CITATION: MTCC No. 985 v. Cheney, 2015 ONSC 7124
COURT FILE NOS.: CV-14-507161 and CV-14-509996
DATE: 20151201

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985	)	*Natalie Schernitzki*, for Thomas Cheney and Sharon MacKay
	)	
Applicant	)	
	)	
– and –	)	*Jonathan H. Fine and Dalia Yonadam*, for Metropolitan Toronto Condominium Corporation No. 985
THOMAS CHENEY and SHARON MACKAY	)	
	)	
Respondents	)	
AND BETWEEN:	)	
	)	
THOMAS CHENEY and SHARON MACKAY	)	
Applicants	)	
	)	
- and –	)	
	)	
METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** 2 and 3 September 2015

REASONS FOR DECISION

MEW J.

[1] It all started on the evening of 24 June 2013 when Sharon MacKay and Tom Cheney (the "Owners") became aware of a strong smell of cigar smoke in their Toronto condominium unit.

[2] It turned out that cigar smoke had migrated from the unit immediately above theirs, most likely through openings in the slab separating the two units.

[3] There has been a running series of disputes between the Owners and the condominium corporation ("MTCC") ever since.

[4] In a decision arising from the trial of an issue between the parties, released on 12 May 2014 (2014 ONSC 2863 (CanLII)), I found that MTCC was not, at that time, in breach of its obligations pursuant to ss. 89(1) and 90 of the *Condominium Act* (these provisions require MTCC to repair units and common elements after damage and to maintain the common elements). Nevertheless, I was of the view that MTCC had not acted with sufficient dispatch when presented with the Owners' concerns and had "adopted an unfortunate attitude towards the Owners, who were quickly branded as complainers who had far too quickly [run] off to their own lawyers." At para. 70 of my decision I observed:

> The owners initially took reasonable steps to try and get the condominium corporation to pay attention to them. Even allowing for the fact that there were people on vacation at the time that the cigar smoke problem first arose, it was unacceptable that it took more than a month before FCS [a consultant] first attended. Having identified violations of the Fire Code and the need to act with dispatch, the response of the condominium corporation was, effectively, not [to] do anything of significance for nearly two months. Unfortunately, FCS and Namcan [another consultant] then incorrectly concluded that the problem had been solved when, in fact, it had not. That is not, of course, directly the fault of the condominium corporation. However, throughout this time, a negative attitude towards the owners continued and in my view coloured the condominium corporation's decision making.

[5] MTCC, with the assistance of its consultants, had ultimately got to a point where, as a result of further investigation and testing, I concluded that "a solution does appear to be in sight". I noted, however, that the parties still disagreed about whether further iterative testing needed to be undertaken and whether other modifications, which had been recommended by engineers retained by the Owners, needed to be made.

[6] My optimism turns out to have been misplaced.

[7] Following the 12 May 2014 decision, the consultants, retained by the Owners and MTCC respectively, conferred with each other. Despite doing so, consensus has still not been reached on what needs to be done to not only eliminate the immediate problems caused by the smoke migration but also, to prevent such problems from occurring in the future.

[8] As the dispute between the parties has rumbled on, MTCC has also raised concerns about certain modifications which the Owners are said to have improperly made to their unit, including the installation of humidifiers in the bathroom and laundry room of the Owners' unit, allegedly

in contravention of MTCC's declaration and which is said by MTCC to have caused or contributed towards the smoke migration problems.

[9] It is noteworthy that the Owners no longer live in the unit. For a time, after they could no longer tolerate the odorous environment in their unit, they lived in a hotel. They have now acquired another residence. Their desire is to have the problems arising from, and associated with, the infiltration of smoke addressed once and for all so that they can sell their unit free of any concerns arising from their disputes with MTCC.

[10] These reasons address two applications, one brought by MTCC, the other by the Owners. By the time of the hearing of these applications, the issues in dispute and the relief sought consisted principally of the following.

