**CITATION:** Carleton Condominium Corporation No. 22 v. MacQuarrie, 2015 ONSC 7719
**COURT FILE NO.:** 13-59695
**DATE:** 20151211

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | ) | |
| CARLETON CONDOMINIUM CORPORATION NO. 22 | ) | Kristen Bailey, for the Applicant |
| Applicant | ) | |
| **– and –** | ) | Rodrigue Escayola, for the Respondents |
| STEPHEN MACQUARRIE and KAREN DALY | ) | |
| Respondents | ) | |
| | ) | **HEARD:** November 19, 2015 |



## REASONS FOR DECISION

**BEAUDOIN J.**

[1] The Applicant, Carleton Condominium Corporation No. 22 ("CCC 22"), brought this application against the Respondents on January 23, 2014. The Respondent, Karen Daly ("Daly"), is the owner of the condominium unit in issue, and the Respondent, Stephen MacQuarrie ("MacQuarrie"), is Daly's son and the occupant of the unit.

[2] CCC 22 sought various items of relief against the Respondents; more specifically against the Respondent MacQuarrie. It alleged that he had engaged in conduct which resulted in damage to the units or common elements of CCC 22; that he had engaged in conduct which altered portions of the common elements of CCC 22, and had engaged in conduct which risked the health and safety of other residents of CCC 22. This conduct necessitated police intervention. CCC 22 further sought the removal of MacQuarrie from the premises if he failed to comply with any order of the court.

[3] In support of its application, CCC 22 relied on sections 98, 117, 134 and 135 of the *Condominium Act*, 1998, S. O. 1998, c. 19.( "the *Act*")

[4] The application record was extensive and was comprised of two volumes and sixty-two exhibits. The affidavit of Wayne Forbes, the current secretary-treasurer of CCC 22, detailed the corporation's extensive 25 year history with MacQuarrie commencing in 1988 when he was 16 years of age. Approximately 47 of the 62 exhibits dealt with parking and traffic infractions during a 10 year period from 1988 to 1998, when MacQuarrie was 16 to 26 years of age.

[5] In 2007, there was an altercation between MacQuarrie and another resident of CCC 22. This led to charges against MacQuarrie. MacQuarrie pled guilty to some charges and was sentenced to a conditional sentence to be served in the community followed by a probation period. The sentencing judge confirmed that he was not a danger to the community. Notwithstanding that event, CCC 22 did not seek the removal of MacQuarrie. Things were then relatively calm between the corporation and MacQuarrie although there were allegations of aggressive behaviour on the part of MacQuarrie against fellow residents that continued into 2013.

[6] On the original return of the application, and on consent, the matter was adjourned to June 19, 2014. Justice Kershman ordered the Respondents to comply with the declaration, bylaws and rules of CCC 22.

[7] MacQuarrie, who was then self-represented, then filed a binder of his own responding materials. On June 19, 2014, Justice Warkentin adjourned the matter to August 26, 2014 to permit the Respondents to retain counsel. She continued the existing order of Justice Kershman until further order of the court.

[8] The matter was resolved after that date and there have been no further incidents involving MacQuarrie. In 2014, MacQuarrie was formally diagnosed with various mood and personality disorders, including a borderline personality disorder with traits of Aspergers, in addition to other disabilities such as attention deficit hyperactivity disorder, dyslexia and learning disabilities.

[9] As a result of these disabilities, he has uncontrollable mood swings and suffers from an inability to cope with confrontation, stress and authority. He has been followed by the psychiatric department of the Ottawa Hospital and he has learned to better cope with his disability and to better control how to manage the stress factors. A treatment plan has been developed for him and he is following it. Medical reports outlining his treatment have been provided to the court by his mother.

[10] The matter came before me on November 19, 2015 solely on the issue of costs. The parties agree that my order is limited to the costs of the application and that no "additional actual costs" pertaining to this matter may be collectable against the Respondents pursuant to section 134(5) of the *Act*.

[11] CCC 22 seeks the full amount of costs incurred by the corporation which costs amount to $21,814.40 on a full indemnity basis; $19,701.13 on a substantial indemnity basis, and $14,923.09 on a partial indemnity basis.

