CITATION: York Condominium Corporation No. 76 v. 10 The Marketplace Limited, 2024 ONSC 4305
COURT FILE NO.: CV-22-00682916
DATE: 2024-08-01

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
YORK CONDOMINIUM CORPORATION NO. 76	)	*Antoni G. Casalinuovo and Yulia Pesin*, for the Applicant
Applicant	)	
– and –	)	*Ian J. Cantor*, for the Respondent 20 The Marketplace Limited and Pinedale Properties Ltd**.**
20 THE MARKETPLACE LIMITED, CRESCENT TOWN CLUB INC., PINEDALE PROPERTIES LTD.	)	
Respondents	)	*John Richardson*, for the Respondent Crescent Town Inc.
	)	**HEARD:** May 23, 2024

PAPAGEORGIOU J.

REASONS FOR DECISION

Overview

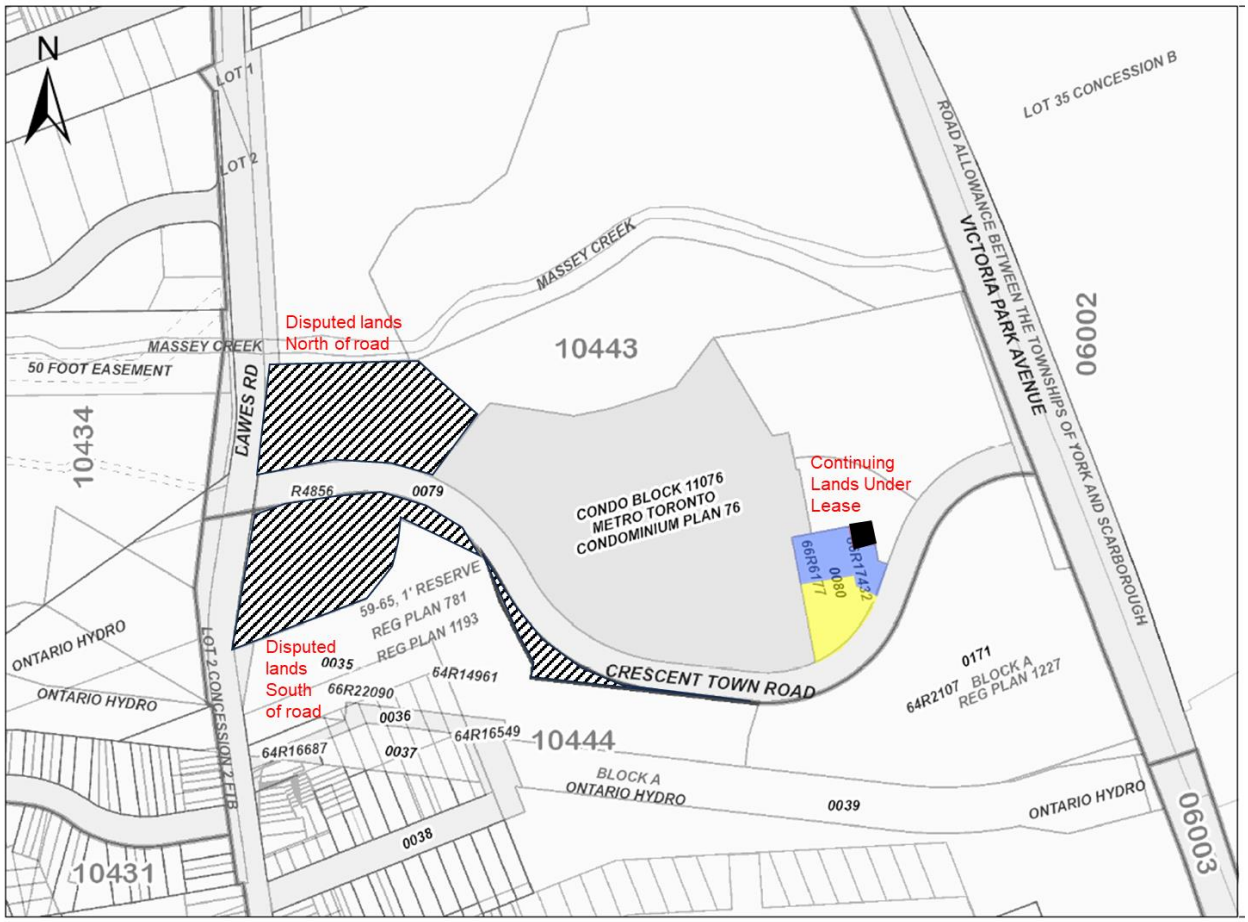
[1] This matter is a dispute between the Applicant Condominium Corporation, York Condominium Corporation No. 76 ("YCC76"), and the Respondents in respect of land over which YCC76 claims a leasehold interest (the "Disputed Lands") and/or other rights/interests.