By MTCC:

(a) an order for entry into the Owners' unit pursuant to s. 19 of the *Condominium Act* and Article 14 of MTCC's Declaration for the purposes of completing remediation to the Owners' unit to remedy a complaint regarding the migration of cigar smoke;

(b) a declaration that the Owners have breached Article 10(f) of MTCC's Declaration by installing, without the prior written consent of MTCC's Board of Directors, a humidifier or humidifiers;

(c) an order requiring the Owners to remove any such humidifier and restraining the Owners from re-installing any such humidifier without obtaining the prior written consent of the Board of Directors as required by MTCC's Declaration.

By the Owners:

(a) an order that any status certificate which MTCC may be required to send to a perspective order of the unit:

(i) Shall not make reference to the present applications or to the installation of any humidifier or any repairs done to the unit (except to the extent that MTCC has failed to satisfy any judgment rendered against it in connection with such applications); and

(ii) Shall make limited or no reference (depending on the circumstances) to an ongoing action for damages brought by the Owners against MTCC.

(b) a declaration that since the hearing held on 28 and 30 April 2014, MTCC has breached its duty to repair after damage in accordance with s. 89 of the *Condominium Act*.

(c) a declaration that since the hearing held on 28 and 30 April 2014, MTCC has breached its duty to maintain the common elements in accordance with s. 90 of the *Condominium Act*.

(d) an order that MTCC deliver a report to the Owners from a qualified engineer stating that the repairs and/or maintenance arising from the migration of cigar smoke have been completed in accordance with applicable building and fire codes such that, as of the date of such report, smoke will not migrate into their unit.

[11] This dispute between the parties has gone on far too long and has mushroomed out of all proportion to the issues involved.

[12] The parties argued these applications before me over two days. I was provided with two bankers' boxes full of documentation, including case law. Each perspective has been comprehensively presented and argued. I have considered it all. That said, I have endeavoured to group what appear to me to be the main areas of contention and, accordingly, these reasons address those issues. To the extent there are elements of the arguments advanced or relief sought which have not been specifically addressed in these reasons, the parties can assume that I have declined to order that relief.

[13] In short, it is my intention that all issues raised in these applications have now been considered and, hence, these proceedings are, subject to compliance and appeal possibilities, concluded (for the avoidance of doubt, I did not have before me, and therefore make no order in the ongoing action between the parties bearing Court File No. CV-14-507813).

The Humidifiers

[14] MTCC's experts believe that two humidifiers, installed by the Owners, have facilitated the migration of cigar smoke. Although the humidifiers are normal household CSA-approved appliances, which are plugged into a 110V outlet and entirely within the unit, for aesthetic purposes they were mounted within cabinets which in turn, were recessed into the drywall of the master bedroom and laundry room.

[15] Article 10(f) of the condominium corporation's declaration provides as follows:

> 10. (f) No Owner shall make any changes or alterations to his residential Unit, including the removal, installation, extension or other structural alteration of any toilet, bathtub, wash basin, sink, door leading to the exterior of the Unit, window, or heating, air-conditioning, plumbing or electrical installations contained in or forming part of his Unit, or any alteration which affects the Common Elements, without the prior written consent of the Board which may attach any reasonable condition to its consent or which may in its absolute discretion withhold its consent.

[16] The Owners say that installation of the humidifiers did not affect the common elements or constitute the kind of changes or alterations contemplated by Article 10(f). What was done was akin to any other appliance that plugs in and makes use of the water supply and drain as well as electrical supply - no different from a washing machine or a refrigerator with a drinking water dispenser. They argue that there is no connection to or through the underside of the concrete slab which is the uppermost legal boundary of their unit. There is no connection to or through any

drywall which marks the vertical plane boundary of any unit *vis-à-vis* any neighboring unit, or through an external boundary *vis-à-vis* the common elements.