[12] CCC 22 submits that the Respondents have put the corporation and all of its owners to great expense by requiring them to bring this application in an effort to obtain compliance with the condominium's declaration and rules as well as the *Act*. The corporation maintains that it is not equitable to require the unit owners to bear the legal costs incurred in relation to this matter as a result of one unit owner's and occupier's failure to act reasonably. It relies on section 134 of the *Act* which provides:

> **Compliance order**
>
> 134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement. 1998, c. 19, s. 134 (1); 2000, c. 26, Sched. B, s. 7 (7).

**Pre-condition for application**

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134 (2).

**Contents of order**

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

i. the damages incurred by the applicant as a result of the acts of non-compliance, and
ii. the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances. 1998, c. 19, s. 134 (3).

**Order terminating lease**

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection. 1998, c. 19, s. 134 (4).

**Addition to common expenses**

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit. 1998, c. 19, s. 134 (5).

[13] The Applicant cites case law supporting their argument that owners and occupants who are ordered to comply with their obligations under the *Act*, the declaration, bylaws and rules, should have to pay all the costs of the corporation because to order otherwise, would mean that

the unrecovered expenses would have to be borne by the other innocent unit owners in their monthly common fees for contributions to the corporation.[1]

[14] Courts have noted that respondents are contractually bound to fully indemnify the corporation for breaches of the declaration, bylaws and rules corporation.[2] CCC 22 submits that when faced with a breach of the *Act*, declaration, bylaws or rules, a condominium corporation is required to act and there is no discretion afforded to a condominium corporation in the exercise of this duty.[3] Given that the corporation is compelled to act, the Applicant maintains that it should be fully indemnified.[4] The Applicant emphasizes that it gave numerous warnings and cautions to the Respondents and written requests to comply with the *Act*, declaration and bylaws, and that this application would not have been necessary had compliance been obtained[5].

[15] The Respondents argue that there should be no costs, or in the alternative, that the costs claimed are excessive. They maintain that the application was settled and that there have been no issues since the date of the first appearance.[6] They argue that the Applicant's actions were heavy-handed and that the extensive application record put before the court was unnecessary. They note that the vast majority of the Applicant's complaints dealt with parking and driving infractions and that most of these had occurred long before the original return date of the application.

[16] The Respondents also submit that MacQuarrie suffers from a disability and that this needs to be taken into account.[7] They cite and rely on early communications from Ms. Daly to CCC 22 in 1988 that her son suffered from a learning disability which left him very frustrated and liable to respond with offensive language when verbally attacked.

[17] The Respondents submit that CCC 22 ought to have resorted to the mediation and arbitration provisions set out in section 134 of the *Act* before resorting to the application to court.

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[1] *Metropolitan Toronto Condominium Corp No. 1385 v. Skyline Executive Properties Inc.* (2005), 197 O.A.C. 145 (C.A.) at para. 46, and *Chan v. Toronto Standard Condominium Corporation No. 1834*, 2011 ONSC 108, at para. 37 aff'd on appeal at 2012 ONCA 312
[2] *YRSCC No. 1076 v. Anjali Holdings*, 2010 ONSC 822, at paras. 4, 5 and 6
[3] *Metropolitan Toronto Condominium Corp. No. 985 v. Vanduzer*, 2010 ONSC 900 at paras. 27 and, 28
[4] *Metropolitan Toronto Condominium Corporation v. Chow*, 2012 ONSC 587, at para. 3
[5] *Wentworth Condominium Corporation No. 34 v. Taylor*, 2014 ONSC 59, at paras. 21, 22, 23 and 24
[6] *Dhillon v. Dhillon Estate* (2009), 75 R.F.L. (6th) 284 (Ont. Sup. Ct.)
[7] *York Condominium Corp. No. 301 v. James (Litigation guardian of)* 2014 ONSC 3360,at para. 11

It is conceded however that these provisions do not apply to breaches of the *Act*, nor to occupants or tenants as is the case of MacQuarrie. Nevertheless, they point out that the Respondents immediately consented to the order of Justice Kershman and that the problems disappeared almost immediately thereafter once MacQuarrie sought and obtained treatment for his personality disorder.



