CITATION: Middlesex Condominium Corporation No. 232 v. Bodkin, 2014 ONSC 106
Divisional Court File No.: 2016/13
Date: 2014/01/10

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT
(At London Ontario)

H. Sachs, H. Polowin, and J. Henderson JJ.

B E T W E E N:	
Middlesex Condominium Corporation No. 232	No one appearing, for the Applicant/Respondent in the Appeal
Applicant (Respondent in the Appeal)	
- and -	
Middlesex Condominium Corporation No. 232 (Owners and Mortgagees of)	No one appearing, for the Respondents/Respondents in the Appeal
Respondents (Respondents in the Appeal)	
- and –	
Dwain Bodkin, Lynda Kirkham, Neil McQuarrie, Norm Walker, and Jennifer Zammit	Robert Dowhan, for the Appellants
(Appellants)	**HEARD:** November 26, 2013

HENDERSON, J.:

REASONS FOR JUDGMENT

OVERVIEW

[1] This is an appeal of two costs decisions, one by Bryant J. and one by Carey J., both dated February 11, 2013, and both arising out of the same proceeding.

[2] The Appellants were all of the directors of Middlesex Condominium Corporation No. 232 ("MCC#232"). In their capacity as directors, the Appellants collectively caused MCC#232 to commence an application to appoint an administrator for MCC#232 ("the Administration Application"), and to bring an interlocutory motion for an injunction to restrain the unit owners from holding a meeting ("the Injunction Motion").

[3] MCC#232 was unsuccessful in both the Administration Application and the Injunction Motion. Although the Appellants were non-parties to the proceedings, both presiding judges awarded costs payable personally by the Appellants. The Appellants request that both costs orders be set aside and that the costs be paid by MCC#232.

BACKGROUND

[4] MCC#232 governs a 98-unit 10-storey condominium apartment building. There had been problems with exterior water entry at this building for many years.

[5] In September 2011 the Board of Directors, being comprised of the five Appellants, received a report from Enerplan Building Consultants ("Enerplan") regarding possible repairs to the building. In January 2012 the Board chose to proceed with one of the Enerplan options at a cost of $755,000.00.

[6] As the MCC#232 reserve fund was insufficient to cover the cost of the repairs, the Board prepared a by-law that would authorize MCC#232 to borrow the sum of $600,000.00. The motion to approve the borrowing by-law was scheduled to be heard at the annual general meeting ("AGM") on April 16, 2012.

[7] Prior to the AGM a group of unit owners ("the Respondent Owners") became concerned about the cost of the repairs and other aspects of the proposal. Some members of the Respondent Owners requested, among other things, access to the Board's documents on this issue, and time to review those documents.

[8] In addition, the Respondent Owners prepared a requisition for a meeting pursuant to s.46 of the *Condominium Act, 1998*, S.O. 1998, c.19 ("*Condominium Act*"), to be held at the AGM on April 16, 2012, for the purpose of bringing motions that would defer the vote on the borrowing by-law, and remove and replace the Board of Directors.

[9] At the AGM there was lively interaction between the Board of Directors and the Respondent Owners. The borrowing by-law put forward by the Board was put to a vote and defeated. At that point, before the Respondent Owners' motion to remove the Board of Directors could be heard, the Board terminated the meeting.

[10] Subsequently, the Board caused MCC#232 to commence the Administration Application pursuant to s.131 of the *Condominium Act* to appoint an administrator for MCC#232. In the Administration Application, the Appellants alleged that a "small group of owners" had created a situation in which the Board could not properly manage the affairs of MCC#232.

[11] In addition, the Board caused MCC#232 to bring the Injunction Motion whereby MCC#232 requested an order that would restrain the unit owners of MCC#232 from holding a meeting to deal with the motion to replace the Board of Directors until the Administration Application had been heard.

[12] The Injunction Motion was heard by Bryant J. on August 3, 2012. By way of an Endorsement dated August 10, 2012, Bryant J. dismissed the Injunction Motion.

[13] The Administration Application was heard on August 17, 2012, by Carey J. By way of Reasons for Judgment dated October 9, 2012, Carey J. dismissed the Administration Application.