[2] In the 1960's and 1970's a group of development companies (the "Original Owners") built condominiums and a high-rise rental complex in Toronto known as the Crescent Town on a seven-acre property they owned (the "Entire Property"). As part of this development, and to obtain the approval of zoning changes that would permit greater density, the Original Owners entered into a contract with the Corporation of the Borough of East York (the "Borough") which set out various obligations. One of these obligations was that the Original Owners would provide recreational, athletic and daycare facilities (the "Community Facilities").

[3] This was operationalized through the creation of the nonprofit corporation, the Respondent Crescent Town Club Inc. ("CTC"), which was incorporated to operate the Community Facilities. CTC then leased the property upon which Community Facilities were built from the Original Owners. The Demised Property covered by the lease included two additional pieces of the Property along the western border which I have defined as the Disputed Lands. The Lease term was for 99 years and expires on October 14, 2071.

[4] The Crescent Town development resulted in three residential rental buildings (the "Rental Buildings") plus three condominium building towers and three townhouses (the "Condominium Buildings"). The Condominium Buildings have approximately 5,000 residents and the Rental Buildings house a similar number of residents.

[5] The following is a diagram that shows the outline of the Entire Property that the Original Owners owned, the Condominium Buildings and the Rental Buildings it constructed, the Community Facilities and the Disputed Lands. Notably, the Disputed Lands are on the West border of the Entire Property, on either side of Crescent Town Road, while the Community Facilities are on the East side, adjacent to the Condominium Buildings Block. The lands that house the Community Facilities are shaded completely. The Disputed Lands are shaded in stripes.



[6] In or around 1998, the Respondent Pinedale Properties Ltd., ("Pinedale") became the successor to the Original Owners. It is now the beneficial owner of the Rental Buildings and the Disputed Lands. The Respondent 20 the Market Place Limited ("TMP") is the registered owner and it holds the Disputed Lands and Rental Buildings in trust for Pinedale.

[7] CTC and TMP have purported to amend the Lease to release the Disputed Lands from the Lease, in exchange for the payment of $500,000 by Pinedale and TMP to CTC.

[8] YCC76 brings this Application seeking various Orders that will prevent this. YCC76's primary objections to the Lease Amendment relate to concerns over development and intensification of the Disputed Lands as well as allegations that Condominium owners use the Disputed Lands for recreational and athletic purposes.

Decision

[9] For the reasons that follow I am dismissing YCC76's Application.

Issues

Issue 1: Does YCC76 have a leasehold interest in the Disputed Lands?

Issue 2: Should the approval of the Lease Amendment by CTC's Board of Directors be invalidated pursuant to s. 41 of the *Ontario Not For Profit Corporations Act*, 2010, S.O. 2010, c. 15 ("ONCA")?

Issue 3: As a matter of contract, did the Lease Amendment have to be approved by the unanimous CTC Board?

Issue 4: Have any of the Respondents conducted themselves in a manner that is oppressive with respect to the Lease Amendment such that this Court should make an Order unwinding the purported amendment?

Analysis

Principles of Contractual Interpretation

[10] Before addressing the matters in dispute, I set out the principles of contractual interpretation which is a search for the parties' objective intentions. A court must take a practical, common-sense approach not dominated by technical rules of construction. It must read a contract as a whole, giving words their ordinary grammatical meaning in accordance with sound commercial purposes and good business sense, and taking into account surrounding circumstances known or reasonably known to the parties at the time of the contract: *Sattva Corp v. Creston Moly Corp*., 2024 SCC 53, at paras. 47-57.

Issue 1: Does YCC76 have a leasehold interest in the Disputed Lands?

[11] I conclude that YCC76 **does not** have a leasehold interest in the Disputed Lands.

[12] YCC76 claims a leasehold interest by virtue of three agreements that are registered on title.

[13] The effect of registration is set out in s. 78(4) of the *Land Titles Act*, R.S.O. 1990, c. L.5:

> When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create transfer, charge or discharge as the case requires, the land or estate or interest therein mentioned in the register.

[14] The mere fact of registration does not create an interest in land. If that were the case, anyone could create an interest in land from the mere fact of registration. Rather, whether such interest is created and in favour of whom depends upon the nature and intent of the instrument.

[15] There is nothing in these agreements, properly interpreted in accordance with well accepted principles of contractual interpretation, which creates any leasehold interest in favour of YCC76.

The Master Agreement

[16] On December 10, 1968, the Original Owners entered into an agreement with the Borough which set out the terms of the Borough's support of the zoning changes required to permit the construction project (the "Master Agreement").[1] YCC76 had not been incorporated yet and is not a party to the Master Agreement. Therefore, even if the Master Agreement created a leasehold interest, YCC76 could not claim it.

[17] In any event, the Master Agreement does not create a leasehold interest in favour of anyone. The word lease is not even used anywhere in the document and YCC76 could not point to any language that would create such an interest.