[17] MTCC requested the permanent removal of the humidifiers so that the wall cavities which housed these units could be dry-walled over, as well as because they were installed without the prior permission of MTCC's board of directors contrary to Article 10(f) of the declaration.

[18] One of MTCC's experts, Phillip Brearton, P.Eng, advised that:

> ... any hole in the drywall provides an easier path for air to move from one suite to another. Accordingly, closing such hole provides a further line of defence against air migration between the units.

[19] Specifically, it was Mr. Brearton's opinion that the Owner's unit "will be less susceptible to smoke migration from [the unit above] if the hole currently accommodating the master bedroom humidifier is fully and permanently closed".

[20] After over a year of resisting MTCC's request, the Owners have now agreed to remove the humidifiers. One of them has already been removed. MTCC stands ready to effect the necessary drywall repairs to close the openings left by the humidifiers.

[21] Notwithstanding this, MTCC wants declarations that the humidifiers were installed in violation of Article 10(f) of MTCC's Declaration; that they should be removed; and, that they should not be re-installed without the board's consent. MTCC acknowledges that "[i]n light of the unit owners' position regarding the removal of the humidifiers, other than for costs purposes, these are dead issues, given the unit owners' late agreement to remove and not to re-install the humidifiers.

[22] The Owners say that such relief is now redundant or, in the alternative, that if a declaration is to be made it should be to the effect that the installation of the humidifiers was not in breach of the condominium corporation's declaration.

[23] Given the Owners' agreement to remove the humidifiers, the disputes regarding the humidifiers are moot. It is no longer necessary for the court to decide whether the Owners were in breach of Article 10(f). Albeit that the Owners' agreement to remove the humidifiers is without prejudice to their position that they were not bound to do so, they should make good on their promise. Accordingly I would order that the Owners cause or permit the humidifiers to be removed (to the extent that they this has not already occurred) and that such humidifiers should not be re-installed without the consent of MTCC's board of directors. MTCC will have access to the subject premises in accordance with paragraph 1(a) of its notice of application.

[24] I decline, without deciding the issue either way, to make a declaratory pronouncement that the original installation of the humidifiers was in breach of Article 10(f) of the declaration.

MTCC's Repair Obligation

[25] The remaining issues between the parties are all connected to the extent to which further work needs to be done in order to satisfy the repair obligations of MTCC. Simply put, is more repair work required over and above what has already been done and the outstanding drywalling that has been recommended by Mr. Brearton?

[26] MTCC's counsel has characterised the debate as "the reasonable fix versus the perfect fix".

[27] MTCC's position is that it is sufficient for it to rely upon the advice of its consultant, Mr. Brearton, that once the planned drywall repairs are completed, the overall result will be a reasonable repair. In particular, MTCC relies on Mr. Brearton's conclusions that:

a. The state of the air transfer between the units (once the drywalling is completed) will be typical, reasonable and acceptable given:

   i. the age and design of the building; and

   ii. the applicable provisions of the *Building Code* and the *Fire Code* at the time the building was built in or about the late 1980s.

b. The building is performing as it should, according to its age and design and that certain amount of their migration must be expected and tolerated.

c. Smoke stops, now found in more modern buildings, which prevent fire smoke from moving from one unit to another, are also effective in preventing and migration as well. However, smoke stops were not a *Code* requirement when the building was built. Rather, small breaches and cracks with respect to a building of this type are consistent with the applicable *Code* requirements at the time the building was built.

d. To complete the "perfect repair" it would be necessary to tear out the expensive finishes in both the Owners' suite and the suite above (not to mention the other sweets in the building on the assumption that the fixes required throughout the building) in order to expose the slab and eliminate any remaining breaches and cracks. This would not be reasonable having regard to the age of the building and the other unit owners.