[14] In their written decisions, both judges invited written submissions regarding costs. The costs decisions were both released on February 11, 2013. Bryant J. awarded costs of $15,000.00 payable by the five Appellants jointly and severally. Carey J. awarded costs of $21,300.52 payable by the five Appellants jointly and severally.

THE DECISIONS BELOW

[15] In their costs decisions both Bryant J. and Carey J. were critical of the conduct of the Appellants.

[16] At para. 1#7 of his Endorsement on the Injunction Motion, Bryant J. wrote:

> The Court finds that the Board's motion is for the sole purpose of preventing the owners from exercising their rights to hold a Requisition Meeting to remove the Board members from office and preventing their right to elect a new Board.

[17] In his Costs Endorsement, Bryant J. wrote at para. 18:

> Based on the material filed before me, I find that the old Board acted in bad faith when it brought an injunction to prevent the unit holders from exercising their statutory right to remove the old directors and elect the new directors pursuant to s. 46 of the *Act*. ...

[18] And further at para. 20:

> The application for an injunction was an unnecessary step in the proceeding. The old Board members tried to maintain its positions as Directors when they no longer represented the majority of unit holders. It was improper because it attempted to prevent unit owners from exercising their statutory right to remove the older directors and elect new directors. I find that the Applicant's application for an injunction was tenuous and without merit.

[19] In his Reasons for Judgment on the Administration Application, Carey J. wrote at paras. 57 and 58:

> Contrary to the submissions of the applicant that "anarchy" and "chaos" are leading the Condominium to the "abyss", I find the owners very capable of governing themselves without an administrator. If there is confusion ... it has been caused by the Board's immovable positions ... and their determination to thwart those opposed to their view of what needed to be done.
>
> Section 131 was designed as a last resort for condominiums in perilous circumstances. It was not intended to be used to allow a board which has lost the confidence of the majority of owners to get their way regardless of the democratic will of the owners.

[20] Further, in his Costs Ruling, Carey J. wrote the following at paras. 3#2, 3#3 and 4:

> The Board all participated in what I find was a pre-orchestrated termination of the Annual General Meeting ("AGM") when the vote on financing the repairs went contrary to their wishes and they were facing a removal vote.
>
> The former Board members, rather than agreeing to postpone the decision and seek another opinion as to remedying the building's issues, brought an action to appoint an administrator and suspend the operation of democracy in the building based on what I found to be wildly exaggerated claims lumped together in their material under the heading "Uncertainty Chaos and Anarchy".
>
> ...
>
> As a result of these findings I conclude that the Board was not acting in good faith in pushing ahead with this unnecessary litigation. ...

[21] He concluded at para. 9:

> I have concluded that the facts here support an award of costs against the former Board members personally. Their behaviour was deliberate, egregious and requires sanction. Anything short of full indemnity costs would penalize the residents unfairly. ...

THE GROUNDS FOR APPEAL

[22] The Appellants raise the following grounds on this appeal:

1. The Appellants submit that both judges erred in law by failing to apply and follow the correct test for a costs order against a non-party, a test known as the "man of straw" test.

2. The Appellants submit that there was a breach of procedural fairness with respect to both costs decisions because the Appellants did not receive adequate notice of the Respondent Owners' intention to seek a costs order against the Appellants.

3. The Appellants submit that both judges made findings that the Appellants acted in bad faith, but failed to follow the general principle that all persons are assumed to act in good faith unless proven otherwise.

4. The Appellants submit that both judges erred in law by failing to apply s. 37(3) of the *Condominium Act* as a defence to a costs order against the directors of a condominium corporation.

5. The Appellants submit that the two costs decisions when read together raise a reasonable apprehension of bias.

THE STANDARD OF REVIEW

[23] A costs decision made by a presiding judge should be given considerable deference by an appellate court. A court should set aside a costs award on appeal only if the presiding judge has made an error in principle or if the costs award is plainly wrong: see the decision of *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, at para. 27.

ANALYSIS

1. Costs Against a Non-Party

[24] Section 131 of the *Courts of Justice Act,* R.S.O. 1990, C. 43, gives the court a broad discretion regarding costs orders. However, the court's power set out in s.131 to "determine by whom and to what extent costs shall be paid" is restricted to costs orders against parties to the proceeding: see the case of *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.* (1972) 27 D.L.R. (3d) 651 (OCA) at p. 659, and the case of *Elliot v. Toronto (City)* (1999), 171 D.L.R. (4th) 64 (OCA) at para. 82.

