Case Name:

Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.

Between

Metropolitan Toronto Condominium Corporation No. 1385, Farhar Ameeriar, Tom Baker, Peter Benum, Ramona Berndt, Pearl Botbol, Joan Bowser, John Bowser, Alice E. Briesmaster, Eva Bryan, Joseph Cabell, Rose Calla, Maria-Carla Carrara, Kim T.R. Carter, David Chin, Nicholas Choo-Son, Penelope Cookson, Renata D'Aliesio, Clem D'Souza, Teresa D'Souza, Juven Duarte, Walter Etna, Tonci Farac, Jane Farnan, Jamie Feehely, Roy Forrester, Marla Friedman, Joan Friel, Ivy Fung, Jeremy Gayton, Stephen S. Grasset, Annette Gratton-Firestone, Michael Groden, Robin Guinness, Sandra Guinness, Carrie Hackett, Ian R. Hackett, Daniel Hanequand, David W. Hansen, Kate Hellin, Ronald S. Hikel, Holger Huls, Ilka Huls, Judy Imm, Janet Jack, Richard James, Janet Kent, John Kent, Tushar Kittur, Patrick S. Lall, Roxanne Lall, John Lawson, Delfin Lazaro, Pilar Lazaro, Helen Larsson, Jacques Le Blanc, Jacob Levman, Tom Longhurst, Patricia MacDonald, Nora Madlangbayan, Gina Mani, Sean Mani, Zeljko Marcan, Helen Matsos, Alexander McIntosh, Kelly McIsaac, Colleen McLeod, Ellen Joanne Millard, Suzanna Ng, Patricia O'Malley, Janice Paul, Lorraine Pauls, Molly Peacock, Terry Pennock, Aleksandar Popovic, Timothy Redmann, Astra Renwick, Rachel B. Romero, Kate Rossi, Lawrence Rossi, Karen Roycroft, Wilma Sarmiento, Amy Sedgwick, Sanjiv Shah, Marina Silov-Marcan, Thanyaporn Sombati, John H. Skye, Rita Skye, Norbert L. Stepien, Alenka Stiglic-Farac, Helen Tavares, Julio Tavares, Greg Thiel, Stephen Tinling, Carlo Tosti, Maria Tosti, Clarita B. Umali, Lavinia Vasilache, Ian Waldron, Michael Waring, Nancy Waring, Charles Wasilewski, Margaret Mary Wasilewski, Nancy Watkins, Charlyn Wee, Dan Wilson, Louise Wilson, Anna Caccamo Davies, Tom Davies, Elizabeth M. De Lory, James W. De Lory, Ann Foster, Kathy Garvin, Jane Glatt, Helen Keenan, Donna Lewis, Elaine Martinovic, Douglas McIntosh, Denis Michaud, Gene Schmidt, Karen Sparks, Leendert Stolk, Christine Van Duelmen, Robert Vienneau, and Alice Wong, applicants by counter-application (responding parties),

and

Skyline Executive Properties Inc., Front Street

Properties Inc., Jacob Aboudi, Ezra Aharon, Ampayer Properties Inc., Daniel Avidor, Oren Balaban, Moshe Becher, Mordechai Ben-Ami, Sholmit Ben Shahar, David Ben Shahar, Michael Burdin, Boris Burdin, Malka Chesner, Yecheskel Chesner, Avraham Cohen, Aviram Cohen, Mordechai Cohen, Miriam Cohen, Tsion Elyasaf, Cohava Elyasaf, Varda Feldman, Mordechai Givon, Yoav Hammer, Chanita Jackson, Joseph Jackson, David Karny, Roni Karny, Marco Libsker, Yana Manelis, Ya'acov Manelis, Dalhia Martin, Moshe Molcho, Atalia Molcho, Yaffe Monefa, Levia Moore, Mordechai Moore, Dalia Munz, David Munz, Miriam Perl, Asher Perl, Noa Renert, Adam Renert, Dina Rolel, Igor Dyakov, Menashe Rosenfeld, Amit Rotem, Henryk Rottenberg, Drora Rottenberg, Yehudith Shapir, Ilana Shnabel, Jacob Tajtelbaum, Naomi Tajtelbaum, Michaeli Uri, Yehezkei Yehuda, Dina Yehuda, Amos Wolfson, and Oded Zucker, respondents by counter-application (moving parties)

[2004] O.J. No. 3360
Court File No. 02-CV-228486-CM2

Ontario Superior Court of Justice
Lax J.