[28] The Owners' consultant, Balázs Farkas, describes Mr. Brearton's recommendations as a "Band-Aid solution". While the closing of the holes left after the removal of the humidifiers would create an additional barrier against air transfer between suites, there would remain numerous other openings – recessed lights, exhaust grilles, smoke detectors, sliding door tracks, pictures hung on the walls – all of which would remain potential pathways for air transfer. Equalising the air pressure between units, or establishing higher positive air pressure in the

Owners's unit compared to adjacent units would be a practical solution but would not, in and of itself be sufficient. What is required, he opines, is to seal all openings between units. This is not only necessary to resolve the problems experienced by the Owners but, according to W. Carson Woods, an architect consulted by the Owners, openings in the concrete floor slab between the units would not, in fact, have satisfied the requirements of the *Building Code* in effect in 1986.

[29] I am not inclined to accept the view that the applicable requirements of the *Building Code* and the *Fire Code* have not been met, and prefer the evidence of Mr. Brearton in that regard. That, however, does not end the debate.

[30] On the question of air supply, adjustments were attempted, seemingly without success. In a report dated 20 May 2015, Mr. Brearton wrote:

> As Mr. Farkas noted, the air supply to the building was increased, to the original design specifications provided for the construction of the building; this was done specifically to satisfy Mr. Farkas's request. The resulting pressure was so high in the corridor that newspapers were reported to be blowing down the corridor when people opened their entrance doors. Several occupants complained that they were almost knocked over by the force of the entrance door due to the increased corridor pressure. During this time, I'm not aware of any attempt by Mr. Farkas or his client to consider whether the change, made for their benefit, improved their circumstances in suite 212.

[31] MTCC argues that it has fulfilled its responsibilities under the *Condominium Act* and has acted reasonably because:

a. it hired an engineer to advise it as to the appropriate fix;

b. it has attempted to carry out the fix recommended by its engineer;

c. it is content with its engineer's conclusion that, *inter alia*, the repair he suggests is reasonable; and,

d. it is not required to follow the advice of the Owners' advisers.

[32] In fulfilling its duties, directors and officers are required to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: *Condominium Act, 1998*, S.O. 1998, c.19, s. 37(1)(b). A director will not be in breach for if he or she relies in good faith upon a report or opinion of, *inter alia*, an engineer whose profession lends credibility to the report or opinion: s. 37(3)(b).

[33] Furthermore, the board of directors of a condominium corporation is charged with balancing the private versus communal rights of owners: *York Condominium Corp. No. 382 v. Dvorchik*, 1997 CanLII 1074 (ON CA). Courts are reluctant to interfere with such decisions:

Baliwalla v. York Condominium Corporation No. 438, 2007, CanLII 14915 (ON SCDC) at para. 27.

[34] The Owners challenge the reasonableness of MTCC's reliance on Mr. Brearton's opinions. They say that he has said conflicting things in a succession of reports which he has provided to the board. Furthermore, MTCC has insisted on the removal of both humidifiers despite Mr. Brearton identifying only the humidifier in the master bedroom for removal. They maintain that MTCC's failure to attach any or sufficient weight to the legitimate health concerns of the Owners undermines the board's claims of reasonable reliance.

[35] There is no doubt that as the dispute has evolved, the views of the various consultants involved have reflected that evolution. For example, steps initially taken by MTCC based on the recommendations of their consultants did not fully solve the problem (see the 12 May 2014 reasons at para. 49). The experts kept going. The principal experts involved – Mr. Brearton and Mr. Farkas – have both endeavoured throughout to provide helpful guidance.

[36] The Owners now seek what amounts to a guarantee that there will be no reoccurrence. The solution offered by Mr. Farakas is more likely to provide that. But, in my view, it goes further than can reasonably be required. Not only would it result in wholly disproportionate remedial work being required (if one measures the expense and disruption, on the one hand, against the likely outcomes) but it would go well beyond what is reasonable and required having regard to the age and construction of the building.

