CITATION: **Couture** v. **TSCC No. 2187**, 2015 ONSC 7596
COURT FILE NO.: CV-15-527224
DATE: 20151204

2015 ONSC 7596 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Polly Ann Couture

Applicant

– **and** –

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2187, YOLA EDWARDS a.k.a.. YOLANTA ZAWADZINSKI, GRAZIELLA MINATEL, MARY GRAHAM and BRUNO GARISTO

Respondents

Timothy M. Duggan, for the Applicant

Rovena Hajderi, for the Respondents

HEARD: December 1, 2015

F.L. MYERS J.

I Overview

[1] In condominium living, the needs of the many outweigh the needs of the few. However, the power of the collective is not absolute. Power must be exercised within the bounds of the condominium's established jurisdiction and with due respect to the legal rights and reasonable expectations of the few or the one.

[2] As with most efforts to balance competing rights, the fact that people are involved complicates matters. It is well understood that in complicated moments people sometimes see exactly what they wish to see. Moreover, some find other's illogic and foolish emotions an irritant.

[3] In this case, like so many others involving neighbours, a discrete issue was allowed to escalate out of hand causing needless distress and expense. Like excellent tacticians, the parties let their counsel attack while they sat and watched for weakness. What they did not do was to act like good neighbours. They were not of the body.

[4] It now falls to the court to unwind the tangled web that the parties wove. I expect that neither side will be particularly pleased with the outcome. Rather, I expect that they may find that having is not so pleasing a thing after all as wanting.

II Parking at 2 Ridelle Avenue

2015 ONSC 7596 (CanLII)

[5] The residential building at 2 Ridelle Avenue in Toronto is owned by Toronto Standard Condominium Corporation No. 2187. The condominium was created by the registration of its declaration on October 21, 2011. The building consists of 44 residential condominium units plus common areas. The common areas include a parking garage that contains only 32 parking spaces. In other words, there is not enough parking for each unit to have its own parking space.

[6] Article 3.2 of the condominium declaration provides, in part as follows:

> The Condominium shall have sixteen (16) single car spaces… eight (8) two car tandem spaces…and will be available through assigned leasing to the Owner at the sole discretion of the Corporation… Each parking space shall be used and occupied only for motor vehicle parking purposes… In strict accordance with the Rules and Regulations in force from time to time, and without restricting any wider definition of a motor vehicle which may be imposed by the Board, "**Motor vehicle**" shall be deemed to include a motorcycle as customarily understood and private passenger automobile, licensed (with an active plate), insured, in good working order and repair, and as further defined in accordance with any regulations and laws established by any government authorities….
>
> **A. Conveyance of Parking Spaces**
>
> (a) The Board has the exclusive authority to assign the right to lease a parking space to an Owner on a priority basis...
>
> (b) …
>
> (c) Every lease of a parking space shall provide or be deemed to contain a provision that where the residential Owner is deprived of ownership of his or her unit through legal action… then the lease shall be deemed to be in default and shall automatically terminate, and the parking space shall revert to the Corporation.
>
> (d) …Any owner who sells, transfers, leases or otherwise conveys his or her residential unit shall simultaneously or prior thereto, also transfer or otherwise convey their parking spot space back to the Corporation.
>
> (e) No lessee has the right to assign the rental of his or her parking space to an existing Owner, prospective purchaser, a tenant, or a non-resident. Any residential Owner who illegally rents his or her parking space will be responsible for any costs incurred to rectify the situation.

(f) The Corporation will maintain a priority list of Owners that occupy their units and that wish a parking spot. The Corporation will assign vacant parking spaces on a priority basis in accordance with the list and new purchasers of units that occupy their units wishing a parking space will be added to the Owners list.

(g) Any instrument or other document purporting to effect a sale, transfer, assignment, gift or other conveyance of any parking space in contravention of any of the foregoing provisions of this section, except as provided for in schedule "F", shall be automatically null and void and of no force or effect whatsoever, and any lease of any parking space so automatically be deemed and construed to be amended in order to accord with the foregoing provisions of this section.

2015 ONSC 7596 (CanLII)

[7] In effect, the declaration provides for the regulation of parking spaces by way of leases. Unfortunately, the condominium chose not to document its leases with formal pieces of paper. Accordingly, one is left to discern the terms of the lease. Some assistance is available from the contemporaneous correspondence. By letter dated January 27, 2012, a copy of which was sent to each unit owner, the board of directors described its understanding of the parking situation as follows:

> Parking has perhaps been the most misunderstood issue at the building. The City was very clear that their consent to convert [the building to a condominium] was dependent on our keeping parking spaces as rental spaces, as actual parking spaces are at a premium due to the lack of sufficient parking spots. Owners are directed to the Declaration, Section 3.2 Conveyance of Parking Spaces, specifically, A(d) and (e) on page 8. Parking terms under the new Declaration remain consistent with our previous Co-ownership documentation. Resident Owners who lease a parking spot from the Corporation are required to convey their parking spot back to the Corporation once they cease to be in **actual occupation** of their suite. Additionally, cars parked in the garage as per section 3.2 Parking **must have valid license plates and insurance and be in good working order**. Vehicles which do not meet the Declaration's standard will have to either rectify the deficiencies or be removed to allow other Owners their right to lease parking spaces as the parking garage is not a storage facility. [Bolded emphasis in original. Underlining added]

[8] As is apparent from the foregoing, particularly the underlined last sentence, the board of directors determined that it was not prepared to allow unit owners to store non-functioning vehicles in the garage when other owners were waiting to obtain parking spots to facilitate active transportation. A non-functioning car can be stored elsewhere with no prejudice.

III The Termination of the Applicant's Parking Lease

[9] By letter dated January 31, 2012, the board of directors put the applicant on notice as follows:

> It has come to the Boards [*sic*] attention that your car, an Audi would license plates ATW607 has an expired license plate from May 2009. Additionally we were informed by a previous manager during one of our garage cleaning appointments that your car could not be removed from the parking garage as it did not have any insurance. Additionally, we note that two of the car's tires are now flat. Please be advised that your vehicle is in contravention of the Declaration and if you wish to retain the right to rent your parking space, you are required to bring the car into good repair, insured and with active plates.

2015 ONSC 7596 (CanLII)

[10] In this letter, the Board asks for the applicant to bring her car into good standing within the meaning of the declaration by February, 29, 2012. The board asked to be advised by February 15, 2012, if the applicant intended to bring her car up to the required standards.

[11] The applicant says that she did not receive this letter. The condominium did not put forward any proof of service.