Heard: June 28, 2004.
Judgment: August 16, 2004.
(41 paras.)

Creditors and debtors law — Security — Liens — Extent of - - Real property law — Condominiums — Common elements — Common expenses — Unit holders — Liability of.

Motion by Skyline Executive Properties Inc. for a declaration that a lien registered by Metropolitan Toronto Condominium Corp. No 1385 against each of 59 condominium units owned and/or managed by Skyline was invalid. Metropolitan obtained two awards of costs for $38,000 and $10,000 against Skyline and sought to add $209,749.55 as additional actual costs to the common expenses for the units owned and/or managed by Skyline. The main action concerned a dispute over Skyline's leasing of the units for short-term, commercial, transient uses. Metropolitan was successful. Skyline appealed the $38,000 costs order against it and the order of the appointment of an administrator, but lost and was ordered to pay an additional $10,000 for costs of the appeal. The court was now asked to determine whether legal and administrative costs in excess of $200,000 claimed by Metropolitan, and included in its lien against the units, were "additional actual costs" to the corporation incurred in the enforcement process of the original order in the main action against Skyline.

HELD: Motion allowed and lien discharged. The legislation did not include legal costs assessable by a court under the Costs Grid and the Rules of Civil Procedure, but included only non-assessable legal costs, such as solicitor's fees. Accordingly, once costs were awarded, Metropolitan could not add to the common expenses of a unit-owner assessable legal costs that were sought but not awarded. It also could not add non-assessable legal costs that arose after the order was obtained. The $38,000 and $10,000 costs awards against Skyline were conclusive of the Metropolitan's legal costs in this case.

Statutes, Regulations and Rules Cited:

Arbitration Act, 1991.

Condominium Act, 1998, ss. 85(1), 85(3), 131, 132(6), 134(1), 134(2), 134(3), 134(5).

Counsel:

Mark H. Arnold, for the applicants by counter-application (responding parties).

Michael Spears, for the respondents by counter-application, moving parties.

LAX J.:—

Overview

¶ 1 Skyline Executive Properties Inc. brings this motion for a declaration that a lien registered by Metropolitan Condominium Corporation No. 1385 against each of 59 units owned and/or managed by Skyline is invalid and for an order requiring its discharge. The motion turns on the interpretation of section 134(5) of the Condominium Act, 1998, S.O. 1998, c. 19, which reads:

> Addition to common expenses
>
> 134(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.

¶ 2 The condominium corporation obtained two awards of costs for $38,000.00 and $10,000.00 in an order made against Skyline under section 134(3) of the Condominium Act 1998 and relies on the above provision as entitling it to add to the common expenses for the units owned and/or managed by Skyline, the amount of $209,749.55 as additional actual costs to the corporation in obtaining the order.

Background to the Motion

¶ 3 109 Front Street East is a residential complex at the intersection of Front and Jarvis Streets in the City of Toronto, comprising two condominium corporations, MTCC 1280 and MTCC 1385, which share certain common facilities. MTCC 1385, responding party on this motion, consists of 189 units.

¶ 4 In 2002, Skyline owned, operated or managed 95 of the units, which it was leasing for relatively short terms creating a transient population. The Board of Directors of the condominium corporation passed a rule ("Rule E") to prohibit this kind of short-term commercial use. Skyline brought an application to restrain the Board from enforcing Rule E. In its counter-application, the condominium corporation sought declaratory and other relief to determine the validity of Rule E and to appoint an administrator pursuant to section 131 of the Condominium Act 1998.

