

COURT OF APPEAL FOR ONTARIO

CITATION: Boily v. Carleton Condominium Corporation 145, 2014 ONCA 735

DATE: 20141023

DOCKET: C56885

Epstein, Lauwers and Pardu JJ.A.

BETWEEN

Danielle Boily, Juan Escudero, Lisa Backa-Demers, Kanta Marwah,  
Doug Cummings and Richard Maurel

Applicant (Respondent)

and

Carleton Condominium Corporation 145, Dan Litchinsky, Avis Miller,  
Jean-Guy Bourgeois and Carol Smale

Respondents (Appellants)

Janice B. Payne, for the appellants Dan Litchinsky, Avis Miller, Jean-Guy  
Bourgeois and Carol Smale

Antoni Casalnuovo and Patricia Elia, for the appellant, Carleton Condominium  
Corporation 145

Rodrigue Escayola and Jocelyn Duquette, for the respondent, Juan Escudero

Heard: December 9, 2013

On appeal from the judgment of Justice Robert N. Beaudoin of the Superior  
Court of Justice, dated March 8, 2013, with reasons at 2013 ONSC 1467 and  
2013 ONSC 2352.

COSTS ENDORSEMENT

[1] The respondents are owners of condominium units in the appellant condominium complex.<sup>1</sup> The Individual Appellants were, at the material time, its board of directors. The respondents challenged the appellants' decision, following extensive repairs to the garage beneath the complex, to install landscaping that differed from the previous landscaping. In his endorsement of June 29, 2011, Beaudoin J. ordered the appellants to restore the landscaping to its previous design.

[2] In defiance of the order, the Individual Appellants authorized the installation of landscaping containing some elements of the previous design and some elements of their preferred design. As a result, Beaudoin J. in his March 8, 2013, judgment, found the appellants in contempt of court. In sanctioning the contempt, the motion judge again ordered that the exterior of the complex be restored to the previous design. He also ordered the Individual Appellants to personally bear the expense of restoration - estimated to be approximately \$400,000.

[3] In separate reasons, the motion judge ordered the Individual Appellants to pay the respondents' costs of the motion, which he assessed on a substantial indemnity basis, that, together with disbursements, amounted to \$109,598.

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<sup>1</sup> The respondent Juan Escudero is the sole remaining member of the group of owners who opposed the board's decisions. I will refer to the respondent in the plural, (the "respondents") in order to be consistent with the history of this proceeding.

[4] In reasons released August 6, 2014, this court allowed the appeal, in part. The appeal of the finding of contempt was dismissed. The sanction, however, was varied. While Beaudoin J.'s order that the appellants restore the landscaping to the original design remained in place, this court set aside the order that the restoration be paid for by the Individual Appellants. Instead, the Individual Appellants were each ordered to pay a \$7500 fine to Carleton Condominium Corporation 145 ("CCC 145").

[5] In the light of the divided success, no costs were ordered on appeal. The parties were invited to make submissions as to the costs of the underlying contempt motion.

[6] In their written submissions, the parties take the following positions.

[7] CCC 145 submits that the motion judge's costs award should not be disturbed. Alternatively, CCC 145 contends that responsibility for the award should be shared equally amongst the appellants, such that CCC 145 would pay one fifth of the amount, roughly \$20,000.

[8] The Individual Appellants argue that the amount of costs the motion judge awarded should be reduced. Specifically, they submit that an award on a substantial indemnity basis is not warranted. They agree that the responsibility to pay the costs award should be shared equally with CCC 145.

[9] The respondents contend that the motion judge's costs award should not be disturbed. If any change is made to the motion judge's costs award, it should only be to reallocate the responsibility for payment among the five appellants.

[10] The sole issue before the court is the motion judge's costs award. No party has formally asked this court to reconsider its decision not to award costs of the appeal.

[11] I agree with the Individual Appellants that there is reason to reconsider the motion judge's decision to award costs on a substantial indemnity basis. I appreciate that these were costs flowing from a successful motion for contempt of court - a finding, upheld on appeal, grounded on conduct that, at the very least, shows disrespect for the court. However, as LaForme J. explained in *Einstoss v. Starkman*, 2003 CarswellOnt 100 (C.A.), at paras. 10-14, aff'd 2003 CarswellOnt 3234 (C.A.), at para. 3, a finding of contempt does not, on its own, justify an award of costs on an elevated scale. The nature of the contemptuous conduct is a relevant consideration: *SNC-Lavalin Profac Inc. v. Sankar*, 2009 ONCA 97, 94 O.R. (3d) 236, at para. 19.

[12] Elevated costs are warranted in only two circumstances: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66. The first involves the operation of an offer to settle under rule 49.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, where substantial indemnity costs are

explicitly authorized. The second is where the losing party has engaged in behaviour worthy of sanction.

[13] In deciding upon a punitive award of costs, the motion judge relied on the conduct of the Individual Appellants. He referred to the following findings in the contempt motion, at para. 34 of his costs reasons:

*I will not reiterate the findings ... other than to note that I found that "[T]he [appellants] breached the order wilfully and deliberately," and that "[T]he [appellants] acted neither honestly and in good faith, nor as a reasonably prudent person [...] The [appellants] adopted a narrow and self-serving interpretation of my order and chose to reinstate elements that they preferred, despite the decision of this court". [Emphasis in original.]*

[14] On appeal, the contemptuous conduct was summarized by the majority, at paras. 100-101:

After having obtained and accepted a recommendation by experts as to the optimal landscaping design, the Individual Appellants simply could not accept being put in a position in which they had to implement a design they believed was not optimal for the condominium owners. They therefore took matters into their own hands and, albeit for reasons they considered valid, defied a court order. The Individual Appellants' arrogance led them to reckless and ultimately unlawful conduct.

Any contempt is serious. This is no exception. However, in my view, the Individual Appellants' contemptuous conduct must be considered in the light of the fact that there is no evidence that it was motivated by personal gain, vengeance or any reason other than that they felt they knew best.

[15] In my view neither any offer to settle nor the Individual Appellants' conduct, as characterized by this court, justifies an award of costs on a substantial indemnity basis. I would award partial indemnity costs.

[16] In the often-cited case of *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), this court set out the principles to apply in fixing costs. The objective is to fix costs that are fair and reasonable having regard to the expectation of the parties.

[17] Applying the principles in *Boucher*, I am of the view that a costs award of \$35,000 fairly and reasonably responds to the expectations of the parties. It is apparent from the history that the issues in this matter were serious and, in certain respects, the stakes were high. However, this was a one-day motion for contempt that involved applying well-established law to clear facts.

[18] I would therefore set aside the motion judge's costs award and award costs in favour of the respondents fixed in the amount of \$35,000 inclusive of disbursements and applicable taxes.

[19] In the circumstances, I see no reason to differentiate among the appellants. While the Individual Appellants made the decisions that gave rise to the contempt finding, they were elected by the unit owners at CCC 145. CCC 145 is an independent entity that was separately represented in these

proceedings. I would order each appellant responsible, on a joint and several basis, for one fifth of the award.

*Gloria Estlin J.A.*

*Chambers J.A.*

*Parsons J.A.*