[18] What the Master Agreement did is impose certain obligations on the Original Owners regarding how they could develop the Entire Property. While section 22 did compel the Original Owners to construct a permanent social and recreational space (the "Community Facilities"), it did not require the dedication of any land to be used as a greenspace or a park as claimed. Pursuant to section 3 of the Master Agreement, the Original Owners contributed $293,400 to a Borough Acquisition Fund to be spent for the purpose of parks in such community or communities as the Borough in its discretion might deem appropriate. There are no provisions that make any specification with respect to any portion of the Entire Property to be dedicated for this purpose.

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[1] There were three additional agreements in respect of such issues, but I have been advised that they are illegible and as such, not in evidence

[19] I also reject the argument that s. 7(p) of the Master Agreement preserves the Disputed Lands for the benefit of YCC76.

[20] Section 7 required the Original Owners (as Developer) "to comply with the following conditions and provisions". One of these is set out in s. 7(p) and states that the Original Owners must "preserve and maintain the lands adjoining the Massey Creek along the northerly limits of the said site unencumbered or otherwise occupied by any building or structure and, save as otherwise hereinafter provided" to not excavate on the land, deposit soil, sand, rock or other material in the valley lands or uproot or otherwise demolish or destroy trees or shrubs. This is reasonably interpreted as being an agreement that the Original Owners would neither develop, nor affect these lands when it constructed the Condominium and Rental Buildings; however, there is no evidence before me that the land referenced in s. 7(p) is the same land as the Disputed Lands.

[21] The description of the land in s. 7(p) suggests that this section referenced a different and/or larger part of the Entire Property because it referenced land adjoining the Massey Creek along the northerly limits. Based upon the diagram of the Entire Property that is in evidence, at least half of the Disputed Lands do not adjoin the Massey Creek along the northerly limits.

[22] Even if s. 7(p) includes part of the Disputed Lands, it still would not create a leasehold interest in favour of YCC76, who did not exist at the time.

The CTC Agreement

[23] On September 20, 1972, CTC was incorporated to be the company that would maintain and operate the Community Facilities that the Original Owners were required to build.

[24] On October 15, 1972, the Original Owners then entered into an agreement with YCC76, CTC and others (the "CTC Agreement").

[25] The surrounding circumstances for the CTC Agreement are the development that had taken place, the Master Agreement registered on title, and the Lease that was being negotiated concurrently with the CTC Agreement.

[26] The CTC Agreement set out various obligations of the parties including: i) CTC's agreement to operate the Community Facilities that had been mandated by the Master Agreement; ii) perform any obligations under the Lease below; iii) the fact that those renting in the Rental Building as well as those who purchase Condominiums would be entitled to a free membership in the Community Facilities; iv) how CTC's board would be established; v) that CTC would be non-profit; and vi) that the Original Owners and YCC76 would share the expenses associated with the Community Facilities on a 50/50 basis.

[27] There is nothing in the CTC Agreement that creates a leasehold interest in favour of YCC76. Given the Lease was negotiated at the same time, had the parties had an intention to create a leasehold interest in favour of YCC76, they could have done so in the Lease itself.

The Lease

[28] On October 15, 1972, CTC and the Original Owners entered into a lease of the property on which the Community Facilities were built (the "Lease"). As noted above, the Lease also included the Disputed Lands.

[29] YCC76 is not a party to the Lease. I reject YCC76's argument that it has a leasehold interest because it is one half the owner of CTC. YCC76 provided no caselaw where a shareholder of a corporation, or a member of a nonprofit corporation who entered into a lease, had a leasehold interest by virtue of that partial ownership. This would be contrary to the principle of separate corporate identity and to the doctrine of privity of contract.

[30] I note here again that the Lease between CTC and the Original Owners is dated the exact same date as the CTC Agreement and YCC76 had its own delegates on CTC's Board and was also a 50 % owner of CTC. Had the parties wanted to create a leasehold interest in favour of YCC76, they could have done so expressly in the Lease of the same date.

Issue 2: Should the approval of the Lease Amendment by CTC's Board of Directors be invalidated pursuant to s. 41 of the ONCA?

[31] I conclude that there is insufficient basis to set aside the approval by CTC's Board of Directors pursuant to s. 41 of the ONCA.

Section 41

[32] CTC is a not-for-profit corporation governed by ONCA. Its directors and officers are required to comply with ONCA, its incorporating documents and its by-laws.

[33] At CTC's Board meeting of December 9, 2021, the Chair of CTC's Board, Mr. Walter-Connoy, advised that Pinedale was prepared to make a payment to CTC if the Disputed Lands were released from the Lease by CTC. The CTC Board discussed this subject again on January 27, 2022.

[34] There were additional discussions about Pinedale/TMP's desire to have the Disputed Lands released in exchange for a payment.

[35] Then, on March 23, 2022, Pinedale/TMP offered the Lease Amendment that purported to release the Lands from the Lease in exchange for the payment of $500,000.