[37] To adopt the labels used by MTCC, the standard is one of reasonableness, not perfection, and on that basis, MTCC is not, in my view, in breach of its duties to repair and maintain pursuant to sections 89 and 90 of the *Condominium Act*, and I therefore decline to make the declarations sought by the Owners in that regard. In particular, I do not accept that I should order MTCC to deliver an engineer's report as described in paragraph 1(e) of the Owners' amended notice of application.

Status Certificates

[38] I am not persuaded that I have jurisdiction to dictate in advance what MTCC states on a status certificate that it issues in accordance with section 76 of the *Condominium Act*. Subsection 1 (h) specifies that a status certificate must contain "a statement of all outstanding judgments against the corporation and the status of all legal actions to which the corporation is a party".

[39] Counsel for MTCC confirmed in argument that, from MTCC's perspective, once the work it wants to complete (as recommended by Mr. Brearton, and including the humidifier-related drywall repairs) is done, from MTCC's perspective there would be no need to mention the smoke migration problems on any status certificate issued by MTCC in relation to the planned sale of the Owners' unit.

[40] In connection with the humidifier and "fix" issues, once the work recommended by Mr, Brearton has been completed, so far as the issues that have been raised in these applications are

concerned (unless there has been a failure to comply with any relief ordered in connection with those applications, or an appeal is pending from any order made in the applications), there would seem to be no reason to make reference to this litigation. But I add the important caveat that, ultimately, such determination is up to the board having regard to its appreciation of its obligations under section 76 at the time that it is requested to provide a status certificate.

[41] As already mentioned, there is at least one extant action between the parties. It would be presumptive of me to make any observation about what should or should not be said on a status certificate in connection with that litigation, and I accordingly declined to do so.

Costs

[42] Not fully reflected in these reasons is the history of a series of case conferences and at least one attendance in open court to deal with undertakings and refusals, the costs of which were reserved until these applications have been heard.

[43] It would be an understatement to say that the parties have simply not been able to resolve the differences through ordinary dialogue. It is highly regrettable that the time and expense associated with court proceedings of this nature has been incurred. That said, while there has been a measure of intransigence on both sides, matters have been complicated by the involvement of insurers and the legitimate concerns on the part of the Owners about their obligations and, hence, potential liability, to prospective purchasers of their unit.

[44] The bills of costs submitted by the parties indicate that each side has incurred costs in the vicinity of $100,000 on a partial indemnity scale. Although, on a strict headcount of the requests for relief made by the Owners and MTCC respectively, MTCC has enjoyed the larger measure of success on these applications, it is my view, in the exercise of my discretion under section 131(1) of the *Courts of Justice Act*, that the interests of justice are best served by making no awards as to costs of these applications to either side. Accordingly the parties shall each bear their own costs.

Orders

[45] The parties should send to me, via my judicial assistant, draft orders which implement these reasons for signature. Should there be any disagreement over the content of the orders, I may be spoken to.

_____

Graeme Mew J.

Released: 1 December 2015

CITATION: MTCC No. 985 v. Cheney, 2015 ONSC 7124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985

Applicant

– and –

THOMAS CHENEY and SHARON MACKAY

Respondents

AND BETWEEN:

THOMAS CHENEY and SHARON MACKAY

Applicants

- and –

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 985

Respondent

REASONS FOR DECISION

Mew J.

Released: 1 December 2015

CITATION: MTCC No. 985 v. Cheney, 2016 ONSC 64
COURT FILE NOS.: CV-14-507161 & CV-14-509996
DATE: 20160106

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Metropolitan Toronto Condominium Corporation No. 985, Applicant

AND:

Thomas Cheney and Sharon MacKay, Respondents

AND BETWEEN:

Thomas Cheney and Sharon MacKay, Applicants

AND:

Metropolitan Toronto Condominium Corporation No. 985, Respondent

BEFORE: Graeme Mew J.

