Case Name:

Chan v. Toronto Standard Condominium Corp. No. 1834

Between
Elizabeth Anne Chan, Applicant, and
Toronto Standard Condominium Corporation No. 1834, Respondent,
And between
Toronto Standard Condominium Corporation No. 1834,
Applicant, and
Elizabeth Anne Chan, Seamus Flanagan, Cian McDonnell and
Rizvan Faruquz, Respondents

[2011] O.J. No. 90

2011 ONSC 108

Court File Nos. CV-09-390843, CV-10-407970

Ontario Superior Court of Justice

B.A. Allen J.

Heard: November 10, 2010.
Judgment: January 6, 2011.

(44 paras.)

Counsel:

Elizabeth Anne Chan, in person.

Michael Spears, for the Respondent.

Michael Spears, for the Applicant.

Elizabeth Anne Chan, in person.

No one appearing for the remainder of the Respondents.

REASONS FOR JUDGMENT

B.A. ALLEN J.:--

BACKGROUND AND FACTUAL OVERVIEW

1 There are two applications before the court. The Applicant Elizabeth Anne Chan ("Ms. Chan") seeks the removal of a lien placed on the title to her condominium unit #2308 ("unit 2308") that she submits was improperly registered by the Respondent Toronto Standard Condominium Corporation No. 1834 ("the Corporation").

2 By its application, the Corporation seeks an Order that Ms. Chan and the tenants residing in the unit comply with the provisions of the *Condominium Act*, 1998, R.S.O. ("the *Act*") and the registered Declaration and Rules of the Corporation with respect to leasing the unit. The Corporation also seeks an Order that Ms. Chan remove the internal locks placed on doors of unit 2308 in breach of the Declaration and the Rules of the Corporation.

APPLICATIONS TO SUPERIOR COURT

3 Subsections 134 (1), (2), (3), and (5) allow a unit owner, an occupier, a corporation, among others, to apply to the Superior Court of Justice for an order enforcing compliance with the *Act*, the declaration, by-laws and rules. The court may grant the order requested; require the persons named in the order to pay damages the applicant incurred as a result of non-compliance and to pay the costs the applicant incurred in obtaining the order. The court may grant any other relief fair and just in the circumstances. The costs or damages awarded together with any additional costs are added to the owner's common area expenses to be paid within a time that may be specified by the Corporation.

4 Courts have stressed the importance of unit owners and occupiers complying with the *Act*, the declaration and the rules of a condominium corporation.

> The owner of a condominium unit does not have a classic freehold. He or she is not at liberty to deal with the property in the same manner as the owner of a single family residential dwelling might be. The nature of a condominium is that in return for the advantages gained through common ownership of certain elements some degree of control over what can be done with those common elements is given up. The details of what is given up are set out in the condominium declaration and its bylaws and rules. It is both the right and obligation of a unit owner or occupier to see that these are obeyed. [*Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, [2010] ONSC 2463, at para. 8, (Ont. S.C.J.)]

5 Courts have addressed the standard of review on a condominium application. The role of the court hearing an application is not to substitute its own opinion for that of the Board of Directors, but to ensure the Board has acted in good faith and in compliance with the *Act*, declaration, bylaws and rules. In deference to the rules, the court should not pronounce on the propriety of a rule except where the rule is clearly unreasonable or contrary to the legislative scheme. The court should accept the board's decision unless it has acted capriciously or unreasonably. [*Muskoka, supra*, at para. 9; *York Condominium Corporation No. 382 v. Dvorchik*, [1997] O.J. No. 378 (Ont. C.A.) and *Metropolitan Toronto Condominium Corporation No. 781 v. Reyhanian*, unreported decision of Mesbur, J, released December 30 1999, (Ont. S.C.J.)].

MS. CHAN'S APPLICATION

The Lien

6 The property management of the Corporation received word on or about June 14, 2009 that unit 2208, the unit just below unit 2308, had been flooded with water. The Corporation determined the water came from the water valve that services water to the toilet in unit 2308. Apparently, the water valve had been turned on in circumstances where the seal at the base of the toilet was defective. The Corporation incurred costs of $8,502.28 to repair unit 2208.

7 There had been a previous water leak from unit 2308 into unit 2208 reported in June 2008. The Corporation incurred costs for that leak. The Corporation delivered two written notices to Ms. Chan advising Ms. Chan of the leak and that she would be responsible for the cost of the repairs.

