings was an impediment to the Arbitrator's right to proceed with this relief as it affected a third party who was not a party to the proceeding. The Arbitrator held that "as the head of relief involves only a dispute between the parties to the Reciprocal Agreement, I do not regard the current owner of the management unit as a necessary party for its resolution". I agree with the Arbitrator.

24 Finally, the Townhouse Condominium submits that the Arbitrator committed another error in law in his award of costs. The reasons for the Arbitrators costs award are set out in his decision dated November 12, 2007 (the "Costs Award"). I do not agree that the Arbitrator made an error of law on his costs award.

25 On the basis of the above, the awards of the Arbitrator with respect to paragraph 1(c), (d), and (e) of the Statement of Claim are set aside and these paragraphs are hereby struck from the Statement of Claim.

Costs

26 Subject to any agreement between the parties and on the request of the parties, brief written submissions on costs are to be made within thirty (30) days of the release of these reasons.

A. POLLAK J.

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