[12] The board sent a further letter to the applicant dated February 29, 2012. The letter recited the prior letter and noted the lack of a response. It continued as follows:

> The Board now regrets to inform you that at a meeting of the Board of Directors, it was agreed by all members that your parking privileges will be withdrawn if the car does not meet the Declaration's criteria. However, in the spirit of goodwill, the Board will extend its timeline to March 31, 2012 to allow you the opportunity to bring the car into good standing. If there continues to be no progress on your part to comply with the condominium's standards the Board wishes to advise you today that the Audi parked in parking space #20 will be towed off the premises and onto the street on April 1, 2012 to allow other deserving residents the opportunity to rent the parking spot.
>
> Please be advised that any costs associated with rectifying the matter will be charged back to you.
>
> The Board is returning your April and May postdated maintenance fee cheques in the amount of $780.51, which include the $50 parking fee.

[13] Several points stand out in this letter. First, the deadline for the applicant to bring her car into good standing was set by the board as March 31, 2012. By that time, the applicant was "to show progress on her part to comply." Consistent with the view previously stated, that the garage was not to be used as a storage facility for junkers, the board threatened that in the absence of progress towards compliance, it would remove the applicant's car, "to allow other deserving residents the opportunity to rent the parking spot."

[14] By letter dated March 28, 2012, the applicant advised the board that she had not received its first letter. However, she also responded that upon receiving the February, 29, 2012 letter, she immediately sent her car to the auto shop. She went on to take issue with the board's view of her rights with respect to her parking space as follows:

> My purchase and sale agreement of 1991 included my apartment and parking space. This purchase and sale agreement was approved by the Co-ownership's Board of Directors. I have paid for this parking space. Ever since my purchase I am entitled to retain this parking spot irrespective of my ownership of a car or not. As per my purchase and sale agreement, I have exclusive use of my parking spot.
>
> The Feb. 29 letter included my cheques for monthly maintenance fees. Please explain why my cheques have been returned.
>
> As no explanation was provided for the return of my postdated maintenance cheques, enclosed are the April and May cheques, as required under the purchase and sale agreements, including the parking fee.

[15] At the hearing of this matter, the applicant did not continue to argue that the terms of her initial purchase of a co-ownership unit took priority over the declaration. Instead, she asserts that her unwritten lease to the parking spot is terminable only upon her loss of possession or sale of the unit as set out in section 3.2 of the declaration. These are the only two grounds of termination specifically mentioned in section 3.2 of the declaration quoted above. Otherwise, the applicant asserts that she is entitled to keep the parking spot as long as she pays her $50 per month rent, whether there is a car occupying the spot or not.

[16] By letter dated March 29, 2012, the board of directors responded. First, it questioned the applicant's truthfulness by sarcastically wondering how it was that its January 31, 2012 letter had "mysteriously not reached you." The board continued:

> You will note that, as under the former Co-ownership documentation, the current registered governing Declaration provides that the "Board has the exclusive authority to assign parking spaces to an owner on a priority basis." As such, kindly be advised that since you have failed to provide the Board with any supporting documentation in any respect, it has no choice but confirm [*sic*] that it has withdrawn your parking privileges as of April 1. Your parking spot will be reassigned. Once you can provide proof of the required documentation and you meet all requirements for a parking spot you may submit a written request for another parking spot. If a parking spot is not available at the time of the written request you will be placed on a waiting list.
>
> Since your parking privileges have been withdrawn the Board requests that you forward a series of new postdated cheques for April 1 to August 1, 2012 in the amount of $730.51 payable to TSCC 2187, which is for maintenance fees only.

2015 ONSC 7596 (CanLII)

> Your old cheques for April and May 2012 in the amount of $780.51 inclusive of parking, payable to Ridelle Avenue Co-ownership are, once again, enclosed.
>
> … For the reasons given above, the Board considers this matter closed and will not entertain further discussion. If you feel you have claim [*sic*], kindly confer with your lawyer.

2015 ONSC 7596 (CanLII)

[17] There is much notable about this letter. First, its tone is disrespectful and dismissive. It is not consistent with an amicable, businesslike, or neighbourly tone among a community member and her elected representatives. Second, the board does not explain how it purported to confirm the termination of the applicant's rights prior to the expiration of its own deadline of March 31, 2012 set in the February, 29, 2012 letter. The board recites its exclusive entitlement to assign parking spaces, but it ignores that under the declaration it carries out that power by entering into leases with unit owners. A lease is an agreement that provides for exclusive possession of a defined piece of property on defined terms. The board's authority to assign parking spaces is carried out by agreeing to enter into leases with owners. Once it has done so, the board does not have a unilateral right to ignore the owner's leasehold interest. Rather, if it wishes to terminate an owner's right to use a parking spot under a lease, it must proceed in accordance with the terms of the lease.

[18] Finally, the board purports to terminate the applicant's rights because she had failed to provide documentation to establish that her car met all of the requirements set out in the declaration (license, insurance, and good repair). However, in its letter of February 29, 2012, the board provided the applicant until March 31, 2012 to show "progress on your part to comply with the condominium's standards." The applicant argues that she did so by immediately removing the car from the garage. The board's witness on cross-examination confirmed that as of March 29, 2012, the applicant was not in breach of the declaration because her car had been removed. That is, there was no unlicensed, uninsured car in disrepair occupying the parking space at the time that the board terminated the applicant's lease.

[19] Prior to moving through the rest of the chronology, I pause to pose to questions that seem to have arisen on the facts. First, was the board entitled to terminate the applicant's lease when and as it purported to do? Second, if the board was not entitled to terminate the applicant's lease when and as it purported to do, what flows from the breach?

[20] Rather than addressing the issues that arose from the parties' respective (mis)understandings of their rights and obligations, they determined to take tactical positions with each other that basically involved: name-calling, hyperbole, failure to listen, taking extreme positions, wasting time, money and effort, and causing themselves and each other distress.

IV The Escalation

[21] By letter dated April 27, 2012, the first volley from counsel for the applicant characterized the board's stance as "capricious and unreasonable." Moreover, he provided his firm's opinion that the board had "breached its standard of care by failing to act reasonably or in good faith in this matter." Counsel then indicated that the applicant advised that her cheque for common expenses for April had not been cashed and asked whether it had been lost or misplaced so that the applicant could provide a replacement if necessary.

[22] Much time was spent in ensuing correspondence dealing with the exchange of cheques. The applicant knew full well that the Board did not wish to receive a cheque from her that included a $50 component for her parking space rent after it purported to terminate her rights at the end of March. The applicant's continued insistence upon providing cheques that included rent for the parking space was nothing more than a bare tactic designed to enable the applicant to argue later that if the Board cashed one of the cheques, it would have confirmed her lease by accepting rent. Moreover, by sending cheques that she knew included rent that the Board had returned already, the applicant was falling behind on her common expense payments that represented more than 90% of the value of the cheques.