¶ 5 Skyline's motion for interim injunction was heard in May 2002 and was dismissed. It then requisitioned a meeting of unit owners with a view to repealing Rule E. In August, the condominium corporation obtained an order restraining the holding of the meeting until after the hearing of the application and counter-application, which came on before Hoilett J. on October 2 and 3, 2002.

¶ 6 At that hearing, Skyline abandoned its original application and the matter proceeded on the basis of the issues raised in the counter-application. By Judgment dated December 20, 2002, Hoilett J. determined that Skyline's activities violated both Article 111(1)(a) of the Declaration and Rule E of the Rules and Regulations of the Condominium Corporation. Mr. Gerald Hyman, Q.C. was appointed as the Administrator and empowered to administer and enforce the Judgment and the Declaration, By-laws and Rules and Regulations of the corporation pertaining to the leasing of units for short-term, commercial, transient uses.

¶ 7 In April 2003, Hoilett J. approved the form of Judgment submitted by the condominium corporation and fixed the costs of the counter-application in the amount of $58,000.00. In his endorsement dated April 11, 2003, he wrote: "The costs I have fixed are intended to be on a substantial indemnity basis which, given all the circumstances of this matter, are wholly warranted".

¶ 8 Skyline appealed the portion of the Judgment appointing an administrator and sought leave to appeal the award of costs. By endorsement dated December 12, 2003, the Court of Appeal affirmed the appointment of the Administrator, but granted leave to appeal the question of costs and allowed the appeal on this question. It substituted an order that the costs be on a partial indemnity basis, to be assessed. In its endorsement, the court stated, "... In our view, there were no findings that would bring this case within the principles enunciated in Mortimer v. Cameron (1994), 68 O.A.C. 332. ...". It awarded the condominium corporation costs of the appeal in the amount of $10,000.00.

¶ 9 On June 2, 2004, Assessment Officer Kane issued a Certificate of Assessment of Costs with respect to the Judgment of Hoilett J. awarding costs to the corporation on a partial indemnity basis in the amount of $38,000.00.

¶ 10 After the hearing in the Court of Appeal and approximately six weeks prior to the date of the assessment referred to in the preceding paragraph, the corporation registered a lien for $194,350.72 for "arrears of common expenses to date", plus $9,000.00 for legal collection costs against the 59 units then owned and/or managed by Skyline. It advised Skyline that if these amounts were not paid within 15 days, power of sale proceedings to enforce the lien would be commenced.

¶ 11 The parties have each provided a breakdown of the amounts covered by the lien, which differ slightly from the amounts referred to in the preceding paragraph, and from each other. There is agreement that the claim for additional actual costs is in excess of $200,000.00 and includes the following categories of costs and amounts:

(a)	Legal Accounts of Mark Arnold	$ 108,524.00
(b)	Legal Accounts of Richard Elia	$ 41,164.59
(c)	Additional Legal Costs	$ 11,391.74
(d)	Administrative Costs	$ 20,052.22
(e)	Property Management Services	$ 28,167.00

Analysis

¶ 12 This is the first time that a court is asked to interpret the language of section 134(5), and in particular, the phrase, "together with any additional actual costs to the corporation in obtaining the order". The corporation takes the position that the final order of the Court of Appeal was the culmination of an enforcement process that began on turnover and that it is entitled to all additional costs incurred in this process. It has included in the lien amount every cost incurred that pertains to Skyline from turnover of control of the corporation from the developer on September 25, 2001 through April 2004.

¶ 13 The corporation submits that section 134(5) is intended to provide full cost recovery to a corporation and

rests its submissions on the proposition that in enacting this section, the Legislature intended that the costs of obtaining a compliance order be borne by the recalcitrant unit owner and not by innocent unit owners within the condominium community. It contends that "additional actual expenses to the corporation in obtaining the order" means any and every expenditure that the condominium corporation incurs both before and after the order is obtained, including legal costs in excess of amounts awarded by the court. Skyline disputes that the language of section 134(5) can support this interpretation. I agree.