8 With respect to the June 2009 leak, the mother of one of Ms. Chan's tenants advised that water was leaking from the toilet in unit 2308. The Corporation retained an emergency flood response company to contain the leak and clean up the excess water. The property manager for the Corporation inspected the leak on June 14, 2009 and determined it was caused by a failed toilet seal in unit 2308.

9 Ms. Chan produced an affidavit of a licensed plumber and contractor who inspected the toilet in unit 2308 on March 15, 2010. He gave an opinion that he did not believe the leak came from the toilet in unit 2308 as a result of a broken toilet seal and stated that flushing a toilet with a defective seal or without a seal would not cause a leak of water into the unit below. The plumber speculated that the flood might have been due to a cut in the building's plastic internal pipes by inexperienced contractors.

10 I do not accept the plumber's opinion. The allegation is not that the flood occurred as a result of flushing the toilet. It is rather that the water came from a leaking valve. The opinion suggests the leak was caused by damage to the building's internal pipes and I find this is mere speculation since there is no evidence that occurred. And further, the plumber's inspection was conducted months after the flood which makes his observations untimely.

11 Ms. Chan made much of the fact the Corporation did not produce a report containing an opinion that the water came from unit 2308, the implication behind that assertion being that the court should not accept that the water leaked from unit 2308.

12 I do not accept the Corporation needs a report from a plumber to establish the facts pertaining to the flood. I find there is sufficient evidence for the court to draw a reasonable inference that the water leaked from unit 2308. There was the earlier incident in June 2008 when the property management observed a leaky valve which caused water to leak from the bathroom in unit 2308 into the bathroom in unit 2208. There is no evidence Ms. Chan had the leaky valve repaired in the interim as the Corporation requested. It appears that the tenants in unit 2308 would turn the valve off to stop the leak. I find it can be reasonably inferred from those facts, together with the tenant's mother's report in June 2009 that water was leaking from the valve in 2308 and that the water that flooded into the bathroom of unit 2208 came from unit 2308.

13 I must now look at whether the Corporation acted in compliance with the *Act* and Declaration with respect to the repairs. Subsections 92(1), (3), and (4) of the *Act* and s. 6.1(c) and (d) of the Declaration set out the obligations of the owner of a unit to, within a reasonable time, repair damage to their unit, the common areas and the property of others. Those provisions also deal with the Corporation's entitlement to do the necessary work to repair the damage the owner was obligated to do and to add the cost of the repairs to the owner's common area expenses.

14 Subsection 6.1(c) of the Declaration allows the Corporation to recover from the unit owner any deductible under its insurance policy and s. 6.1(d) permits recovery of the costs of the repairs, any legal and collection costs and interest at the rate of 20%. The Corporation provided documentary support for the amount claimed for the repairs to unit 2208. The $8,502.28 is comprised of the $5,000 under the Corporation's insurance policy; $2,887.16 for flooring; and an additional $711.90 for laminate and baseboard removal. I am satisfied by the Corporation's documentary evidence that it complied with the provisions of the Declaration in that the repairs claimed are for items and labour not covered by the policy because they were improvements to unit 2208 beyond the standard unit specifications given to the Board when construction was completed.

15 Subsections 85(1) and (4) provide the Corporation with the authority to place a lien against the owner's unit for unpaid amounts together with interest and all reasonable legal costs and reasonable expenses. The Corporation is required to give written notice to the owner of the affected unit at least 10 days before the lien is registered.

16 There was a bit of back and forth in the evidence about whether Ms. Chan received the various notices the Corporation sent in accordance with the 10-day notice requirement. I do not think in the end it matters whether she received the initial notices since she ultimately concedes she received written notice of the lien on September 8, 2009 when the property manager hand-delivered it to her at her place of business. The lien was not registered until October 30, 2009 which puts the registration within the requirements of the *Act*.

17 I find therefore that the Corporation properly registered the lien in accordance with the notice provisions under the *Act* and that the amount claimed also complies with the requirements of the Declaration.

18 I therefore dismiss Ms. Chan's application for an order vacating the lien.

THE CORPORATION'S APPLICATION

The Locks

19 The Corporation seeks to have the interior locks removed from unit 2308 as being in breach of s. 9.1(d) of the Declaration and Rule D1 of the Rules of the Corporation.

20 Section 9.1(d) of the Declaration provides the Corporation may require unit owners to furnish it with keys to locks on doors to and within the unit. That provision prohibits unit owners from changing any locks to or within a unit without immediately providing the Corporation with a key to each lock. Rule D1 of the Rules provides a unit owner is not permitted to place an additional lock on any door to or within a unit without first obtaining the written approval of the Board. If such approval is given a lock should not be installed without first providing a key for the changed or additional lock.