[36] YCC76 objected to the acceptance of the Lease Amendment on the basis that the Lands were used and enjoyed as open space physical facilities by YCC76's owners and residents.

[37] On April 28, 2022, CTC held a Board meeting. After discussion of YCC76's objections to the Lease Amendment, CTC's Board held a vote.

[38] Pursuant to CTC's By-Laws, its affairs and business are managed by an eight-member Board of Directors consisting of:

a. two City of Toronto representatives;

b. two TMP representatives;

c. two apartment building tenant representatives; and

d. two YCC76 representatives.

[39] The Board approved the Lease Amendment at the April 28, 2022 meeting. There were three votes in favour from the two apartment building tenant representatives and one City of Toronto representative (one City of Toronto seat was vacant).

[40] The two Pinedale/TMP representatives, Mr. Walter-Connoy and Mr. Gambelic were present, but they abstained from the vote. It is undisputed that Mr. Walter-Connoy is the director of finance at Pinedale and Mr. Gambelic is a senior property manager at Pinedale. As well, Mr. Walter-Connoy was one of three individuals at Pinedale who spearheaded the Lease Amendment.

[41] Section 41(1) provides as follows:

> (1) A director or officer of a corporation who,
>
> > (a) is a party to a material contract or transaction or proposed material contract or transaction with the corporation; or
> >
> > (b) is a director or an officer of, or has a material interest in, any person who is a party to a material contract or transaction or proposed material contract or transaction with the corporation,
>
> shall disclose to the corporation or request to have entered in the minutes of meetings of the directors the nature and extent of his or her interest.

[42] Pursuant to s. 41(5), where the criteria in s. 41(1) apply, the party referred to shall not attend any part of a directors meeting during which the proposed transaction is discussed and they also may not vote on such contract or transaction.

[43] Pursuant to s. 41(11), if a director fails to disclose an interest in a material contract or transaction in accordance with s. 41(1), the corporation can apply to the court for an order setting aside the contract or transaction and directing that the director or officer account to the corporation for any profit or gain realized and upon such application, the court can make any order it thinks fit.

[44] YCC76 argues that the Board vote should be set aside pursuant to s. 41 of ONCA because even though Mr. Walter-Connoy and Mr. Gambelic abstained from the vote, they were still present at the meeting with Mr. Walter-Connoy contributing to the discussion.

[45] This argument fails for the following reasons:

- Although YCC76 argues that s. 41 is applicable because Mr. Walter-Connoy and Mr. Gambelic have a non-arm's length relationship with Pinedale and/or TMP, that is not the test pursuant to s. 41 set out above. The test is whether Mr. Walter-Connoy and Mr. Gambelic are: i) directors or officers of Pinedale and/or TMP; ii) whether they have a material interest in Pinedale and/or TMP; or iii) whether they are a party to the Lease Amendment.

- **Directors and officer of Pinedale or TMP?** Mr. Walter-Connoy and Mr. Gambelic are not (and have never been) officers or directors of either Pinedale or TMP. The corporate profile reports do not list them as such. They are only employees of Pinedale. In response to a Request to Admit on this issue, YCC76 maintained that "it did not have sufficient information as of the date of this Reply to be able to admit or deny that neither Walter-Connoy nor Gambelic was at any time a director or officer of [TMP] or Pinedale".

- **Parties to the Lease Amendment?** In response to a Request to Admit, YCC76 admitted that Mr. Walter-Connoy and Mr. Gambelic were not direct parties to the Lease Amendment. Although YCC76 argued that Mr. Walter-Connoy and Mr. Gambelic are indirect parties to the Lease Amendment, they did not establish this.

- **Material Interest in Pinedale and/or TMP?** Although YCC76 maintains and argues that Mr. Walter-Connoy and Mr. Gambelic have a material interest in Pinedale and/or TMP, they did not establish this.

- As such, Mr. Walter-Connoy and Mr. Gambelic did not have any anything to disclose pursuant to s. 41(1) because it did not apply.

- In any event, they did abstain and declare a conflict of interest as is reflected in the Board Minutes. They indicate that this was out of an abundance of caution.

- Furthermore, it was well known from the CTC Agreement that CTC was controlled 50% by YCC76 and 50% by the Original Owners (now TMP/Pinedale). It was also well known from the CTC Agreement that CTC's Board would be composed of delegates appointed by YCC76 as well as delegates appointed by the Original Owners (now TMP/Pinedale) who continued to own the Rental Buildings.

- Notably, Mr. Walter-Connoy's email dated February 17, 2022, to CTC enclosing the Offer to Amend the Lease was sent from his Pinedale email address. In it he provided a written draft and referred to it as "our" offer. If the relevant parties did not already know of Mr.

> Walter-Connoy's and Mr. Gambelic's affiliation with Pinedale, the offer put them on notice.

Issue 3: As a matter of contract, did the Lease Amendment have to be approved by the unanimous CTC Board?