COUNSEL: *Natalie Schernitzki*, for Thomas Cheney and Sharon MacKay

Jonathan H. Fine and Dalia Yonadam, for Metropolitan Toronto Condominium Corporation No. 985

HEARD: In Writing

COSTS ENDORSEMENT

[1] In reasons for decision released on 1 December 2015 (2015 ONSC 7124 (CanLII)) I made the following provision with respect to the costs of these two applications (at paras. 42-44):

> Not fully reflected in these reasons is the history of a series of case conferences and at least one attendance in open court to deal with undertakings and refusals, the costs of which were reserved until these applications have been heard.
>
> It would be an understatement to say that the parties have simply not been able to resolve the differences through ordinary dialogue. It is highly regrettable that the time and expense associated with court proceedings of this nature has been incurred. That said, while there has been a measure of intransigence on both sides, matters have been complicated by the involvement of insurers and the legitimate

concerns on the part of the Owners about their obligations and, hence, potential liability, to prospective purchasers of their unit.

The bills of costs submitted by the parties indicate that each side has incurred costs in the vicinity of $100,000 on a partial indemnity scale. Although, on a strict headcount of the requests for relief made by the Owners and MTCC respectively, MTCC has enjoyed the larger measure of success on these applications, it is my view, in the exercise of my discretion under section 131(1) of the *Courts of Justice Act*, that the interests of justice are best served by making no awards as to costs of these applications to either side. Accordingly the parties shall each bear their own costs.

Request to Reconsider Costs Order

[2] Within 24 hours of the release of my reasons for decision, and before a formal judgment had been taken out, counsel for Metropolitan Toronto Condominium Corporation No. 985 (MTCC) contacted the court and requested the opportunity to make formal submissions on costs, thereby inviting me to reconsider my decision on that issue. Counsel noted that his client had not had the opportunity to make such submissions at the hearing of the applications but, rather, had simply submitted a costs outline.

[3] In light of this request, counsel for Sharon MacKay and Thomas Cheney (the "Owners") was given an opportunity to express a view on the appropriateness of MTCC's request. Not surprisingly, the Owners opposed the request. Counsel for the Owners submitted that it was apparent that the facts relevant to the exercise of the court's discretion to award costs had been considered and that formal, written costs submissions at this juncture would only serve to escalate the time and expense incurred by the parties with respect to these proceedings.

[4] Rule 51.01(7) permits the court to devise and adopt the simplest, least expensive and most expeditious process for fixing costs. Although, at the conclusion of oral submissions in these matters, I received and, subsequently considered, the parties' costs outlines, those outlines were directed at the factors set out in Rule 57.01(1) but did not (and were not asked to) address the issues of which party should pay costs or the appropriate scale of costs.

[5] An Ontario court retains a broad discretion to alter or vary a decision until the formal judgment is taken out (*Montague v. Bank of Nova Scotia*, 2004 CanLII 27211 (ON CA), para. 34, leave to appeal denied, [2004] S.C.C.A. No. 79; *Pammett v. 1230174 Ontario Inc.* 2014 ON SC 4072 (CanLII) at para. 4. Although the discretion is broad, it is one that should be exercised with caution, particularly where (as was the case in *Montague v. Bank of Nova Scotia*) there may be costs consequences. In *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ON CA 125 (CanLII), the Court of Appeal referred to the "significant onus" on the judge to explain a change. The Divisional Court recently noted that the discretion to re-open a matter is generally

one that should be resorted to "sparingly and with the greatest care": *Brown v. Municipal Property Assessment Corp.*, 2014 ON SC 7137 (CanLII) at para. 22.

[6] In the present case, MTCC raises what is, effectively, a fairness issue, namely that it should have had the opportunity to make submissions on the issue of costs before I made a final determination on that issue.