¶ 14 I reproduce below relevant portions of section 134 of the Condominium Act 1998:

Section 134

Compliance order

134(1) Subject to subsection (2), an owner, ... a corporation, ... [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 ...

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.

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.

(4) ...

Addition to common expenses

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and

the corporation may specify a time for payment by the owner of the unit.

¶ 15 The predecessor to section 134 of the Condominium Act 1998 was section 49 of the Condominium Act, R.S.O. 1980, c. 84. Section 49 permitted the condominium corporation to apply to the court for an order directing the performance of a duty imposed by the Act and/or the corporation's Declaration, By-laws and Rules. The court was authorized to include in any order made, "any provisions that the court considers appropriate in the circumstances". Unlike section 134(3) of the current Act, section 49 did not specifically address the matter of damages or costs.

¶ 16 When the Condominium Act 1998 was in draft form as Bill 38, the Legislative Committees of the Canadian Condominium Institute (Ontario branches) and the Association of Condominium Managers of Ontario presented joint recommendations for various amendments to Bill 38. They asked the Legislature to amend section 134(5) to include the italicized words so as to read, "together with any additional actual costs to the corporation in obtaining and enforcing the order". Their rationale was that additional costs may be incurred by the corporation in enforcing a compliance order. This recommendation did not find its way into the section. The reason may be that under the current Act, the corporation is given broad lien rights that enable it to collect unpaid amounts from defaulting unit-owners, including unpaid awards of damages or costs.

¶ 17 Section 134(5) requires the corporation to add the damages or costs of obtaining a compliance order, (together with any additional actual costs to the corporation in obtaining the order), to the common expenses for the unit and may specify a time for payment. If the unit-owner defaults in payment, Section 85(1) gives the corporation a lien against the owner's unit and its appurtenant common interest together with all interest owing for the unpaid amount and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount. Thus, the effect of section 134(5) is to create a statutory debt, which, the corporation can collect through its statutory lien once a certificate of lien is registered as provided in section 85(3). It reads:

(3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's liens that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and

(c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b) including the costs of preparing and registering the certificate of lien and a discharge of it.

¶ 18 Another feature of the current Act is the introduction of mediation and arbitration processes in section 132. The vast majority of compliance cases are, to use Mr. Arnold's words, about "people, pets and parking" and arise from infringements of the Declaration, By-laws and Rules of the condominium corporation. They will now be governed by mediation and arbitration. The Legislature has wisely determined that these disputes are better resolved in this manner than through the courts. Where these provisions apply, there can be no application to the court for an order under section 134, unless compliance is not obtained.

¶ 19 On this motion, the condominium corporation filed affidavits from two experienced condominium

lawyers. The substance of their evidence is that in the consultations that led to the enactment of section 134(5), there was widespread support for full cost recovery to require the party against whom a compliance order was made to pay all of the costs of the corporation in obtaining the order regardless of whether those costs were awarded by the court or were additional actual costs to the corporation in obtaining the order. This evidence is of limited assistance in interpreting the section, but even so, the claim here goes well beyond this.

Legal Costs

¶ 20 There are sixteen legal accounts for Mr. Arnold's services as litigation counsel. Five of the legal accounts cover the period from June to November 2002 and total $61,991.81. He concedes that all of the services set out in these accounts are identical to the services described in the client ledger sheets presented at the assessment hearing. I observe that the Bill of Costs that was presented to Hoilett J. was in the amount of $62,496.00. The congruence in the amounts suggests that the corporation is now claiming to recover as "additional actual costs" an amount for legal services that Justice Hoilett in the first instance awarded on a substantial indemnity basis, but discounted to $58,000 and that the Court of Appeal awarded on a partial indemnity basis. These accounts were assessed in the total amount of $38,000.00 and have been paid in full by Skyline. The effect of including this in the lien amount is to render meaningless the order of the Court of Appeal allowing Skyline's appeal of the costs order of Justice Hoilett and the assessment of these costs that followed.