[46] I reject the argument that the Lease or CTC Agreement required the Lease Amendment to be approved by a unanimous vote of CTC's Board such that the failure to approve the Lease Amendment by unanimous vote is a defect in corporate governance.

[47] YCC76 argued that a relevant surrounding circumstance is that the Original Owners obtained approval for rezoning to increase the permitted density of the development in exchange for their agreement to provide the Community Facilities and "parklands". This is partially incorrect. As set out above, the Master Agreement did not require the dedication of "parklands", only Community Facilities. Although I agree that the Master Agreement is a surrounding circumstance, YCC76 has not persuasively articulated how the Master Agreement, or history of concessions that the Original Owners made, is relevant to the contractual interpretation issues. The fact that the Original Owners agreed to provide Community Facilities in exchange for zoning changes does not assist YCC76. The problem that YCC76 continues to face is that it cannot point to an agreement that required the dedication of "parklands" or that created a leasehold interest.

The Lease Permits Amendments Without YCC76's Consent.

[48] The plain and ordinary meaning of sections 35 and 46 of the Lease is that the Lease could be amended as long as CTC and the Original Owners agreed to such change:

> 35. It is mutually agreed between the parties hereto respectively that [CTC] shall not, during the said term of the Lease and/or any renewal thereof, sublet or transfer the demised premises, or any part thereof, or part with, or share the possession of occupier of the demised premises, or any part thereof, or assign any of the benefits or obligations of the Lease to any person or persons whomsoever without having first obtained the consent in writing of [the Original Owners] which shall not be unreasonably withheld; and provided that no such consent shall relieve [CTC] of [CTC's] liabilities for the due observance and performance of all or any of [CTC's] covenants and obligations hereunder.
>
> […]
>
> 46. This Indenture shall not be modified or amended except by an instrument in writing of equal formality herewith and signed by the parties hereto or by their respective successors and assigns.

[49] These provisions did not require YCC76's consent to any such amendment. YCC76 did not articulate any other parts of the Lease or surrounding circumstance that would impact this interpretation.

CTC's By-Laws

[50] CTC's By-Laws direct that CTC matters are to be decided by majority, not unanimous vote.

The CTC Agreement Only Requires a Unanimous Vote Where YCC76 Can Show Prejudice.

[51] Section 9 of the CTC Agreement does not assist YCC76 either.

[52] Section 9(c) provides as follows:

> Without the unanimous consent of each of the Owners, [CTC] shall not be permitted to:
>
> take any action that will prejudice the position, financial or otherwise of any of the Owners [defined to be YCC76 and the Original Owners, now Pinedale and TMP].

[53] I reject the argument that s. 9(c) means that YCC76 has the unilateral right to assert that something is prejudicial to it, without proof, such that whenever it does so, a unanimous vote is required. The plain and ordinary meaning of the words do not support this. This would also be a commercially unreasonable interpretation, particularly given the Lease, which is a surrounding circumstance and which permits amendments without YCC76's consent.

[54] Further, if YCC76 is correct in this interpretation, it would mean that each of the Owners (YCC76 and TMP/Pinedale) could require every single vote to be unanimous simply by asserting prejudice, thus undermining the By-Law that provides for majority vote. This is also a commercially unreasonable interpretation.

[55] It is also relevant that s. 9(c) uses the mandatory term "will", as opposed to the permissive "may", or "might" or "could". This confirms the parties' objective intention that YCC76 must demonstrate actual prejudice, not just speculative prejudice.

[56] Given the Lease and the By-Law, had the parties wanted to create a contractual obligation that all amendments to the Lease or amendments that relate to the Disputed Lands could only be made by unanimous vote, they would have said so clearly in the Lease.

[57] Thus, reading the CTC Agreement as a whole, in light of the Lease that expressly permitted amendments without YCC76's consent, as well as the By-Laws, for a unanimous vote to be required, YCC76 had to show that the Lease Amendment would prejudice its position, financial or otherwise.

[58] It failed to do so:

a. YCC76 has never had any right to use the Vacant Lands. Rather, any right to use the Vacant Lands belonged to CTC by virtue of the Lease. The basis for the argument that YCC76 is prejudiced by losing a right it never had is unclear.

b. To the extent that it claims this on behalf of Condominium owners, they also did not have the right to use the Vacant Land unless they joined the Community Facilities.

c. Even if YCC76 could advance such a claim on its own behalf or on behalf of owners, it still has not proven prejudice.

d. While its affiant Mr. Gupta says that the Vacant Lands are used for recreational purposes, there is no other Condominium owner (among some 5,000 residents) or other individual attesting to this; nor are there any details as to Mr. Gupta's observations of Condominium owners using the Vacant Land in this regard. He simply makes a bald statement. No one who is a member of the Community Facilities, with a right to use the Vacant Lands, has sworn an affidavit in support of YCC76's Application.