[25] In certain exceptional circumstances a court may make a costs order against a non-party to a proceeding. However, an award of costs against a non-party is limited to a situation in which the non-party is the real litigator, who, in order to avoid liability for costs, puts forward a "man of straw" to prosecute the litigation: see the *Rockwell* decision at p. 663, and see the case of *Television Real Estate Ltd. v. Rogers Cable T.V. Limited,* 34 O.R. (3d) 291 (OCA) at paras. 13-15.

[26] In the *Television Real Estate* case, the Ontario Court of Appeal formulated a three-part "man of straw" test for the purpose of determining whether costs should be awarded against a non-party. At para. 15 of that decision Finlayson J.A. wrote:

> Accordingly, in order to bring the appellants within the exception of *Sturmer* as applied in *Rockwell*, it was incumbent upon the respondent to show (1) that the appellants had status to bring the action against Rogers Cable themselves; (2) that TVR was not the true plaintiff and (3) that TVR was a "man of straw" put forward to protect the appellants and presumably Burry from liability for costs.

[27] Therefore, we find that a court may only order costs against a non-party if the three part "man of straw" test applies, as follows:

> 1. The non-party has status to bring the action;
> 2. The named plaintiff is not the true plaintiff, and
> 3. The named plaintiff is a man of straw put forward to protect the true plaintiff from liability for costs.

[28] We find that Bryant J. did not apply the "man of straw" test in his Costs Endorsement. Rather, Bryant J. focused on his discretion to award costs as set out in s.131 of the *Courts of Justice Act*, and the factors in Rule 57.01 that apply when a court exercises that discretion. Specifically, at para. 13 of his Costs Endorsement Bryant J. wrote:

> Section 131 of the *Courts of Justice Act* R.S.O. 1990, C.43 provides that costs of a step in a proceeding are in the discretion of a court. Rule 57.01

> identifies factors to be considered when a court exercises that discretion.
> ...

[29] Moreover, also at para. 13, Bryant J. considered the case of *Boily v. Carleton Condominium Corp No. 145*, [2012] ONSC 1324, as support for a costs award against the directors of a condominium corporation. Unfortunately, the *Boily* decision is not support for a costs order against non-party directors as the directors in *Boily* were named parties to the proceeding, and thus the man of straw test was not a consideration.

[30] In his Costs Endorsement, Bryant J. found that the Appellants acted in bad faith. He found that the motion was "improper" because it was an attempt by the Appellants to maintain their positions as directors when they no longer represented the majority. He concluded that the Injunction Motion was "tenuous and without merit".

[31] Then, relying on those findings, Bryant J. made a costs order against the non-party directors. He made no reference to the man of straw test, nor did he make any findings that specifically dealt with the three parts of that test.

[32] We accept that Bryant J. was understandably offended by the conduct of the Appellants, and we accept that the Appellants' conduct justified a consideration of cost sanctions. However, given Bryant J.'s failure to consider the man of straw test and his reliance upon the *Boily* case, we find that there has been an error in principle.

[33] Therefore, the Costs Endorsement of Bryant J. will be set aside. Costs of the Injunction Motion fixed at $15,000.00 will be payable by MCC#232.

[34] Regarding the Costs Ruling of Carey J., although Carey J. did not specifically refer to the man of straw test, it is clear from his decision that he was well aware of the test and he made findings that were consistent with the test.

[35] The first factor in the three-part test, whether the non-party has the status to bring the action, was not specifically dealt with by Carey J., but that factor is a simple matter of law. Section 131(1) of the *Condominium Act* allows the corporation, a lessor of a leasehold, an owner, or a mortgagee of a unit to bring the application for the appointment of an administrator. Therefore, despite Carey J.'s failure to mention this part of the test, we accept that the first part of the man of straw test has been fulfilled.

[36] Regarding the second and third parts of the man of straw test, we find that Carey J. considered evidence that applied to those two parts of the test, and made findings against the Appellants.