[23] Not to be outdone, by letter dated April 25, 2012 (that apparently crossed with the applicant's counsel's letter) the condominium's counsel once again returned the applicant's cheques and requested new cheques in the corrected amount. He also noted that the applicant is responsible for legal costs associated with his letter and requested payment of costs of $452 within 10 days. The letter ended with an enforcement threat that "[s]hould you have any doubts as to the ability of the Corporation to enforce the Declaration, we strongly recommend that you seek your own legal counsel immediately."

[24] Much back-and-forth follows with counsel reiterating their positions to each other as common expense arrears and the condominium's legal expenses continued to grow. Somehow, it dawned on neither side that it might be a good idea to provide for a mechanism for the applicant to pay her common expense fees on a without prejudice basis, either with or without the extra rent component. Instead, correspondence turned to the issue of collection of arrears of common expenses and legal fees. It was the applicant's position that the condominium was not entitled to legal fees for the termination of her lease because she was not in breach at the time that the board purported to terminate it. That argument fell on deaf ears. Arrears, including legal fees, climbed from $1,503.26 on June 19, 2012 to $2,233.77 on July 6, 2012. In addition, in its July 6 letter, the board threatened to place a statutory lien on the applicant's unit for the mounting arrears. Moreover, in separate correspondence the Board threatened to levy an "administration fee" of $250 as compensation for the inconvenience of corresponding with the applicant. Although the applicant made a payment for July 1 and for August 1, 2012, her alleged arrears of common expenses and fees had climbed to $3,971.88 by August 23, 2012.

2015 ONSC 7596 (CanLII)

[25] By letter dated September 27, 2012, the applicant delivered a notice of dispute to the board in accordance with Bylaw No. 2 of the condominium. That bylaw imposed a system of mediation and arbitration for the resolution of disputes among the members of the condominium community. In accordance with article 2.1 of that bylaw, upon delivery of a notice of dispute the parties were required to meet for the purpose of trying to resolve the dispute, "as soon as possible…as many times as the parties reasonably deem necessary."

[26] By letter dated October 9, 2012, the condominium corporation, acting without legal counsel, declined to meet as they purported to determine that the applicant did not have a claim. Moreover, it expressed its, "considered opinion that the Court's [*sic*] may view, Ms. Couture as a vexatious litigant." I respectfully beg to differ. In a fit of arrogance, the board concluded its letter as follows:

> As such the Corporation respectfully declines the invitation to meet with Ms. Couture and will not subject itself to any arbitration or mediation as clearly all matters have been determined.
>
> We trust this information settles these meritless matters.

[27] Life would be much neater if all disputes could be terminated unilaterally. The board somehow satisfied itself that it did not need to comply with the condominium's mediation and arbitration bylaw or the provisions of section 132 of the *Condominium Act, 1998* concerning mediation and arbitration. Rather than following the statutory prescription to attempt to resolve matters without resort to formal litigation and within the body of the condominium, the board was inviting a lawsuit against the condominium corporation.[1]

[28] The board's witness confirmed that the board knew that it was required to participate in mediation when it refused to do so. No excuse was put forward before me for its initial refusal to comply with its legal obligation. After being contacted by one of the potential mediators named by the applicant, the board responded by choosing a different mediator and requiring that the applicant pay 100% of the mediation costs in advance. Under the terms of its Bylaw No. 2 however, the costs of mediation are to be split equally.

---

[1] Perhaps the board had an eye toward subsection 134 (5) of the statute that entitles a condominium corporation to full indemnity costs in litigation against a unit owner in which the condominium corporation obtains any award of damages or costs. This subsection performs an important role to protect innocent unit owners from paying the price of unmeritorious litigation. However, it also provides a skewed incentive to boards of directors and their advisors who can wield a heavy sword over the heads of unit owners. In this case, for example, by rejecting the applicant's common area expense cheques, the board could have a high degree of certainty that it would be entitled to obtain a judgment at least in the amount of outstanding common expenses. Were that the case, it would then attach a lien to the applicant's unit for its full indemnity costs. This section unfortunately incentivizes recalcitrant, litigious behaviour by condominium boards of directors and their advisors whom may be so inclined.

2015 ONSC 7596 (CanLII)

V The First Lien

[29] By a further letter dated October 9, 2012, counsel for the condominium corporation advised the applicant that it had filed a lien against title to her unit in the amount of $5,405.47 consisting of arrears of common expense payments for October, 2012 of $664.10, outstanding legal costs of $3,241.37, and $1,500 for legal fees in relation to drafting and eventual removal of the lien itself. Counsel indicated that payment was due by the end of the month, failing which the corporation may immediately commence power of sale proceedings. The applicant made the payment under protest.

[30] The applicant denies that she is liable for legal fees incurred at the end of March, 2012 by which time she was not in breach of the declaration. Moreover, after raising this argument, the condominium corporation changed its grounds for requiring payment of legal fees from claiming that the legal fees were incurred to "remedy a breach" to then claim for fees incurred for collection of outstanding common expenses. But, as noted above, the condominium corporation refused to accept common expense cheques that included an extra $50 for rent for the parking spot. Had it truly been concerned with collecting its common expenses, it could have readily deposited the cheques and either refunded the parking overpayment or negotiated a without prejudice provision as discussed above. Moves and counter-moves. Tactics and counter-tactics.

[31] Under subsection 85(2) of the statute, a condominium corporation's right to lien expires three months after the default that gave rise to the lien unless the corporation has, by that time, registered a certificate of lien on title. Prior to registering the certificate, the corporation is also required to give notice of each lien claim to the owner. *York Condominium Corporation No. 82 v. Bujold*, 2013 ONCA 209 at paras 11, and 17 to 20. Outstanding legal fees were claimed for over $2,200 by July 6, 2012, which is just before the three-month period that could lawfully be covered by the first lien. Accordingly, it appears that the lien had already expired for the bulk of the funds claimed as outstanding costs under the lien.

[32] It should be noted that section 7.5 of the declaration provides an obligation on each owner to indemnify the condominium corporation for all loss, cost, damage, injury, or liability caused by any act or omission of the owner *to the common elements or any unit*. In addition, each owner is required to indemnify the corporation for the loss, cost, damage, injury or liability that the corporation may suffer by reason of any breach of any provision of the statute, the declaration, bylaws etc. In my view, neither of those indemnities assists the condominium corporation. The legal fees alleged were not incurred as a result of any act or omission by the applicant to her unit or the common elements. Rather, they were claimed due to an alleged breach. However, as noted above, and by the corporation's witness, by the time the corporation retained counsel in late March or early April, 2012, the applicant had removed her car from the parking lot and was not in breach. Whether she has the right to keep her lease or not is a different question that will be addressed below. However, in my view, the filing of this lien against the applicant's unit by the condominium corporation was neither a reasonable step nor a lawful one.