e. Although YCC76 asserts that these are "parklands", the Disputed Lands do not contain any parkette, playground equipment, benches, playing fields or any other physical structures that would facilitate any recreational, athletic or social activities.

f. There are two genuine public parkland facilities—Detonia Park and Taylor Creek Park—in the immediate vicinity readily available for use by YCC76's Condominium owners.

g. The Disputed Lands are not contiguous to the Community Facilities but instead are located some distance away. These lands have not been used by CTC to deliver any part of its mandate. Although the third recital to the Lease indicates that the Master Agreement required the Original Owners to make the "lands hereinafter demised available for recreational purposes to the residents of Crescent Town," the Master Agreement did not require Vacant Land to be used for recreational purposes, only the Community Facilities, which would have to be upon land. In my view, this is what this recital is referring to, taking into account one of the surrounding circumstances—the Master Agreement. It is unclear why the Disputed Lands were included in the Lease given the Master Agreement did not require any "parklands" and given that the Community Facilities were not located on the Vacant Lands.

   The third recital of the CTC Agreement of the same date, provides further support for this conclusion because it defines the facilities and lands as the "recreational and day-care centre **premises**" [Emphasis added]

> AND *WHEREAS* by a lease of even date herewith **Howard Investments has leased to the Club the said recreational, athletic and day-care centre facilities and lands to be used in connection therewith (which**

> **recreational, athletic and day-care centre facilities and lands are herein referred to as the "recreational and day-care centre premises"***)*, and it is a condition of the granting of the said lease that the Club maintain and operate the recreational and day-care centre premises as required under the said agreements with The Corporation of the Borough of East York and Ontario Housing Corporation and Housing Corporation Limited, and provide such further facilities as the Club from time to time shall determine. [Emphasis added]

h. In any event, the Disputed Lands have not been used by CTC to deliver any part of its mandate and there is no evidence that they have ever been used in connection with the Community Facilities. In a letter dated April 13, 2022, to CTC from YCC76's then president, Beth Edwards, she stated "This land is at a distance from the Club premises and of no consequence to the Club operations."

i. Less than half of YCC76 Condominium owners are members of the Community Facilities managed by CTC. Almost 70% of the 5000 Condominium residents, including YCC76's sole affiant Narenda Gupta, are not members of the Community Facilities and thus would have no right to use the Vacant Lands. Further, the majority of condominium dwellers would not have any right to use the Vacant Lands, even if the use of the Vacant Lands for recreational purposes were part of CTC's mandate.

j. To be clear, members of the Community Facilities, who are the only individuals with the right to use the Vacant Land, has come forward to claim prejudice through sworn evidence.

k. CTC's Board has determined that it would use the $500,000 to upgrade the facilities and equipment, including upgrading the men's showers, the replacement of hot water heaters, shower curtains and new exercise equipment, replacement of lockers and installation of changing cubicles. These would be a benefit to CTC members.

l. The fact that CTC currently has a surplus does not mean that the additional $500,000 would not be a benefit to CTC.

m. The fact that CTC's operational expenses and capital expenditures are funded by Pinedale/TMP and YCC76 on a 50/50 basis also does not mean that the additional $500,000 would not be a benefit to CTC or to YCC76 who would be relieved of at least $250,000 in expenditures.

n. The Lease Amendment would release CTC from the expenses of paying realty taxes, landscaping and maintenance costs that have been a drain upon CTC's staff resources, without any obvious benefit to CTC's mandate which is to operate the Community Facilities. This is also a benefit.

o. The Lease Amendment would also release CTC from occupier's liability. This is also a benefit.

p. Although YCC76 complains that CTC's Board did not do any analysis of the market value of the remaining 49-year Lease term, so as to support the quantum of the deal as being fair and reasonable, neither did YCC76 when it brought this Application. If YCC76's position is that the Lease Amendment is not fair and reasonable, such that this caused prejudice to YCC76, it must provide evidence of that. It did not.

q. I add that it is improbable that the Vacant Lands would have any value to anyone other than Pinedale/TMP and related companies who own the Vacant Lands. It is unclear what the value of the Vacant Land would be to a mere assignee of the remaining 49-year term.

r. YCC76 commenced this Application in 2022. I accept the inference that the Respondents ask me to make that if YCC76 was able to garner any credible evidence that the value of the remaining leasehold interest exceeded $500,000, it would have put this before the court.

s. In terms of YCC76's fears with respect to future development, I first note that CTC was not created to protect condominium owners from future development on the Vacant Lands. None of the documents and agreements I have reviewed reference such a purpose at all. In any event, there had to be a zoning amendment to permit the Crescent Town Development. Any potential future development would necessarily be subject to an extensive, detailed and lengthy municipal approval process, including TMP and Pinedale's submission of all required applications and studies, municipal department reviews, public notices and consultation, and opportunities for YCC76 to assert any objections or concerns they may have.

t. Further, it is not possible to accept without evidence that any adjacent development would be prejudicial to either YCC76 or its residents. Some YCC76 members could lose access to the Vacant Land, if they indeed use it as members of the Community Facilities, but they will also gain better facilities and save money that would otherwise have to be spent to fund CTC.

u. In terms of YCC76's assertion that any potential future development would harm the market value of condominium owners, there is no expert evidence before me on that issue.