[37] Specifically, in his Costs Ruling, Carey J. wrote at para. 3#5:

> The former Board members instructed their counsel to proceed with the application for the appointment of an administrator even though they had been voted out at the August 8th meeting. The former Board members

> continued to use the MCC 232 designation and declined to participate in their personal capacity. This appears designed to avoid cost liability. (Emphasis added)

[38] Further, at para. 4 of the Costs Ruling Carey J. wrote:

> The former Board members were in effect the true litigating parties. (Emphasis added)

[39] Therefore, we find that Carey J. applied the correct test in determining whether to award costs against the non-party Appellants. He considered factors that were relevant to the man of straw test, and he made findings, supported by the evidence, that fulfill all aspects of the test. Therefore, we find that the Appellants have not proved that Carey J. failed to apply and follow the correct test. The appeal fails on this ground regarding the decision of Carey J.

[40] With respect to the balance of the grounds of appeal, we will analyze only the Costs Ruling of Carey J.

2. Procedural Fairness

[41] In order to achieve procedural fairness non-parties must be given adequate notice of a litigant's intention to seek a costs award against them: see the case of *St. James' Preservation Society v. Toronto (City)*, 286 D.L.R. (4th) 146 (OCA), at paras. 48-55.

[42] In *St. James,* the Ontario Court of Appeal found that a letter sent two months prior to the hearing did not provide adequate notice to the non-party directors of a corporation without share capital that had been incorporated to preserve and protect certain historical properties, including St. James Cathedral.

[43] The facts of the *St. James* case differ from the facts in the present case. In particular, the Court in *St. James* accepted the findings of the trial judge that the non-party directors were not acting to vindicate a private interest, and were not acting for personal gain, and that no other persons were better suited to raise the novel issues they did. Moreover, the Court noted that the issue of a personal costs order had not arisen prior to the notice letter. There are no other Ontario decisions on point.

[44] In our view the issue of adequate notice will be a contextual one driven by the circumstances of each case. In most cases we agree that unequivocal notice of a litigant's intention to seek costs from a non-party should be given as soon as reasonably possible prior to the hearing.

[45] In the present case, we find that the Respondent Owners first gave unequivocal notice to the Appellants of their intention to seek costs against them when the Respondent Owners delivered their Factum on August 10, 2012, seven days prior to the hearing of the Administration Application on August 17, 2012.

[46] In addition, we find that because of other circumstances that existed prior to August 10, 2012, the Appellants should have been aware that the Respondent Owners might seek costs against them personally. Specifically, the Appellants had been aware since the Administration Application was commenced that there were two competing groups, the Appellants and the Respondent Owners, on opposite sides of a dispute. Although the Appellants used MCC#232 as a vehicle for the litigation, it should have been clear that the dispute was between these two groups.

[47] Further, on June 29, 2012, in its Factum on the Injunction Motion the Respondent Owners notified the Appellants that the Respondent Owners sought costs against the Appellants personally on the Injunction Motion. Thus, the Appellants should have been aware that there was a possibility that the Respondent Owners would take the same position on the Administration Application.

[48] Most significantly, on August 8, 2012, the Respondent Owners convened a meeting of all of the unit owners of MCC#232. At that meeting the unit owners voted to remove the Appellants as the directors of MCC#232, and replaced them with a new Board of Directors. Thus, by August 8, 2012, the Appellants would have known that they no longer controlled MCC#232, and their authority to proceed in the name of the condominium corporation was questionable.

[49] Still further, after receiving the unequivocal notice on August 10, 2012, the Appellants did not seek to adjourn the Administration Application to respond to that notice. Rather, the Appellants proceeded with the Administration Application fully aware that if the Application was unsuccessful, the Respondent Owners intended to seek a costs order against them personally.

[50] Moreover, after Carey J. gave his decision on the Administration Application and invited submissions on costs, the Appellants delivered comprehensive written submissions to Carey J. on the costs issues.

[51] For all of these reasons we find that the Appellants received adequate notice of the Respondent Owners' intention to seek costs against them personally. We find that there has been procedural fairness with respect to the costs issues. The appeal fails on this ground.

3. The Presumption of Good Faith

[52] A person is not required to prove his good faith in a court proceeding. As a general principle persons are assumed to act in good faith unless proven otherwise: see the case of *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5, at para. 35.