2015 ONSC 7596 (CanLII)

VI Further Escalation of Hostilities – Administration Fees

[33] At about the same time, the board began memorializing complaints that the applicant's husband was behaving in an abusive, harassing manner towards neighbours. The police had been involved more than once and charges have since been laid. By letter dated December 13, 2012, the board purported to levy a $250 administration fee against the applicant, "for its need to take time away from other matters to continuously notify you of your failing to heed past warnings" concerning her husband's behaviour Not surprisingly, the applicant denies the allegations concerning her husband. Moreover, she denied the board's entitlement to levy fines. Continued nasty exchanges ensued leading the board to levy another $250 "administration fee" in relation to an allegation that Mr. Couture tampered with security cameras. The board alleged that Mr. Couture, "was observed tampering with the Corporation's security cameras". Yet the Board offered no evidence to rebut the affidavit of Patricia O'Connor, who swore that her daughter turned the camera on her instruction, "because the camera had always been turned to the exit door as a security measure, and [the respondent] Edwards had turned it toward the hallway to watch residents coming and going." There is no evidence before me of anyone observing Mr. Couture touching a security camera despite the board's allegation that he was observed doing so.

[34] Article 10 of Bylaw No. 1 of the condominium corporation provides in part as follows

> The contravention of any provisions of the Act, declaration, by-laws and/or rules of the Corporation, shall give the Board, subject to its duty to act reasonably in addition to any other rights set forth in the Act and the declaration, the right to:
>
> (d) impose an administrative fee of up to $250 per incident against the owner of a Unit responsible for breach of the Declaration, By-laws and/or Rules of the Corporation by the owner… as a reasonable cost incurred by the Corporation for the extra administrative work involved in enforcing the Declaration, By-laws and/or Rules of the Corporation.

[35] I agree with Mr. Justice Maloney in *Basmadjian v. York Condominium Corporation No. 52*, 1981 CarswellOnt 532 at para 14, where his Lordship suggested that such bylaws are *ultra vires* or invalid for being beyond the powers of the corporation to enact. Counsel for the condominium corporation did not point to any provision of the statute empowering the condominium corporation to enact bylaws allowing the Board to levy administrative fines. Moreover, the condominium corporation already has a clear right to indemnity for costs, expenses, and losses that it actually suffers at the hands of a unit owner who may breach the provisions of the declaration, other constating documents of the condominium corporation, or the statute. While one can understand an argument to deem a certain minimum amount of damages in order to avoid the expense and inconvenience of proving trifling amounts, an administrative fee also has the potential to operate as an arbitrary weapon. Given the nature of condominium disputes - involving significant emotional components brought on by the parties' ongoing physical proximity - and the policy favouring consensual dispute resolution mandated by the statute, I do not

2015 ONSC 7596 (CanLII)

view the power to levy administrative fees or fines as being commensurate with the statutory scheme or purpose. Accordingly, I view the administration fees as improper and the provision that purports to authorize them as *ultra vires* the corporation. If the corporation claims entitlement to indemnity for costs, losses, or expenses incurred, it must document and prove its entitlement in the ordinary course under the statute whether through the lien, court, or alternate dispute resolution processes provided.

2015 ONSC 7596 (CanLII)

[36] In accordance with section 132 of the *Condominium Act, 1998*, arbitration may proceed when mediation does not. In light of the condominium corporation's refusal to mediate in breach of its own bylaw, the applicant served a notice of arbitration on May 7, 2013. The Corporation was required to respond within five days in accordance with its bylaw. It did not do so.

[37] The applicant could have proceeded to court to appoint an arbitrator and then moved for default arbitration proceedings if the condominium corporation continued to fail or refuse to respond. The applicant's counsel argued that once the applicant had to incur the cost of proceeding to court, she determined to proceed with her full application. Moreover, as she couched her relief, in part, in terms of oppression, such a claim can only be dealt with in court. It is not clear to me that labeling the allegations of breaches of the declaration, bylaws, and statute as "oppression" actually adds anything to claims on those breaches. However, the parties are here and the court plainly has jurisdiction to deal with the entirety of the relief claimed. *York Condominium Corporation, No. 26 v. Ramadani*, 2011 ONSC 6726 at paras 47 to 52.

<u>VII The Second Lien</u>

[38] By letter dated July 17, 2013, the condominium corporation gave notice of a second lien to the applicant. It made reference to an invoice dated March 25, 2013 for $3,441.60 for costs incurred by the corporation as a result of the applicant's continued pursuit of her "baseless issues" and in relation to her husband's alleged misconduct. It is clear on the face of the letter that the defaults upon which the lien was being claimed occurred more than three months previously and hence the notice was invalid. Moreover, in the letter, the board returned to the applicant her cheque in the correct amount for common expense fees for March, April and May, 2013. It did so because the cheque did not also include payment for the further legal costs sought in the March 25, 2013 invoice. The letter also gave notice of a further claim for fees of $12,003.56. The invoices provided as back up for this further charge show that only approximately 10% of the amount claimed was incurred in the prior three months and the bulk that amount consisted of the common expense payments that the board had refused to receive unless all of its other claims were paid without dispute. The back-up claimed as well for fees incurred back to 2009 including thousands of dollars for which the limitation period would have already expired even if they were properly claimed.

[39] More correspondence; more name calling; more threats of proceedings; more threats of costs; and more administrative fees ensued.

[40] On August 30, 2013, the condominium corporation registered its second lien against title to the applicant's unit in the amount of $14,511.16. Counsel added another healthy $1,500 for its costs in preparing and ultimately discharging the lien. One pauses to wonder if counsel ought to be entitled to charge for preparing and registering a lien for amounts that were too old to be lienable on their face.