¶ 21 The remaining eleven accounts rendered by Mr. Arnold cover the period from December 31, 2002 to January 23, 2004 and therefore post-date the Judgment. As such, I fail to see how they can be characterized as costs to the corporation in obtaining the order. They total $72,388.91. The accounts include services for what appears to be an unrelated matter in connection with proceedings against a tenant of one of the units (the "Izzard application"). Further, many of the services described in the accounts relate to preparation for and attendance at the Court of Appeal on December 12, 2003, which costs were fixed by the court at $10,000.00 and paid by Skyline. The effect of including this in the lien amount is to render meaningless the order of the Court of Appeal fixing the costs of the appeal.

¶ 22 The claim includes thirty-one accounts in the total amount of $41,164.59 for the services of Richard Elia, corporate counsel to the condominium corporation, although he played no part in obtaining the order and no claim was made for his time in the Bill of Costs submitted to Justice Hoilett. Seventeen of the accounts cover the period from October 31, 2002 to November 30, 2003. With the exception of two accounts, all of the services described in the accounts were performed after the order of Justice Hoilett was obtained. With respect to the two accounts dated November 21, 2002, one includes a disbursement charge of $2,150.00 for obtaining parcel register pages for 86 condominium units. In the other account, there is an entry for Mr. Elia's time for attendance in court on October 2 and 3, 2002, although he did not participate in the hearing and his time was not included in the Bill of Costs.

¶ 23 The additional legal costs totaling $11,391.74 include legal fees charged by Miller Thomson for a trademark application, legal costs of Mr. Stein for the defence of a criminal assault charge and an account of Mr. Hyman, Q.C. as Administrator. The account of Mr. Hyman cannot be an additional actual cost under section 134(5) as paragraph 9 of the Judgment of Hoilett J. provides that the Administrator's fees and expenses are to be paid by the corporation. Skyline will share in this expense through its contribution to the common expenses of the 59 units it owns or manages. The legal accounts of Miller Thomson and Mr. Stein have nothing to do with the obtaining of the compliance order.

¶ 24 Under the former Act, a condominium corporation had no ability to add to the common expenses of a unit-owner, the damages or costs awarded by a court. This has been addressed under the current Act in section 134. However, the Legislature did not remove the court's discretion to determine the question of costs. This is the effect of the decisions in Carleton Condominium Corporation No. 555 v. Lagacé, [2004] O.J. No. 1480 (S.C.J.) and York Condominium Corp. No. 482 v. Christiansen, (1983), 64 O.R. (3d) 65; [2003] O.J. No. 343 (S.C.J.).

¶ 25 In Lagacé, which is the only other decision to have considered the meaning of section 134(5), Aitken J. granted a compliance order against a tenant in a unit. The condominium corporation sought an order against the unit owners for costs on a substantial indemnity basis relying on section 134(5). At paragraph 15, the court stated:

> Section 134(5) simply provides that if a corporation obtains an award of costs in an order made against an owner or occupier of a unit, the costs shall be added to the common expenses for the unit and collected accordingly. This subsection does not speak to the question of whether a costs order should be made in the first instance. Section 134(3)(b) confirms that the court, on an application by the condominium corporation for an order requiring someone to comply with the declaration, by-laws or rules of the corporation, may make an order requiring the persons named in the order to pay the costs incurred by the condominium corporation in obtaining the order. It does not require the court to do so.

¶ 26 As the condominium corporation had not given the owners adequate notice of the breaches by their tenant, costs were fixed on a partial indemnity basis and ordered added to the common expenses of the unit and paid by the owners of the unit at the rate of $300.00 per month.