[18] The Respondents' cite case law that has held that section 134(5) of the *Act* does not give a condominium corporation's counsel license to spend the client's money with impunity[8]. The case law is also clear that the provisions of the *Act* do not deprive the court of its discretion to fix the costs that are appropriate in the circumstances of the particular case. The court can also take into account the circumstances contained in rule 57.01 as well as the result of the proceedings in the reasonable expectations of the parties.[9] The court's discretion with respect to costs is preserved under section 131(1) of the *Courts of Justice Act* R.S.O. 1990, c.C.43.

[19] Finally, the Respondent argues that the Board of Directors of a condominium corporation has a fiduciary duty which requires it to behave reasonably and exercise reasonable business judgment to manage the affairs of the corporation and good faith.[10]

**Conclusion**

[20] I find that the extensive application record on behalf of CCC 22 was unnecessary. Most of the complaints set out in the affidavit of Mr. Forbes were historical in nature. While the corporation brought its application under section 117 of the *Act* claiming that MacQuarrie's continued actions presented a danger to the other residents, CCC 22 never took any steps to remove MacQuarrie after the more serious events of 2007 which resulted in criminal charges. There was a period of relative calm thereafter.

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[8] *Durham Standard Condominium Corporation N. 187 v. Morton*, 2012 ONSC 5132, 298 O.A.C. 94 (Ont. Sup.Ct, Div. Ct.) and *York Condominium Corp. No. 345 v. Qi*, 2013 ONSC 4592, at para. 9
[9] *Mancuso v. York Condominium Corp. No. 216* (2008), 292 D.L.R. (4th) 737] at par. 6
[10] *Peel Condominium Corporation No. 231 v. Grygorchak and Levkiska, (May 19, 2015)*

[21] A two volume application record was not required. The historical background could have been summarized in a few pages. It appears to have been added solely to give more weight to the more recent events.

[22] I adopt the comments of Quigley, J. in *Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna*, 2012 ONSC 1504 (CanLII), where he concluded at para. 92:

> **92** I am aware that in making this order, I am forcing the unit-owners as a whole, including these recalcitrant unit-owners, to shoulder these costs, together since it is inevitable that TCECC No. 1508 will seek to pass those costs on to unit-owners. The respondents must certainly pay for costs associated with this action and this application, but as well, all unit-owners, including these respondents, ought to bear the costs associated with their board's decision here to first litigate and only talk later. It was a decision that may have been legally correct, but that showed poor judgment in my view. I choose not to reward that conduct by a more fulsome award of costs, in the hope the message will avoid the recurrence of future similar situations.

[23] Although mediation was not technically required in this case, MacQuarrie has been an occupant of the unit for 25 years. CCC 22 had notice of his learning disabilities and his reaction to confrontation since 1998. The corporation did not take any steps to remove him after the more dramatic events of 2007. That it should seek to do so at this stage appears to be overreaching. Having regard to the consent reached on the return of the application and the lack of any concerns since that date, a more conciliatory approach could and should have been considered. CCC 22 has a fiduciary duty towards all unit owners including Daly and her son.

[24] I am satisfied that an application was necessary in that it has indirectly brought about a resolution of the long-standing issues between CCC 22 and MacQuarrie by leading him to get the psychiatric help that he required. For that reason, this is an appropriate case for an award of costs on a partial indemnity basis. Those costs are limited to the costs of preparing a reasonable and proportionate application record. This could have been achieved at a much lesser cost than $20,000. In examining the Bill of Costs, $8,000 is claimed for correspondence alone and over 18 hours were devoted to the preparation of the application record. These amounts are excessive. Given the particular circumstances of this case as well as those of Respondent MacQuarrie, and

having regard to the settlement reached, I fix the Applicant's costs in the all-inclusive amount of $5000 which shall be paid within 5 years of this date.

Mr. Justice Robert N. Beaudoin

**Released:** December 11, 2015

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**REASONS FOR DECISION**

Beaudoin J.

**Released:** December 11, 2015