VIII The Applicant Sues

2015 ONSC 7596 (CanLII)

[41] Finally, by notice of application dated September 13, 2015, the applicant sued the condominium corporation and each of its directors for:

a. a declaration that the condominium corporation was not entitled to revoke the applicant's lease to her parking space;

b. in the alternative, a declaration that the decision the board of directors to revoke the lease was unreasonable;

c. an order that the applicant's parking privileges be restored forthwith;

d. an order that all references to the first lien be deleted from the parcel register for the applicant's unit;

e. a declaration that the condominium corporation was not entitled to add the amount secured by the first lien of $5,405.47 to the common expenses for the applicant's unit;

f. an order that the respondents repay the first lien amount to the applicant;

g. an order that the second lien be discharged forthwith and that all references to the second lien be deleted from the parcel register to the applicant's unit;

h. in the alternative, an order that the second lien be discharged upon payment by the applicant of $1,337.20, being the common expense arrears amounts secured by the second lien;

i. a declaration that the condominium corporation was not permitted to add the amount claimed in the second lien that was not attributable to common expenses, $10,599.56, to the common expenses for the applicant's unit;

j. an order that the condominium accept monthly payments in respect of condominium common expenses paid by the applicant;

k. a declaration that the respondents are in breach section 135 of the *Condominium Act, 1998* by virtue of their conduct toward and regarding the applicant;

l. an order that the respondents pay the applicant damages in the amount of $10,000 for the respondents' breach of section 135 of the act;

m. an interlocutory and permanent injunction requiring the respondents to cease treating the applicant in a harassing, harsh, burdensome and/or unfair manner;

n. an order that any and all damages, costs and/or other monies awarded to the applicant by the court be paid by the individual respondents;

o. an order that the individual respondents be personally responsible, on a joint and several basis, for any legal and/or other costs or expenses incurred by the condominium corporation in connection with the application and with the events underlying same;

p. an order that the individual respondents not be reimbursed or indemnified by the condominium corporation and/or by any policy of insurance maintained by the corporation for any legal and/or other costs or expenses incurred by them in connection with the application or with the events underlying same;

q. in the alternative to (n)-(p), an order that the applicant be exempt from contributing her proportional share via her common expenses to any amount(s) that this Honourable Court orders the condominium corporation to pay to her;

r. in the alternative to (q), an order that any amount(s) awarded to the applicant be adjusted to reflect her obligation to contribute to the common expenses of the condominium corporation;

s. costs on a substantial indemnity basis;

t. prejudgment and post judgment interest;

u. if necessary, an order abridging the time for service of materials;

v. if necessary an order validating service of the materials relied upon by the applicant; and

w. such further and other relief as counsel may advise in this Honourable Court deems just.

[42] Although the application was commenced on September 13, 2013 and had an initial hearing date of December 16, 2013, the applicant did not swear her supporting affidavit until December 9, 2013. Not surprisingly, the matter did not proceed on the initial return date. In fact, it did not proceed at all until the hearing before me on December 1, 2015.

[43] By supplementary affidavit sworn after a two year hiatus, on September 23, 2015, the applicant explains that in November, 2013, her husband was arrested as a result of disputes with neighbours in which, she says, the respondent Graham fabricated accusations of assault.

2015 ONSC 7596 (CanLII)

[44] The applicant testifies that as result of the ongoing disputes and criminal charges, she "no longer felt safe from ongoing and escalating harassment from the Board." As such, she moved out of her unit into a rental apartment on April 11, 2014. She says that she determined that any tenant to whom she might lease her unit would suffer harassment from the respondents and therefore she let her unit sit empty.

[45] One year later, in April, 2015, the applicant paid $13,057.66 to discharge the second lien under protest in order to clear her title to allow her to sell her unit. On June 22, 2015, the applicant sold her unit for $245,000.

IX The Applicant Renews her Claim

[46] In her supplemental affidavit, the applicant particularizes additional costs that she claims she has incurred as a result of the respondents' harassment including: registered mail, renting a UPS box, storage of furnishings, moving costs, rent for her new apartment, costs of sale of her unit, and the difference between the proceeds of sale, "and what it will likely cost me to purchase an equivalent condominium unit."

[47] The applicant recites information and belief from her real estate agent that the average cost of a condominium unit similar to hers in a nearby radius is approximately $638,000. She also advises that while her unit was for sale, the unit directly above her in the building was also for sale and ultimately sold for $77,000 more. The applicant testifies that the difference is attributable to the fact that the condominium corporation placed a park bench outside her unit on the common elements. The applicant testifies that her agent received complaints and comments from other agents about a perceived lack of privacy in the unit as a result of people sitting on the park bench under the window of her unit. Accordingly, she seeks to recover the $77,000 difference between the sale price of her unit and the unit above it and/or the difference between her sale price and the average price in the area.

[48] In addition, the applicant seeks damages for physical manifestations of the distress that she has endured as a result of the harassment received at the hands of the respondents. To that end, she has included as an exhibit to her affidavit a letter from her doctor discussing her symptoms.

X Analysis

(i) The Statute

[49] The relevant provisions of sections 132, 134, and135 of the *Condominium Act, 1998* provide as follows:

Mediation and arbitration
132. (1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,

2015 ONSC 7596 (CanLII)

(a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and

(b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,

(i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or

(ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed. 1998, c. 19, s. 132 (1).

Application
(2) Subsection (1) applies to the following agreements:

1. An agreement between a declarant and a corporation.

2. An agreement between two or more corporations.

3. An agreement described in clause 98 (1) (b) between a corporation and an owner.

4. An agreement between a corporation and a person for the management of the property. 1998, c. 19, s. 132 (2).

***

Disagreements between corporation and owners
(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132 (4).

Duty of mediator
(5) A mediator appointed under clause (1) (a) shall confer with the parties and endeavour to obtain a settlement with respect to the disagreement submitted to mediation. 1998, c. 19, s. 132 (5).

Fees and expenses
(6) Each party shall pay the share of the mediator's fees and expenses that,

(a) the settlement specifies, if a settlement is obtained; or

(b) the mediator specifies in the notice stating that the mediation has failed, if the mediation fails. 1998, c. 19, s. 132 (6).

Compliance order
134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a

2015 ONSC 7596 (CanLII)

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).

2015 ONSC 7596 (CanLII)

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).

***

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).

Oppression remedy
135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section. 1998, c. 19, s. 135 (1); 2000, c. 26, Sched. B, s. 7 (7).

Grounds for order
(2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter. 1998, c. 19, s. 135 (2).

Contents of order

(3) On an application, the judge may make any order the judge deems proper including,

(a) an order prohibiting the conduct referred to in the application; and

(b) an order requiring the payment of compensation. 1998, c. 19, s. 135 (3).

(ii) Termination of the Applicant's Parking Lease

[50] While the declaration plainly anticipates the leasing of parking spaces to owners, it is not clear to me that an actual lease exists or existed between the applicant and the condominium corporation. There is a dearth of formal terms, particularly relating to the length of the tenancy and the termination of the tenancy. Nevertheless, the relationship was plainly contractual-whether formally a lease or not. Either way, basic common law principles are applicable.