¶ 27 In York Condominium Corp. No. 482 v. Christiansen, (1983), 64 O.R. (3d) 65 (S.C.J.); [2003] O.J. No. 343 (S.C.J.), Lane J. was asked to interpret provisions in the Condominium Act 1998 that give lien and attornment rights to a condominium corporation to enforce an owner's obligation to contribute to the common expenses. The costs of the motions he heard were subsequently addressed through written submissions and fixed on a substantial indemnity basis Lane J. thought that this was the appropriate scale because the by-laws of the corporation provided for this and because he thought that the motions were an attempt by defaulting owners to avoid their obligations. He did not think that the rest of the owners should have to bear any part of these costs: See, York Condominium Corp. No. 482 v. Christiansen, [2003] O.J. No. 1371.

¶ 28 The condominium corporation relies on this decision, but ignores that the successful corporation in Christiansen did not receive all of its legal costs. Lane J. fixed the costs in an amount that he thought appropriate on the basis of the principles that apply to an award of costs under the Costs Grid and the Rules of Civil Procedure.

¶ 29 I pause here to note the different costs orders made by the courts in Lagacé, Christiansen, and here and the different reasoning that led to these orders. The endorsement of the Court of Appeal makes no reference to the kind of factors that led Lane J. in Christiansen to award costs on a substantial indemnity scale. With great respect, I would have thought that these factors commend an award on the higher scale. Lane J. does not refer to Mortimer v. Cameron and it appears that the argument addressed to him was different than the one heard by Aitken J. in Lagacé. I do not interpret the decision of the Court of Appeal as establishing a precedent that costs awards in compliance cases are to be on a partial indemnity basis. Costs are always in the discretion of the court and as compliance cases reach the court, this will no doubt be considered further.

¶ 30 It seems to me that a possible approach to the interpretation of section 134(5) is to make a distinction between assessable legal costs that are awarded under the Costs Grid and the Rules of Civil Procedure and other costs, which may include non-assessable legal costs, such as solicitor's fees. Section 134(5) does not give the corporation an absolute entitlement to the former for the reasons given by Aitken J. in Lagacé. The Legislature could have used words to accomplish this by providing that the corporation was to recover its costs of obtaining a compliance order on a substantial or full indemnity basis. Clearly, this determination has been left to the court. In view of this, "additional actual costs" cannot include any amount for legal costs that could have been awarded by the court under the Costs Grid and the Rules of Civil Procedure. This would render meaningless the court's jurisdiction to award costs, which is a precondition to the operation of the subsection. Accordingly, once costs are awarded, a condominium corporation may not add to the common expenses of a unit-owner as additional actual costs under section 134(5), assessable legal costs that were sought, but not awarded. Further, as "additional actual

costs" must have been incurred to obtain the order, I do not see how they can include non-assessable legal costs that arise after the order is obtained.

¶ 31 As I have already noted, the Act now provides for mediation and arbitration for the vast majority of compliance cases. Although the costs of these processes can be quite substantial, the Legislature did not see fit to provide for full cost recovery to the corporation. Rather, it left the determination of the payment of the mediator's fees and expenses to the mediator under section 132(6), who specifies the amount each party will pay. Where mediation fails to obtain a settlement, the parties are required to arbitrate under the Arbitration Act, 1991. Presumably, the arbitrator will determine how the parties will share in payment of these fees and whether to award costs of the arbitration to either party. In my view, this is further support for my view that section 134(5) does not provide for full cost recovery to the corporation, despite the policy arguments that might favour such a provision.

¶ 32 In summary, the awards of costs of $38,000 and $10,000 that were made against Skyline are conclusive of the corporation's legal costs in this case. The other legal costs included in the lien amount either post-date the order and are therefore not an additional actual cost of obtaining the order, or, were never presented to the court for scrutiny, or if presented, were rejected by the court, or, have nothing to do with the obtaining of the order. They cannot be swept in as "additional actual costs to the corporation".