[59] Section 13 of the CTC Agreement also does not assist YCC76.

[60] Section 13 provides as follows:

... None of the Owners [the Rental Buildings and YCC 76], without the prior written consent of each of the other Owners, will grant, convey, assign or otherwise dispose of its

> *<u>interest in this Agreement</u>, except to a purchaser of all or a portion of the apartment rental lands or the condominium lands…*

[61] This section relates to YCC76's and TMP/Pinedale's interest in the CTC Agreement, not the Disputed Lands that CTC leased and in which YCC76 does not have any interest.

[62] Section 13 does nothing more than require TMP/Pinedale and YCC76 to obtain the consent of the other if either wishes to "*grant, convey, assign or otherwise dispose of [their] interest* ***in the (CTC Agreement)".*** This limitation, by its terms, applies to the CTC Agreement only, and not to the Lease. In any case, this limitation applies to TMP/Pinedale, and YCC76, not to the CTC. TMP/Pinedale and has not disposed of anything, much less its interest in the CTC Agreement.

[63] YCC76 has not articulated any part of the CTC Agreement that it has an interest in, that was granted, assigned or otherwise disposed of.

[64] Having failed to establish that the CTC Agreement or the Lease mandated that there had to be a unanimous vote in this situation, the By-Law that provided for majority vote governed. The Court should not interfere when the internal process of an organization is followed: *Sikh Cultural Society of Metropolitan Windsor v. Kooner*, 2011 ONSC 5513, 108 O.R. (3d) 490, at para. 63.

[65] I add that the jurisdiction for a court to intervene in corporate governance matters is to be exercised cautiously and only when a strong case for intervention is demonstrated. The court should respect the contractual and corporate autonomy of a Board of Directors and avoid any action or intervention that would undermine and distort the purpose of an internal democratic process: *Jacobs v. Ontario Medical Assn*, 2016 ONSC 4977, at para. 62; *Maudore Minerals Ltd v. Harbour Foundation*, 2012 ONSC 4255, at para. 109; *Bhadra v. Chatterjee*, 2016 ONSC 4845, at para. 149.

[66] YCC76 has failed to demonstrate any strong case for intervention.

Issue 4: Have any of the Respondents conducted themselves in a manner that is oppressive with respect to the Lease Amendment such that this Court should make an Order unwinding the purported amendment?

[67] I also reject this claim.

[68] YCC76 relies upon s. 174 of the ONCA and says that this section gives the Court broad jurisdiction to grant an oppression remedy, similar to s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA") and s. 253 of the federal *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23 ("CNCA").

[69] However, unlike the OBCA and the CNCA, there is no explicit oppression remedy section in the ONCA, only s. 174, which directs that a court may order an "Investigation" of the corporation, in certain circumstances.

[70] Section 174 of the ONCA provides in full as follows:

> **174** (1) On the application of a member or debt obligation holder of a corporation, without notice or on any notice that the court requires, the court may direct an investigation to be made of the corporation and any of its affiliated corporations and may,
>
> (a) appoint an inspector to conduct the investigation or replace an inspector and fix the remuneration of the inspector or the inspector's replacement;
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> (b) determine the notice to be given to any interested person or dispense with notice to any person;
>
> (c) authorize an inspector to enter any place if the court is satisfied that there are reasonable grounds to suspect that there is relevant information in that place and to examine anything and make copies of any document or record found there;
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> (d) require any person to produce documents or records to an inspector;
>
> (e) authorize an inspector to conduct a hearing, administer oaths and affirmations and examine any person under oath or affirmation, and make rules for the conduct of the hearing;
>
> (f) require any person to attend a hearing conducted by an inspector and to give evidence under oath or affirmation;
>
> (g) give directions to an inspector or any interested person on any matter arising in the investigation;
>
> (h) require an inspector to make an interim or final report to the court;
>
> (i) determine whether a report of an inspector should or should not be made available for public inspection and, if it should be made public, order that copies be given to any person designated by the court;
>
> (j) require an inspector to discontinue an investigation;
>
> (k) require the corporation to pay the costs of the investigation; and
>
> (l) make any other order that it thinks fit.
>
> (2) The court may make an order on an application under subsection (1) only if it appears to the court that,

> (a) the activities of the corporation or of any of its affiliates are or have been carried on with intent to defraud any person;
>
> (b) the activities or affairs of the corporation or of any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member or debt obligation holder;
>
> (c) the corporation or any of its affiliates was formed for a fraudulent or unlawful purpose or is to be dissolved for a fraudulent or unlawful purpose; or
>
> (d) persons concerned with the formation, activities or affairs of the corporation or of any of its affiliates have acted fraudulently or dishonestly.