21 The property manager discovered the interior locks when a contractor hired to repair the leak entered Chan's unit on July 11, 2009. The Corporation delivered a letter dated July 11, 2009 to the occupant of unit 2308 to remove the locks by July 16, 2009. There was no response to the letter nor was it acted upon. Ms. Chan does not deny she installed locks on the doors of the three bedrooms in the units. Ms. Chan says she installed the locks because building staff trespassed into her unit on several occasions after she and her son moved into the unit in August 2007. She states as a result they moved out of the unit and she decided to lease it.

22 I do not find the story about the trespassers believable. There is no evidence Ms. Chan reported the incidents to property management or the police. In any event, even if I were to accept that evidence, I find Ms. Chan was not justified in installing the locks because she did not comply with the provisions of the Declaration. The Corporation denies Ms. Chan approached it or sought approval with respect to installing the locks. I find there is simply no credible evidence that Ms. Chan obtained the approval or that she provided the Corporation with keys to the locks.

23 I therefore allow the Corporation its remedy and order Ms. Chan to remove all installed locks to the interior doors of unit 2308 pursuant to subsection 9.1 (d) of the Declaration and Rule D1 of the Corporation's Rules.

The Lease of Unit 2308

24 The Corporation's most current records reveal that Ms. Chan is leasing unit 2308 to the respondents Seamus Flanagan, Cian McDonnell and Rizvan Faruqui ("the tenants"). The lease agreements between Ms. Chan and Flanagan and Ms. Chan and McDonnell commenced in February 2010 and the agreement between Faruqui and Ms. Chan commenced March 9, 2008.

25 Ms. Chan's evidence reveals different information about the persons residing in the unit and when they resided there. Faruqui's affidavit states his lease started in early 2008 to January 2009 and resided there with a friend Tasara Turturu, a person not contained in the Corporation's records. McDonnell's affidavit indicates she resided with three roommates, Flanigan and Abhay Hari Govind, the latter person also not in the Corporation's records. Flanigan's affidavit indicates he leased the unit with McDonnell and Govind and did not reside with or know Faruqui. It appears that Flanigan has recently moved out of the unit.

26 The evidence of both McDonnell and Flanigan is that they were friends before moving into unit 2308 and neither of them knew Govind before moving in but became friends after they began residing together in the unit. None of the persons who leased the unit at the same time were members of the same family unit or related to each other as family.

27 Section 119 of the *Act* requires, among other things, that the unit owner and any occupant comply with the *Act*, the By-laws and the Rules and places an obligation on the owner to take all reasonable steps to ensure occupiers and invitees comply. Section 83 of the *Act* and section 5.1 of the Declaration require a unit owner to notify the Corporation if the unit is leased and to provide the lessee's name and a copy of the lease agreement within 30 days of leasing the unit. The Rules contain restrictions on leasing units. Rule B1 provides that each unit is to be occupied and used only as a private single family residence and for no other purpose. Rule F1 places the obligation on the unit owner to ensure their tenants strictly comply with the provisions in the Declaration governing the use and occupation and leasing of units.

28 By letter dated July 2, 2009, the Corporation advised Ms. Chan it had become aware she was renting each of the rooms to three different tenants and that as such unit 2308 was being occupied as a rooming house and not a private single family dwelling. A letter dated May 21, 2010 to Ms. Chan's former lawyer advises unit 2308 was being used as a boarding/rooming house contrary to the single family use restriction under the Rules and further demands that Ms. Chan "immediately cease the improper use of her unit as other than a single family residence" or a compliance order would be sought. Unit 2308 continues to be leased to persons who do not meet the requirement of being a private single family unit.

29 Courts have addressed the meaning of "family" within the condominium context and the propriety of a rule prohibiting the occupancy of units by roomers or boarders. The court accepted the condominium corporation's definition of "family" as a "social unit consisting of parent(s) and their children, whether natural or adopted, and includes other relatives if living with the primary group". The court also accepted the definition of family to mean occupants who are related. [*Nipissing Condominium No. 4* v. *Kilfoyl*, [2009] O.J. No. 3718 (Ont. S.C.J.)].

30 Ms. Chan submits she should be permitted to lease her unit to tenants who are not related as blood relatives. She contends the tenants are not roomers or boarders but are living as friends together sharing the unit, and she submits this should be allowed.

31 I do not accept Ms. Chan's position. The court's interpretation of what is meant by private single family unit clearly restricts leases to persons like Ms. Chan's tenants who admittedly are not members of a private family unit as interpreted by the court.