[7] Upon reflection, I agree with the position taken by MTCC. I am persuaded that the overall interests of justice require that the parties be given an opportunity to make submissions to the court on the issues of who should pay the costs of these applications and on what scale. The present circumstances bear no comparison to those in *Montague v. Bank of Nova Scotia*, where, in a wrongful dismissal action, the trial judge increased the reasonable notice period of 12 months, which she had originally awarded to the plaintiff, to 16 months. This increase had the effect of depriving the defendants of the costs consequences of a Rule 49 offer that had been made by the defendants. By contrast, in the present case, I am simply being asked to enable the parties to be heard on an issue when they would ordinarily have had the opportunity to do. The fact that they did not was due to an error of process on my part. I perceive no real prejudice to the Owners arising from the request that has been made, other than the possibility of a different disposition on the issue of costs.

[8] Accordingly, the parties were given the opportunity to make written submissions on costs and I provided directions with respect to the timing and length of such submissions. I declined, however, a request by MTCC to consider further evidence (including invoices) in relation to costs on the basis that the process of fixing costs is not akin to an assessment of costs and, having already received the parties' costs summaries, no further information concerning the quantum of costs should be considered.

Discussion

[9] As I noted in my reasons for decision, there has been a running series of disputes between the Owners and MTCC for over two years.

[10] In a decision arising from the trial of an issue between the parties, which I referred to in para. 4 of my reasons for decision, I declined to make declarations sought by the Owners that MTCC was in breach of its repair and maintenance obligations pursuant to ss. 89(1) and 90 of the *Condominium Act*. However, I found that it had been appropriate for the Owners to commence proceedings. At para. 73 of my reasons relating to the trial of issues (2014 ONSC 2863) I commented:

> I do not find it unreasonable that the owners found it necessary to commence their application. Less formal efforts to obtain a satisfactory response from the condominium corporation had not worked. Accordingly, despite the fact that I have concluded that the condominium corporation is not presently in breach of its obligations, I would exercise my discretion under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, C. c. 43, to award costs in favour of the applicants. I would provisionally do so on a partial indemnity scale although if there are

> circumstances, such as settlement offers, which would warrant a different disposition on costs, the parties may make appropriate submissions.

[11] Following receipt and consideration of written submissions I fixed costs payable by MTCC to the Owners in respect of the trial of issues heard on 28 and 30 April (including an attendance before Low J. on 18 December 2013 and all steps taken after that date in connection with the issues that were tried) at $32,500 inclusive of disbursements and HST.

[12] Following the trial of issues, I remained involved in this matter as case manager and, as a consequence, heard a motion brought by MTCC to strike out parts of an affidavit of Thomas Cheney sworn on 14 August 2014. I heard argument on 3 November 2014 and 6 February 2015, and subsequently released my endorsement on 12 February 2015. Out of 18 portions of Mr. Cheney's affidavit which I was asked to strike, I determined that only four portions should be struck and that a further portion should be struck without prejudice to an expert report (which had been filed as an exhibit to Mr. Cheney's affidavit) being refiled in an acceptable way. The costs of the motion were reserved to the judge hearing the applications in which the Cheney affidavit was tendered in evidence. Accordingly, the costs of that motion were, and are once again now, considered by me in respect of the applications that I heard in September 2015.

[13] MTCC asserts that it achieved substantial and, arguably, complete success on the applications. It was successful on every "live" issue in dispute as of the dates of the hearing. The issue of whether article 10(f) of MTCC's declaration had been breached by the Owners when, without the prior written consent of MTCC's board of directors, they installed humidifiers in their unit, was "at worst a tie" because both parties claimed mirror image relief in respect of that issue and no determination was made either way because, by the time of the hearing, the point was moot.

[14] MTCC also points to conduct of the Owners which lengthened the proceedings and, in particular, to the unjustifiable refusal of the Owners to permit remedial work to be carried out by MTCC.

[15] In that regard I would observe that the impasse in relation to remedial work turned on the differing views of the experts retained by the parties as to whether or not MTCC was under an obligation to implement what it described in argument as a "perfect fix" of the problem of migrating cigar smoke into the Owners' unit from a neighbour's unit. I may not ultimately have agreed that MTCC had to effect a "perfect fix", but I do not regard the Owners as having taken a wholly unreasonable stance.