Administrative and Managerial Costs

¶ 33 The lien amount includes administrative costs of $20,052.22. Some of this amount is for the costs of meetings of unit-owners held during the period from September 2001 to January 2004. They include six owner information meetings, two Annual General Meetings held in 2003 and 2004, and one meeting requisitioned by owners to consider and vote on new house rules, which came into effect on March 5, 2002. It is evident that some of these meetings post-date the order and some are required pursuant to provisions of the Condominium Act. Some of the information meetings may have been held to inform owners of the status of the litigation and on better evidence, I may have been prepared to find that the costs associated with those meetings are additional actual costs to the corporation, but on the record before me, I am unable to determine this.

¶ 34 Also included as an administrative cost in the lien is the amount of $10,793.91, which consists of a commitment fee plus interest for a $60,000.00 loan taken out by the condominium corporation in April 2003 to pay its day-to-day expenses. The interest charges cover the period from April 15, 2003 to April 15, 2004 and therefore cannot have been incurred to obtain a compliance order granted in December 2002. I am unable to determine if the remaining amount for administrative costs is an additional actual cost of obtaining the order. Clearer evidence is required to make this finding.

¶ 35 Finally, the amount of $28,167.00 has been included in the lien amount as costs for managerial services. These are the services of two employees of the corporation's property management company. In support of the claim, time sheets for these employees were provided but they cover the period from March 2003 through to January 2004 and amount to exactly one-half of the amount claimed. This was then doubled as a conservative estimate of employee time from September 2001.

¶ 36 In Christiansen, Justice Lane briefly discusses this at 64 O.R. (3d) 65 at p. 82; [2003] O.J. No. 343, para. [52]. He states:

> [52] There were disputes about the reasonableness of certain costs and expenses raised in the material ... The reasonableness of a $100 charge per Notice requires evidence and possibly credibility findings. The court is not equipped on a motion to deal with such matters. In my view, a cost can be incurred even where the work is done by an employee within the organization, not only where a payment is made to a third party. Employees do not come for nothing. But evidence would be required in support of the reasonableness of the employee's salary allocated to the task.

¶ 37 I agree with his comments and think that employee time can equally be an item of additional actual costs under section 134(5). However, I again do not have the appropriate evidence to determine this. In summary, I accept that administrative costs and employee costs can support a claim for additional actual costs of obtaining a compliance order under section 134(5), but the onus is on the corporation to demonstrate that the costs were incurred to obtain the order. This has not been demonstrated on this motion.

Additional Actual Costs

¶ 38 What other costs might the Legislature have had in mind in enacting this provision? I make these suggestions. There will be court applications in those situations that are not covered by section 132, and in the hopefully rare instances where there is a failure to obtain compliance using mediation and arbitration. Prior to the commencement of an application under section 134(1), there may be meetings of the Board of Directors to address the problem. The condominium corporation's corporate counsel or litigation counsel, or both, may be involved in advising the corporation. There may be employee time as I have mentioned, and there may be costs incurred by the corporation through the mediation and arbitration processes as well as legal costs that are not assessable under the Costs Grid and the Rules of Civil Procedure. It seems to me that these kinds of costs could be considered to be additional actual costs to the corporation of obtaining a compliance order and if properly documented, come within the language of the subsection.

¶ 39 The provision may also encompass the corporation's out-of-pocket expenses of such matters as registering the court order on title, filing the order with the Sheriff, and serving the order on the unit-owner. I do not intend this to be an exhaustive or exclusive list but only to give some guidance on the kind of costs that, in my view, could reasonably be considered to be "additional actual costs to the corporation in obtaining the order", and which the corporation would be justified in adding to the common expenses of the unit.

Order

¶ 40 For these reasons, the order sought by Skyline for a declaration that the lien registered on April 12, 2004 by Metropolitan Toronto Condominium Corporation No. 1385 as Instrument No. AT440967 is invalid and that the lien be forthwith discharged, is granted.

¶ 41 Costs, if not agreed, are to be addressed through written submissions. The parties are to provide me with material sufficient to permit me to fix costs in the event I determine that costs are to be awarded. Skyline is to deliver its material by August 30, 2004 and MTCC 1385 is to deliver its material 10 days later. There are to be no reply submissions without leave.

LAX J.

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