[53] In the present case we find that Carey J. did not require the Appellants to prove that they were acting in good faith. Rather, Carey J. considered the evidence of the conduct of the Appellants and he found that it supported a finding of bad faith.

[54] From his Reasons for Judgment it is clear that Carey J. was fully aware of the background facts, the history of the proceedings, the conduct of the parties during the proceedings, and the positions taken by the parties. Further, at para. 1 of his Costs Ruling Carey J. averted to the August 8, 2012, meeting that purported to remove the Appellants from the Board. He was entitled to take all of those factors into consideration in his costs decision.

[55] It is also clear that Carey J. considered and rejected the Appellants' evidence of good faith, presented by way of the affidavits of Jennifer Zammit, one of the Appellants, and Sean Eglinton, the condominium manager, who both deposed that there were legitimate reasons for the Administration Application.

[56] In his Costs Ruling, after referencing this evidence, Carey J. made certain findings that were adverse to the Appellants at paras. 3#2, 3#3, and 3#5, as follows:

> The Board all participated in what I find was a pre-orchestrated termination of the Annual Meeting ("AGM") ...
>
> The former Board members ... brought an action ... based on what I found to be wildly exaggerated claims ...
>
> The former Board members instructed their counsel to proceed with the application for appointment of an administrator even though they had been voted out at the August 8th meeting. ...

[57] Then, at para. 4 Carey J. found:

> As a result of these findings I conclude that the Board was not acting in good faith in pushing ahead with this unnecessary litigation. ...

[58] We find that Carey J. based his findings of bad faith on all of the evidence before him. He did not place the onus on the Appellants to prove that they were acting in good faith. We find that Carey J. made no error in principle and no error in law with respect to these findings. The appeal fails on this ground.

4. The *Condominium Act* Defence

[59] Section 37(1) and (3) of the *Condominium Act* reads as follows:

> 37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

> (a) act honestly and in good faith; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
> ...
> (3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
> (a) ... or
>
> (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion.

[60] Counsel for the Appellants submits that Carey J. failed to properly interpret and apply s.37(3) because he rejected the Appellants' assertion that s.37(3) provided a defence against costs liability as the Appellants had relied in good faith upon the opinions of their lawyer, the Enerplan engineers, and the condominium manager. In our view, this ground of appeal has no merit.

[61] In paras. 5, 6, and 7 of his Costs Ruling, Carey J. referred to the Appellants' submission on this issue, and then provided cogent reasons for rejecting that submission. In particular, he found that the Appellants had not produced any evidence that the Appellants had relied on legal advice. He also rejected the Appellants' ability to rely on the condominium manager as he was not independent of them.

[62] In addition, Carey J. found that the Appellants did not correctly represent the opinion of the Enerplan engineers to the court, but instead submitted material that was "in turn hyperbolic, exaggerated, and alarmist". In our view, Carey J. made no error in principle and no error in law on this point.

[63] Moreover, although a director of a condominium corporation may rely upon s.37(3) as a defence against a costs award, that defence is only available if the court finds that the director acted in good faith. In the present case, Carey J. clearly found that the Appellants acted in bad faith. Thus, the potential defence set out in s.37(3) of the *Condominium Act* cannot apply. The appeal also fails on this ground.

5. Bias

[64] The Appellants' submission that the two costs decisions when read together raise a reasonable apprehension of bias was not pursued in oral argument. Having carefully reviewed the two decisions, we find that this ground of appeal has no merit.

SUMMARY AND CONCLUSION

[65] For the reasons set out herein the appeal of the Costs Endorsement of Bryant J. dated February 11, 2013, is allowed. That decision is set aside. Costs of the Injunction Motion fixed at $15,000.00 are payable by MCC#232.

[66] The appeal of the Costs Ruling of Carey J. dated February 11, 2013, is dismissed.

[67] Since the appeal of these two costs decisions was unopposed, there will be no costs of the appeal.

Sachs J.

Polowin J.

Henderson J.

Released: January 10, 2014

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REASONS FOR JUDGMENT

Sachs, Polowin, and Henderson JJ.

Released: January 10, 2014