[16] MTCC also points to the fact that both applications were commenced pursuant to s. 134 of the *Condominium Act, 1998* and, significantly, that both sides sought compliance orders. Section 134(5) of the *Condominium Act, 1998* provides as follows:

> 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.

[17] As noted by the Court of Appeal in *MTCC No. 1385 v. Skyline Executive Properties Inc.*, 2005 CanLII 13778 (ON CA) the purpose of this subsection is to protect innocent unit owners in a condominium corporation by shifting the financial burden of obtaining compliance orders from the innocent unit owners to the guilty unit owners who necessitated the application.

[18] While my function is to determine an award of costs pursuant to the usual considerations, the determination which I make in that regard, in terms of the operation of s. 134(5) and, in particular, the interests of other "innocent" unit owners, may be borne in mind as a relevant factor when making a costs order. See, for example *Wentworth Condo Corp. v. Brendan Taylor*, 2014 ONSC 59.

[19] MTCC also argues that my previous award of costs in favour of the Owners ($32,500) arising from a trial of issues in which they were unsuccessful is difficult to reconcile with no award of costs being made for the balance of the applications, in which MTCC was substantially successful.

[20] Finally, MTCC raises the fact that the Owners made unsuccessful allegations against MTCC's board of directors that it failed to act honestly and in good faith. These are said to be serious allegations, akin to alleging fraud, which, when alleged unsuccessfully, may attract an award of substantial indemnity costs.

[21] The Owners point to an offer to settle which they made as long ago as 11 July 2014 in which, *inter alia*, they offered to remove the existing humidifiers installed in their unit but also sought a commitment by MTCC to complete all repairs and maintenance to the common elements necessary to render the unit free of air containing smoke particulates migrating into their unit from the unit above. At the time the offer was made, the experts retained by the Owners and MTCC respectively continued to differ as to what was required to effectively repair the problem. Nevertheless, the Owners point to their offer as demonstrating their willingness to find a solution and compromise.

[22] The Owners also point to the lack of success enjoyed by MTCC in respect of its motion to strike portions of Mr. Cheney's affidavit as well as to a case conference, requested by MTCC in July 2015, in which leave was sought to deliver a further affidavit (which, ultimately, was never delivered). In essence, I take the position of the Owners to be that MTCC gave as good as it got when it came to taking unnecessary steps and incurring unnecessary or excessive expense.

[23] While I agree with the submission made on behalf of MTCC that bad behaviour on the part of condominium members should not be rewarded and that there are circumstances where a failure to award costs against the unit holders could send out the wrong message to disgruntled condominium unit owners, it nevertheless remains my view that MTCC has to accept some of the responsibility for matters having got to this point. As I said in my previous costs decision, it was necessary for the Owners to institute legal proceedings in order to get MTCC engaged on a

path towards finding a solution and despite the outcome of the trial of the issues as well as judicial efforts to guide the parties towards settlement, the parties continued to litigate.

[24] In my view, both parties have contributed towards the tempo and temper of this litigation. Both parties have, at various times, unreasonably dug in. Both parties have, at times, had good reason to feel provoked by the other. Both parties have taken steps that have caused unnecessary delay, expense, or both.

[25] Ultimately, it remains my view that the overall interests of justice would not be advanced by a further costs award being made at this time. The Owners will get a reasonable (but not perfect) fix of the smoke migration problem, which was not a problem of their creation. MTCC will be able to get the job done. Assuming the Owners go through with their planned sale of their unit, the parties will also be relieved of the need to deal with each other again. Life will go on.

Disposition

[26] I am not persuaded that I should vary the disposition of costs made in my decision of 1 December 2015. Accordingly, each party will bear its costs of these applications (including the motion to strike out portions of Mr. Cheney's affidavit).

Graeme Mew J.

Date: 6 January 2016