32 Therefore, I find Ms. Chan and the tenant respondents are in breach of s. 119 of the *Act*, the Declaration and the Rules in that their occupancy is that of multiple unrelated tenants in the nature of a rooming/boarding house and not a "single family." I therefore order that the respondents cease the improper use of unit 2308 for other than as a single family unit.

COSTS

33 As noted earlier, the *Act* and Declaration provide for the successful party to recover its costs of the application.

34 Section 134(3)(b)(ii) provides:

> On application, the court may, subject to subsection (4),
>
> ...
>
> (b) require the persons named in the order to pay,
>
> (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.

35 Section 6.1(d) of the Declaration provides the owner *shall* reimburse the Corporation for any legal or collection costs incurred in order to collect the costs of repairs together with interest on those costs at the rate of 20%.

36 The Corporation was fully successful on both applications. In accordance with the principle that costs should follow the event, the Corporation is entitled to costs under the *Rules of Civil Procedure.* Courts have addressed the scale of costs on a condominium application. It is appropriate for the court to require the unit holder to pay costs on the higher solicitor/client scale. [*York Condominium Corporation No. 216 v. Nalevka*, unreported decision of D.J. Haley, J., released December 17, 1982 (Ont. Dist Ct.) and *Peel Condominium Corporation No. 449 v. Amy Elizabeth Frances Hogg*, unreported decision of Carnwath, J., released March 13, 1997 (Ont. Sup. C.J.)].

37 Courts have also considered the expense consequences to other unit owners of the Corporation incurring costs in pursuing a legal proceeding against one unit owner for their breach of the condominium rules. It has been held not to be fair or equitable for other unit owners to subsidize the

costs of such unwarranted conduct making an award of solicitor/client costs appropriate. [*York Condominium Corporation No. 219 v. Naumovich et al*., unreported decision of Taliano, J., released January 3, 1985 and *York Condominium Corporation No. 42 v. Miller*, unreported decision of M.P.R. German, J., released on January 5, 1988 (Ont. Dist. Ct.)]. Courts have also held that when the Corporation has given repeated warnings of the cost consequences of enforcement to the unit owner and the warnings are ignored, the costs are the consequence of the unit owner's own actions. In these circumstances, the other blameless unit owners should not be made to bear any part of those costs and it is therefore appropriate that the non-compliant unit owner pay the costs on a full recovery basis. [*Muskoka*, *supra*, at paras, 15 and 16].

38 Counsel for the Corporation submitted a bill of cost seeking total costs of $41,706.28 on a full recovery scale, broken down as follows: $37,085 for fees; $2,500 for the application; and $2,121.28 for disbursements. An hourly rate of $200 was charged for a lawyer recently called to the Bar and $450 per hour was charged for the principal lawyer on the file who was called to the bar in 1978. Those fee rates are not excessive.

39 Taking into account the principles courts have adopted on condominium applications, I find it appropriate to award the Corporation full indemnity costs for its success on both applications. In arriving at this decision I had regard to Ms. Chan's persistently non-compliant conduct with respect to the Rules of the Corporation. She has taken unreasonable positions on her obligations as a unit holder, failing to repair the leaking valve when she received notice of it.

40 Ms. Chan has also flagrantly breached the Rules with respect to leasing her unit and has advanced unreasonable and dishonest arguments about her leasing practices. Further, her evidence about why she placed the interior locks on the doors in her unit is not in the least believable. I do not accept that property management staff trespassed in her unit. She neither complained to police or the property management about this. In any event, even if her account about trespassing were true, there would be no justification for the continued use of locks for that reason. The more obvious reason, which Ms. Chan will not admit, is that she has been renting her unit to separate, unrelated tenants rather than to a family unit and the locks were in aid of that practice.

41 The Ontario Court of Appeal set out the principle that the objective of a determination on costs is to fix an amount the unsuccessful party is required to pay that is fair and reasonable rather than an amount reflecting the actual costs of the successful party. The quantum of costs allowed must be fair, within the reasonable expectations of the parties, and in accord with the principles set out by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

I find under the circumstances described an award of costs fixed at the full indemnity rate of $41,706.28 to be fair and reasonable.

ORDER

42 Ms. Chan's application is dismissed.

43 Order to issue in accordance with the relief the Corporation seeks at paragraph 1 (a) to (i) of its Notice of Application.

44 Costs are ordered accordingly.

B.A. ALLEN J.

cp/e/qlafr/qlvxw