[51] For example, whatever the length of their terms, at common law contracts and leases are terminable upon material breach. The condominium corporation relies upon its letters of January 27 and February, 29, 2012, as giving notice to the applicant that she was in breach of the declaration by continuing to park a car in the garage that did not have a valid license plate sticker or insurance and was not in good repair. While the declaration does not provide a mandatory or specific notice period, the initial 30 days provided plus the extra 30 days provided in the second letter were certainly reasonable steps. Having set out a notice period in which it required the applicant to show only some steps to comply, the condominium corporation was then bound to refrain from terminating the applicant's rights until the notice period ran its course. In response to the February 29, 2012 letter that she received, the applicant removed her car from the garage right away. Regardless of whether she actually took her car to a repair shop, of which I will say more below, the applicant was not parking an unlicensed, uninsured car in a state of disrepair in her spot when the board of directors purported to terminate her rights. It is true that the applicant did not provide proof of her license, insurance, or that the car was in good repair by the date of termination on March 29, 2012. However, if the applicant did not receive the January, 27, 2012 letter, she did not know that this was specifically demanded of her. The February 29, 2012 letter required only that she show that she had taken some steps to comply by March 31, 2012. Moreover, and in any event, the condominium corporation acted prior to the expiration of the notice period that it had set. In my view, therefore, whatever rights the applicant had were violated by the condominium corporation when it purported to terminate the applicant's lease prematurely.

[52] It is important to note that no matter what rights the applicant had, she had no right to park an unlicensed, uninsured car that was in disrepair in the garage. Section 3.2 of the declaration is clear on this point. An important fact in this case is that throughout all of the back-and-forth over the past three, almost four years, the applicant has never provided evidence to the board of directors to show that she actually ever had her car licensed, insured, or repaired. In fact, while steadfastly maintaining that she had no obligation to do so, the applicant has delivered no evidence in this application to show that she ever

2015 ONSC 7596 (CanLII)

had her car licensed, insured, or repaired after it was removed from the garage. The condominium corporation asked for this information many, many times in its correspondence. I can only infer from the applicant's silence that she is unable or unwilling to adduce evidence showing that she ever brought her car into compliance with the declaration after removing it from the garage.

[53] One questions then why the applicant went through such a horrendous escalation of hostilities if she did not need the parking spot for anything other than cheap storage of a junker. The relevance of this point is that even though the condominium corporation acted in breach of the applicant's rights by terminating her parking lease when it did, the applicant cannot show that she suffered any harm or loss from that breach. She has not submitted any evidence that she paid more to park her car elsewhere. She could not bring it back into the garage unlicensed, uninsured, and in disrepair, without immediately finding herself in receipt of another default notice. While the applicant argues that there was no right to terminate her lease prior to the termination of her ownership of her unit, that argument could only apply if her car otherwise met the standards set out in section 3.2 of the declaration. The contract was not terminated due to the expiry of its term but for an alleged breach. There was no breach on the date of the purported termination. At some stage however, an owner who in good faith wished to use a parking spot for her licensed, insured, usable car would have responded to the multiple requests by the board of directors for proof that the car did indeed meet those standards. Absent proof that the applicant had a car that met the standards set out in section 3.2 of the declaration and that the board of director's termination thereby caused her to lose a right that she properly maintained, in my view, the applicant suffered no compensable loss.

[54] Moreover, the ancient legal expression "it takes two to tango" applies to this case. Rather than fixing her car, the applicant sicked her lawyer on the board to immediately allege bad faith and to make repeated threats with lengthy, self-serving, repetitive recitations that brazenly evading the key issue of whether the applicant's car had been repaired,. Her actions did not demonstrate good faith, reasonable, or neighbourly conduct either.

(iii) The Two Liens

[55] I have already discussed the two liens registered by the condominium corporation against the applicant's unit. In my view, neither lien was registered appropriately. The bulk of the amounts claimed were no longer subject to a lien by the time the liens were filed. To the extent that the liens included amounts for recent common expenses, the applicant had tendered those payments. In the first lien, the payments were refused because they included an extra $50 for parking. In the second lien, the payments were refused because they were not accompanied by payments of other alleged outstanding legal fees. In both cases, the liens were used to punish the applicant in legal fees rather than as *bona fide* methods to collect amounts actually fairly subject to lien rights. The applicant is entitled to the return of funds that she paid on the liens under protest net of the common expense component of those amounts. The applicant is therefore entitled to judgment for $4,741.37 on the first lien and $9,881.66 on the second lien with prejudgment interest

2015 ONSC 7596 (CanLII)

under the *Courts of Justice Act*, R.S.O. 1990 c. C.44 from the date of each payment under protest.

(iv) Administration Fees/Fines

[56] I have already found the fees levied by the condominium corporation to have been beyond the scope of its authority. As I have already adjudged the condominium corporation liable to refund amounts paid on account of the liens, any amounts actually paid by the applicant for administrative fees are already being refunded to her. The condominium corporation has not brought a counter-application seeking payment of any amounts for administration fees. Accordingly, no further relief as required. This issue may however be relevant to an assessment of the oppression remedy below.

2015 ONSC 7596 (CanLII)

(v) Refusal to Mediate/Arbitrate

[57] The condominium corporation offers no good faith explanation for its refusal to engage in mediation and arbitration as required by its bylaws and the statute. This matter could have been resolved before the end of 2012 had the parties sat down in good faith to work out their issues. So much of the escalated hostilities could have been avoided had the condominium corporation engaged in mediation I response to the applicant's notices. If mediation did not yield a settlement, arbitration could have quickly ensued. As with the administration fees/fines issue, this issue may be relevant to an assessment of the oppression remedy below.

(vi) Oppression

[58] The oppression remedy protects a party's reasonable expectations. To qualify, a party must have a subjective expectation. In addition, the expectation must be a reasonable one. The oppression remedy does not protect a party's wish list. *B.C.E. Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560. *Hakim v. Toronto Standard Condominium Corporation No. 1713*, 2012 ONSC 404 at paras 31 to 38.

[59] The most obvious sources of reasonable expectations are the law and the formal legal documents produced by the party opposite. I have found several breaches of the condominium corporation's legal obligations above. In addition, small harassments can indeed add up to unfairly prejudicial conduct. *Dyke v. Metropolitan Toronto Condominium Corporation No. 972*, 2013 ONSC 463 at para 23.