[71] While one of the grounds for making an investigation order is where "it appears to the Court" that the affairs of the corporation have been carried out in a manner that is oppressive, there is no general jurisdiction to grant a remedy for oppression in the ONCA when it "appears" to be the case. Notably, in the OBCA and the CNCA, the provisions that grant the court the jurisdiction to make an oppression remedy require a court to be "satisfied" that oppression has occurred. Even the test in the ONCA supports the conclusion that there is no broad jurisdiction to grant an oppression remedy in the ONCA. Unwinding the Lease Amendment because "it appear[ed]" to the Court that oppression had occurred, as opposed to being satisfied that it did, would be an extreme outcome.

[72] The powers of the court identified under s. 174 are limited to the court directing an investigation, appointing an inspector to conduct an investigation and the powers available to an inspector. The penultimate paragraph that says that a court may make any order it thinks fit in connection with the Investigation must be interpreted in light of the preceding paragraphs and the purpose of the provision, which is to permit the court to make an order that an Investigation take place.

[73] If the legislature had intended the court to have the broad statutory powers under the ONCA as it has under the OBCA and CNCA, then it would have done so clearly as has been done in those Acts. The parties did not submit any caselaw where the ONCA has been interpreted in the broad and unlimited fashion that YCC76 urges upon me.

[74] If I am wrong about the absence of jurisdiction to grant an oppression remedy, YCC76 has failed to prove oppression for the following reasons:

- **The test:** I accept the submission that the same test for oppression as applicable pursuant to the OBCA or the CNCA would apply under the ONCA if s. 174 can be read to grant the

court broad jurisdiction to grant an oppression remedy. The reasonable expectations of shareholders/members "are the bedrock of the oppression remedy." The parties must first establish that a breach of such reasonable expectation has occurred in order to consider "whether the conduct complained of amounts to 'oppression', 'unfair prejudice' or 'unfair disregard'": *Marot v. Marot,* 2019 ONSC 866, at paras. 45-46.

- **Leased for the full 99 years**: I reject YCC76's argument that YCC76 and individual unit owners, who it says it can represent pursuant to s. 23 of the *Condominium Act, 1998,* S.O. 1998, c. 19, had a reasonable expectation that they would be able to use and enjoy the Disputed Lands as "parklands" for the full 99-year Lease term.[2]

- As noted, section 35 of the Lease permits amendments without YCC76's consent; therefore, there was no guarantee that the Vacant Lands would remain leased by CTC for the full Lease term.

- **Used as "parklands":** Section 10 of the Lease provided that the demised premises should be used "for recreational, athletic, social and day care center purposes only as provided" in the Master Agreement. As noted above, the Master Agreement did not require the Original Owners to dedicate "parklands" for recreation purposes. Rather, it required the Original Owners to provide Community Facilities and that the Owners contribute $293,400 to a Borough Acquisition Fund to be spent for the purpose of parks in such community or communities.

- YCC76 also did not negotiate any contractual right related to the alleged use of "parklands" in this regard in the CTC Agreement.

- **Unanimous Vote to Approve Lease amendment**: As noted, CTC's By-Laws provide for majority vote. A party who read the CTC Agreement would have the reasonable expectation that if they wanted to rely on s. 9(c), which requires unanimity for some issues, there would have to be demonstrable prejudice. For the same reasons as above, there is no prejudice proven.

- **Corporate Governance**: There is also no basis to establish oppression based upon breach of corporate governance for the reasons set out above.

[2] I need not decide whether YCC76 can actually use s. 23 in the way it proposes because the facts do not make out oppression even if it can.

- **Non-Development**: If s. 7(p) of the Master Agreement is ultimately found to relate to any part of the Disputed Lands, YCC76 will be able to raise this part of the Master Agreement if and when Pinedale/TMP attempt to develop it.

- **Absence of sufficient evidence:** Additionally, this is a significant remedy being sought and YCC76's evidence is insufficient because as noted, not one of the other 5,000 residents submitted any evidence attesting to, supporting or corroborating Mr. Gupta's narrative regarding any unmet expectation or any prejudice they would suffer.

[75] The parties may make cost submissions as follows: the respondents within 5 days and the applicant within 5 days thereafter.

Papapgeorgiou J.

Released: August 1, 2024

CITATION: York Condominium Corporation No. 76 v. 10 The Marketplace Limited, 2024 ONSC 4305
COURT FILE NO.: CV-22-00682916
DATE: 2024-08-01

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

YORK CONDOMINIUM CORPORATION NO. 76

Applicant

– and –

20 THE MARKETPLACE LIMITED, CRESCENT TOWN CLUB INC., PINEDALE PROPERTIES LTD.

Respondents

REASONS FOR DECISION

Papageorgiou J.

Released: August 1, 2024