

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bahadoor v. York Condominium Corporation No. 82 et al.

BEFORE: Justice D. M. Brown

COUNSEL: D. Levitt, for York Condominium Corporation No. 82
M. Valente, for the former Administrator of York Condominium Corporation No. 82

DATE HEARD: November 13, 2007

ENDORSEMENT

I. Introduction

[1] In my February 13, 2007 endorsement I adjourned, until April 17, 2007 the motion of Fengate Property Management Ltd. (“Fengate”), the administrator (the “Administrator”) of York Condominium Corporation No. 82 (“YCC 82”), for an order seeking approval of its Fifth Report, with directions that the parties file additional materials on certain issues, and I stayed the payment of fees in the amount of \$4,200 charged by the Administrator (exclusive of legal fees) for the month of January, 2007 until the disposition of those matters. On consent the motion did not proceed on April 17, 2007, but was adjourned several times, ultimately to November 13.

[2] Fengate now seeks orders (i) approving its Fifth Report as Administrator; (ii) releasing all claims against it as Administrator save for any gross negligence or willful misconduct on its part; (iii) authorizing payment of the \$4,200.00 in fees stayed by my February order; and (iv) approving legal fees it has incurred since February 1, 2007 in the amount of \$25,820.03, plus a counsel fee for this motion of \$3,500.00.

II. Unopposed matters

[3] YCC 82 now does not oppose the first three items of relief sought by Fengate. I therefore grant the orders requested in paragraphs 1, 2 and 3 of the draft order attached as Schedule “A” to Fengate’s Notice of Motion dated November 9, 2007, and I lift the stay on payment of the \$4,200.00 in Administrator’s fees for January, 2007. Those fees are now due and owing by YCC 82.

III. Administrator's claim for legal fees for the period February 1, 2007 until November 8, 2007

[4] YCC 82 objects to the request for an order approving legal fees, arguing that they are excessive and, if any legal fees are allowed, they should be fixed at \$5,000.00.

[5] In paragraph 7 of his appointment order made March 1, 2004 Hoilett J. ordered that "the Administrator be indemnified from the funds of YCC 82..." I set out in paragraphs 18 through to 21 of my February Endorsement the principles that should inform a court's review of an administrator's request for indemnification for fees, including legal fees incurred.

[6] I have reviewed the account of Fengate's counsel dated November 9, 2007 which contained a detailed itemization of legal work performed. Fengate's counsel submitted that most of the work took place between February and May, in contemplation of the return of the motion. I am satisfied that such was the case. In my February Endorsement I had directed Fengate to file additional materials to address several issues raised in its Fifth Report. It did so in its motion records of April 10 and April 13, 2007, and now has satisfied me on the outstanding issues.

[7] I also directed the parties to file brief statements of law on issues relating to YCC 82's position that it was contemplating conducting a forensic audit of Fengate's activities as Administrator and possibly bringing legal action against Fengate. I received a detailed factum from Fengate in advance of the motion's return date. YCC 82 did not file any materials, and the motion was adjourned several times thereafter at its request.

[8] In my view, the amount of time spent by Fengate's counsel, and the rates charged, were reasonable (with two exceptions) given that most of the work was done in response to directions from me on issues relating to Fengate's administration of YCC 82. The two exceptions are as follows. First, Mr. Speranzini, the partner-in-charge of the file, docketed \$2,680.00, but Mr. Valente candidly, and properly, conceded that such time probably represented a duplication of work. I disallow recovery for any of Mr. Speranzini's time. Second, Fengate settled, at its own expense, a claim brought by a YCC 82 unit owner, Mr. Trieu. Mr. Valente submitted that no legal time was charged in the invoice for that matter. In fact, there were two small entries for time on that matter for early May, 2007 totaling 20 minutes, and I disallow \$150.00 in respect of those minor items. In all other respects, I find the legal fees incurred to be fair and reasonable.

[9] Counsel for YCC 82 submitted that I should give some recognition to the reasonable way in which the corporation has acted in this matter since the release of my February Endorsement by reducing the amount of the Administrator's approved legal fees. While I commend the parties for avoiding a full-fledged contested motion on the remaining matters of the administration, I do not consider it appropriate to reduce otherwise the legal fees incurred by Fengate. The appropriate test to apply is whether the fees incurred were fair and reasonable, and I have concluded that they were.

[10] I therefore fix and approve the legal fees incurred by Fengate, as the former Administrator of YCC 82, at \$22,990.03 for the period February 1, 2007 until November 8, 2007, and I order YCC 82 to pay such fees forthwith to Fengate, or its corporate successor.

IV. Impact of Offers to Settle

[11] At the hearing of the motion counsel for YCC 82 advised that the parties had exchanged offers to settle and that I should take them into account in determining whether to approve the legal fees requested by the former Administrator. Counsel for Fengate objected, questioning the relevance of such offers to that issue.

[12] I subsequently received correspondence from counsel enclosing a series of exchanged offers to settle. I did not read the correspondence until I had reached the decision set out in paragraph 10 above.

[13] Having now read the correspondence I accept the argument of Fengate that the offers are not relevant to the issue of the entitlement of the Administrator to recover its legal fees for the continuation of the motion seeking approval of its Fifth Report.

[14] YCC 82 offered to resolve the motion by having both sides absorb their own costs. It took the position that Fengate was not entitled to legal costs incurred following the termination of its mandate. I disagree.

[15] As a court-appointed administrator, Fengate was entitled to indemnification for costs reasonably incurred in respect of the administration of YCC 82. Hoilett J. so provided in his appointment order. Fengate was obligated to obtain court approval for its final report. At the January, 2007 motion Fengate sought such approval, its discharge as Administrator and indemnification for its fees, including legal costs incurred. The matter was not concluded that day because YCC 82 opposed the approval of the report and the granting of an indemnity – it wanted time to consider whether it could claim a claw-back of fees previously paid to Fengate. Consequently, the subsequent continuation of the motion - and Fengate's incurral of additional legal fees - was directly linked to its obligation as a court-appointed administrator to seek final approval of its Fifth Report. Although YCC 82 ultimately decided not to oppose the report's approval, it should not be surprised that its initial opposition to bringing closure on the January return date to all aspects of Fengate's administration would generate further legal fees for which Fengate would seek indemnity.

IV. Costs of the hearing of this motion

[16] Counsel for Fengate also sought a counsel fee of \$3,500.00 for the hearing of this motion. YCC 82's counsel submitted that no counsel fee should be awarded. Since Fengate was successful on this motion, it is entitled to some fee for the hearing. Argument of the single contested issue only took about one hour. In light of the factors enumerated under Rule 57 of the Rules of Civil Procedure, in my view \$500.00 would be a reasonable counsel fee for the hearing of this motion, and I order YCC 82 to pay Fengate, or its corporate successor, that amount within 30 days of this order.

D. M. Brown J.

DATE: November 22, 2007