[60] The Supreme Court of Canada described the oppression remedy in *B.C.E. Inc.* as follows:

> [89] Thus far we have discussed how a claimant establishes the first element of an action for oppression — a reasonable expectation that he or she would be treated in a certain way. However, to complete a claim for oppression, the claimant must show that the failure to meet this expectation involved unfair conduct and prejudicial consequences within s. 241 of the *CBCA*. Not every failure to meet a reasonable expectation will give rise to the equitable considerations that ground actions for oppression. The court must be satisfied

that the conduct falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of the claimant's interest, within the meaning of s. 241 of the *CBCA*. Viewed in this way, the reasonable expectations analysis that is the theoretical foundation of the oppression remedy, and the particular types of conduct described in s. 241, may be seen as complementary, rather than representing alternative approaches to the oppression remedy, as has sometimes been supposed. Together, they offer a complete picture of conduct that is unjust and inequitable, to return to the language of *Ebrahimi*.

[90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression.

[91] The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the type of wrong or conduct that the oppression remedy of s. 241 of the *CBCA* is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[92] The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally — a wrong of the most serious sort.

[93] The *CBCA* has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94] "Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

2015 ONSC 7596 (CanLII)

[61] In my view, the applicant had a reasonable expectation that the respondents would deal with her lawfully, in good faith, in a neighbourly manner, commensurate with living in a condominium community, and in accordance with the terms of the constating documents of the condominium corporation. While the applicant may have been over-stating her rights to her parking space, she did not deserve the harsh, vindictive, burdensome treatment that she received. As noted above, had the parties gone to mediation and arbitration right away, the merits could have been addressed. Instead, the board of directors acted with arrogance and declined to follow its own internal law and the law of the province in responding as it did.

[62] While the applicant was plainly engaged in perpetuating an agenda of her own, the respondents were bound to behave better. The condominium corporation is governed by legal duties designed to protect and enhance the communal body. The registration of facially invalid liens, levying of subjective and arbitrary fines, and the refusal to mediate/arbitrate as required, were not reasonable responses by a board seeking to manage the affairs of the corporation reasonably and in good faith. They were punitive responses meted out by managers who would brook no dissent from the likes of the applicant. Resistance was futile. The board of directors disregarded the applicant's interests from the outset. Its responses were indeed harsh, burdensome, and oppressive.

(vii) Damages/Compensation

[63] In light of the breaches and oppression found, the applicant is entitled to compensation under subsections 134(3)(b) and 135(3)(b) of the statute. As noted above, the applicant has recently filed a new affidavit in which she seeks substantial damages. The respondents rightly note that the applicant has not amended her notice of application in support of her recent claims. There are no pleadings in an application process. The notice of application is not a direct parallel to a statement of claim in that it is not required to contain a concise statement of allegations setting out particularized causes of action upon which the parties opposite may join issue. Accordingly, I do not accept that the court lacks jurisdiction to adjudicate on the claims recently brought by the applicant due to her failure to amend the notice of application. Case law limiting plaintiffs' relief to the causes of action claimed in their statements of claim is not apposite. The respondents have had over two months in which to prepare on the new affidavit. They chose not to respond or to cross examine.

[64] Moreover, the respondents have been on notice throughout that the applicant was moving for compliance orders and an oppression remedy including at least $10,000 in damages on top of the return of amounts paid under the liens. The sections of the statute referred to in the preceding paragraph make clear the applicant's entitlement to damages should she succeed in establishing the causes of action alleged. The respondents were not surprised or prejudiced at the hearing by the applicant seeking additional heads of damages on over two months' notice.

[65] Having said that, in my view, the applicant has not proven that the wrongful conduct of the respondents caused her to suffer the bulk of the damages claimed. The applicant

2015 ONSC 7596 (CanLII)

moved out of her apartment months after this litigation commenced. That move was infused with issues concerning the ongoing difficulties between the applicant's husband and others. Apparently the criminal charges against the applicant's husband are not yet finally resolved. I would expect any bail conditions imposed on the applicant's husband to include a provision requiring him to stay a certain distance away from the complainants. That is a typical, common, and the normal bail condition associated with criminal charges. While the applicant attests to her strong support of her husband's innocence, she did not include in her material any promise to appear or other bail document applicable to him. I infer from her silence that the documents would not have assisted her argument.

[66] In all, there is no basis in the evidence to find that the wrongful acts to which I have referred above caused the applicant to move out of her condominium unit. I do not accept the applicant's self-serving bald statements in this regard. She has not proven that the liens and fines levied months earlier that made living in the unit unsustainable like the ongoing onslaught of noise in *Dyke*. Did she move out to protect herself from the issues associated with her husband's alleged criminal behaviour? Did they have to move out because of his bail conditions? The applicant's bald statement that she feared for her safety does not prove that the breaches that I have found reasonably caused her to move out or that responsibility for her moving reasonably lies on the condominium corporation's side of the ledger. Moreover, the applicant's decision not to rent out her unit based on her supposition that a tenant would face harassment is insufficient evidence to establish a causal link to the wrongdoing found. On the contrary, it is more supportive of a lack of mitigation by someone with another agenda.

[67] Similarly, the applicant's claim that she did not receive fair market value on the sale of her unit is inexplicable. There is no evidence as to the marketing process that she undertook or any other offers that she received. There is no indication as to why she would have accepted an offer that was $77,000 less than the price of her upstairs neighbour's unit and several hundred thousand dollars less than the neighborhood average that she alleges. If the positioning of a park bench might have caused tens or hundreds of thousands of dollars of market value diminution as suggested by the applicant's inadmissible double hearsay evidence, any reasonable person would have grieved in an appropriate manner about the placement of the park bench prior to selling. Furthermore, there is no evidence of any comparison between the applicant's unit and the upstairs neighbour's unit apart from them sharing a common structural layout. There are many other reasons why the neighbour's unit might have garnered a higher price. Perhaps it had more valuable finishes, fixtures, and appliances. It might have been marketed better. I do not know and will not speculate. What is clear, however, is that the applicant purported to prove market value through hearsay non-expert testimony of her real estate agent and gave the baldest of comparison evidence concerning her neighbour's unit. Neither is sufficient to satisfy, on the balance of probabilities, the causation requirement recognized by the Supreme Court of Canada in *B.C.E. Inc.* and the common law.

2015 ONSC 7596 (CanLII)

[68] Nor would I award the applicant any damages for the physical and distress that she says she has endured. There is no expert medical evidence before the court linking the applicant's symptoms to the wrongful acts of the respondents. Moreover, as I have noted above, the legal doctrine of "it takes two to tango" suggests that the applicant was very much a participant in the escalation of the hostilities between the parties. I have no way to assess what amount, if any, of the applicant's distress was caused by her own conduct, her husband's conduct, and the criminal proceedings brought against him. While I am satisfied that the corporate respondent engaged in significant wrongful conduct, that does not give license to the applicant to lay all of her unsubstantiated wish list at the respondents' feet absent admissible proof to the requisite standard.

[69] I have reviewed the applicant's spreadsheet in which she lists the expenses that she claims. None are backed up by invoices. I see no basis to consider awarding the applicant indemnity for legal fees regarding accusations against her husband. I make no findings in this case concerning those accusations. In the event that the applicant's husband is successful in criminal court, they will have the remedies. In the absence of proof of further damages, in my view, the applicant is entitled to $1,000 as nominal damages for oppression which will more than defray her out-of-pocket costs for registered mail. Prejudgment interest on this portion of the award is calculable from the date of issuance of the notice of application.

[70] I do not need to deal with the issue of personal liability of the other respondents. The applicant confirms that since she has sold her condominium unit, she no longer has an interest in whether her damages are paid by the condominium corporation or the individuals.

XI Outcome

[71] The applicant is entitled to judgment requiring TSCC No. 2187 to pay her the sum of $15,623.05 plus prejudgment interest as discussed above. The other relief sought by the applicant has become moot by reason of her sale of the unit. I am not prepared to make any of the declarations of right sought by the applicant. The application against the non-corporate respondents (while reasonably brought against senior management and the members of the board of directors in the circumstances) is dismissed.

2015 ONSC 7596 (CanLII)

[72] The applicant may deliver no more than five pages of submissions on costs by December 18, 2015. The submissions shall be accompanied by a costs outline and any offers to settle upon which the applicant relies. The respondent may deliver no more than five pages of responding submissions by January 8, 2016. The submissions shall be accompanied by a costs outline and any offers to settle upon which the respondents rely. All submissions shall be delivered in searchable PDF format as attachments to an email to my Assistant. No copies of cases shall be delivered. References to case law, if any, shall be contained as hyperlinks to CanLII or another legal database embedded in the parties' submissions.

2015 ONSC 7596 (CanLII)

F.L. Myers J

Released: December 4, 2015

CITATION: Couture v. TSCC No. 2187, 2015 ONSC 7596
COURT FILE NO.: CV-15-527224
DATE: 20151204

2015 ONSC 7596 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Polly Ann Couture

Applicant

– and –

TORONTO STANDARD CONDOMINIUM CORPORATION NO. 2187, YOLA EDWARDS a.k.a.. YOLANTA ZAWADZINSKI, GRAZIELLA MINATEL, MARY GRAHAM and BRUNO GARISTO

Respondents

REASONS FOR JUDGMENT

F. L. Myers, J.

Released: December 4, 2015

CITATION: Couture v. TSCC No. 2187, 2016 ONSC 161
COURT FILE NO.: CV-15-527224
DATE: 20160107

2016 ONSC 161 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Polly Ann Couture, Applicant

AND:

Toronto Standard Condominium Corporation No. 2187, Yola Edwards a.k.a. Yolanta Zawadzinski, Graziella Minatel, Mary Graham and Bruno Garisto, Respondents

BEFORE: F.L. Myers, J.

COUNSEL: *Timothy M. Duggan*, for the Applicant

Rovena Hajderi, for the Respondents

READ: January 7, 2016

ENDORSEMENT

[1] The applicant asks for costs of this proceeding that was resolved by Reasons reported at 2015 ONSC 7596. The applicant claims costs on a partial indemnity basis in the amount of $20,885.41 all-in. She says that she achieved substantial success. She submits that the bulk of the time expended involved the liens registered on her unit by the respondents which were held to have been illegally registered. Although she obtained a very modest award of damages, she relies on cases in which courts have awarded declarations of right with no damages and have still awarded significant costs.

[2] The respondents ask that the applicant be denied costs or that the quantum be limited. They point to Rule 57.05 of the *Rules of Civil Procedure* that authorizes the court to deny costs to a party where recovery was within the monetary jurisdiction of the Small Claims Court as occurred here. They point out that while their offers to settle were for amounts that were less than the plaintiff ultimately obtained, the back and forth of the settlement process showed that the applicant was not realistic in her approach. I note as well that the applicant's requirement that as a term of settlement the respondents withdraw criminal allegations against her husband was not at all appropriate. One cannot buy a resolution of criminal proceedings and it is quite improper to try to do so.

[3] The fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These include the principle of indemnity for the successful party (57.01(1)(0.a)), the expectations of the unsuccessful party (57.01(1)(0.b)), the amount claimed and recovered (57.01(1)(a)), and the complexity of the issues (57.01(1)(c)). Overall, the court is required to consider what is "fair and reasonable" in fixing costs, and is to do so with a view to balancing compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario),* 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, at paras 26, 37.

[4] I would have considered finding this case to be one for the application of Rule 57.05 but for the fact that sections 134 and 135 of the *Condominium Act, 1998*, S.O. 1998, c 19 required that the applicant bring her proceedings in this court.

[5] Having said that however, I did find that the respondents had acted illegally and oppressively. The enforced liens that were plainly invalid on their faces. They violated their own by-laws by refusing to participate in mediation and arbitration. They repeatedly levied arbitrary administrative fines against the applicant. And they wholly ignored the applicant's legitimate expectations, and those of all unit holders, that the board and management would comply with the corporation's internal law and documentation (as well as the law of the land of course).

[6] However, as discussed in my Reasons, the applicant brought much of this upon herself. While she was entitled to expect lawful, neighbourly treatment, she too failed to conduct herself or these proceedings on a reasonable basis. Rather than raising a question fairly for resolution, her first position was to make nasty and uncalled for allegations against the board. She adopted transparent strategies to try to lure the board into accepting rent while letting her common area expenses run into arrears. She let this proceeding sit for a year and then grossly over-reached in her claims. She recovered nothing on damages claims in the hundreds of thousands of dollars.

[7] Of greatest significance however is that the applicant never came clean on what happened to her car. This whole escalation that has led to criminal charges against her husband and the sale of their unit may have been brought on by a dog in the manger approach to the parking spot that the applicant did not even need. She had more than ample opportunity to respond to the repeated requests of the board that she prove that her car was licensed, insured, and in good repair. I can only infer the opposite from her sustained refusal to respond on the merits.

[8] While in no sense ought I to be taken to be approving the conduct of the respondents, I cannot view it as fair or reasonable for the applicant to be entitled to costs in the circumstances.

2016 ONSC 161 (CanLII)

Although she had some minimal success in getting back money wrongly taken, that was not the thrust of the case. The case was about a clash of wills and strategic gamesmanship without regard to the harm being caused on both sides. In my view, the parties should each bear their own costs.

F.L. Myers, J.

Released: January 7, 2016

2016 ONSC 161 (CanLII)