

**CITATION:** Metropolitan Toronto Condominium Corporation 1067 v. 1388020 Ontario Corp.,  
2017 ONSC 4793

**COURT FILE NO.:** CV-16-557120

**DATE:** 20170814

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** METROPOLITAN TORONTO CONDOMINIUM CORPORATION 1067,  
Plaintiff

**AND:**

1388020 ONTARIO CORP., Defendant

**BEFORE:** J. Ferguson, J.

**COUNSEL:** *Bernard B. Gasee*, for the Plaintiff

*Filip Boskovic* and *Jonathan Kulathungam*, for the Defendant

**HEARD:** August 8, 2017

**ENDORSEMENT**

[1] This motion for summary judgment is brought by the plaintiff against the defendant.

[2] The defendant owns and occupies 8 condominium units and 3 VIP parking spaces in a condominium located at 4002 Sheppard Avenue East, Units 300, 304, 307, 309, 310, 311, 314 and 328 in Toronto, Ontario (“the condominiums”).

[3] This matter stems from an outstanding balance owed by the defendant for unpaid condominium common elements maintenance fees (“maintenance fees”), interest and additional claimed expenses for such things as bank runs and fees for reviewing records (“claimed expenses”).

[4] The parties arrived at partial minutes of settlement, which minutes of settlement are attached as Appendix “A” to this endorsement.

[5] The issues are as follows:

- i. Interest on the unpaid condominium fees;
- ii. Additional claimed expenses; and

iii. Costs.

[6] The parties will advise as to any remaining issue with respect to parking and storage.

[7] Section 7 of By-law No. 1 provides specifically for two charges to be levied:

(a) Interest at the rate of 30% per annum, compounded monthly:

*“Arrears of payments required to be made under the provision of this Article XI shall bear interest at the rate of thirty (30%) percent above the prime rate charged by the Toronto Dominion Bank to its best risk commercial accounts per annum and shall be compounded monthly until paid and shall be deemed to constitute a reasonable charge incurred by the Corporation in collecting the unpaid amounts within the meaning of the Act.”*

(b) In addition to any other remedies, the Board may bring legal action on behalf of the Corporation to enforce collection thereof and “they shall be added to any amounts found due, all cost of such action, including cost as between a solicitor and his own client”. In other words, costs of the litigation (“Litigation Costs”).

[8] The *Condominium Act* Section 85(1) states as follows:

Lien upon default

**85** (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner’s unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount. 1998, c. 19, s. 85 (1).

[9] In June of 2016 the plaintiff registered such a lien against the condominium.

**Interest**

[10] The plaintiff’s position is that Section 7 of the By-law number 1(a) governs interest at the rate of thirty percent per annum above the prime rate, compounded.

[11] Counsel for the plaintiff correctly points out that the interest rate is a contractual matter between the parties and that I should not lightly interfere with holding the parties to the contract they entered into. (unless there are clear, cogent reasons to interfere)

[12] Plaintiff’s counsel agrees that the interest rate is discretionary but submits that the following supports against a reduction of the interest rate:

- i. The plaintiffs are innocent parties. They have not been paid for the maintenance fees;
- ii. The defendant does not operate with clean hands. It has continued to operate a business in 8 units (some sort of medical clinic business);
- iii. Although the defendant has provided \$112,000.00 to their lawyer to be held in trust it is not the same as the defendant agreeing to pay this amount (or paying the amount) to the plaintiff. There is no reason why those funds have not been paid to the plaintiff;
- iv. The defendant was responsible for its own bookkeeping. If it did not agree with the plaintiff's statements it should have provided proof, (I do not agree with this submission);
- v. The fact that the defendant's shareholders are involved in a shareholder dispute does not impact its obligation to pay the maintenance fees.

[13] The defendant submits that when a high interest rate is an issue, it is imperative that the plaintiff establish and provide precise record keeping, to avoid substantial unjust enrichment by way of inappropriate interest charges. Its position is that the plaintiff has not provided precise, consistent statements. I find that the plaintiff has done its best in providing records and statements.

[14] The defendant points to various inconsistencies between the statements of account. As a result of the plaintiff not actually knowing how much it was owed and what precise collection efforts were taken it has created false statements. (I do not accept that the plaintiff has deliberately created false statements)

[15] The defendant's position is that I should exercise discretion and provide relief against the 33% interest rate. He made the following further submissions:

- i. The defendant has agreed to an amount of approximately \$114,000.00 for maintenance fees which is essentially the same amount that was paid to the defendant's lawyers in trust. As a result interest at 33%, at the very least, should not run after October 2016. (In order to accept this submission the defendant should have paid these funds to the plaintiff as a payment on account)
- ii. The plaintiff's own statements were inconsistent and therefore should not give rise to the contractual high interest rate.

[16] Based on the evidence and on the submissions, there is absolutely no reason to not enforce the contractual arrangement made between the parties with respect to interest. Interest is to be paid as per the condominium by-law.

[17] On consent, I am making an order that the \$112,000.00 being held in trust (plus any accrued interest) be paid to “Bernard Gasee in trust”.

### **Claimed Expenses**

[18] The plaintiff submits that it is entitled to all of the additional claimed expenses in collecting the unpaid maintenance fees.

[19] With respect to the issue of these additional claimed expenses, I accept the defendant’s position that there is no provision under any of the existing by-laws which permits the plaintiff to claim any such further expenses.

[20] I find that any additional claimed expenses spent in recovering arrears, are included in the high interest rate charged of 33%.

[21] The plaintiff is not entitled to recover these additional claimed expenses.

### **Costs**

[22] In *Chandra v. CBC*, 2015 ONSC 6519 (“Chandra”), the court set out the following principles for dealing with costs at paras. 15-17:

15. The general principles to be applied in fixing costs are conveniently articulated in *Agius v. Home Depot Holdings Inc.*, 2011 ONSC 5272, at paras. 10-12, as follows:

Cumming J. in *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 at para. 5, described the “normative approach” to an application for costs:

Costs are in the discretion of the Court: s. 131, *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 57.01 of the Rules of Civil Procedure. In Ontario, the normative approach is first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, i.e. within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.

Fixing of costs is not merely a mechanical exercise in reviewing the receiving party’s Cost Outline. In *Andersen v. St. Jude Medical Inc.* (2006),

264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291], *Moon* [*Moon v. Sher* (2004), 246 D.L.R. (4th) 440], and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 75 O.R. (3d) 638 (C.A.).
2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher*. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont. C.A.), at para. 4.
3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
4. The court should seek to avoid inconsistency with comparable awards in other cases. “Like cases, [if they can be found], should conclude with like substantive results”: *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at p. 249.
5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher*.

The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 Epstein J.A. stated at paras. 51-52:

As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher*, this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful

party to pay in the particular proceeding at para. 37, where Armstrong J.A. said “[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice.”

16. As Mark Orkin in *The Law of Costs*, 2<sup>nd</sup> ed., loose-leaf (Aurora, Ont.: Canada Law Book, 2010) reminds us (at para. 201) awarding costs is an exercise in balancing two principles:

...One, that a successful party to litigation who is free of blame should not be required to bear the costs of either prosecuting or defending the action, and two, that citizens will be unduly hesitant to assert or defend their rights in court if an unsuccessful party is required to bear all of the costs of a successful one.

17. The principle of indemnification is no longer the only purpose of costs awards. There is recognition that modern costs awards may encourage settlement, prevent (or at least discourage) frivolous or vexatious litigation, or sanction behaviour that increases the expense of litigation.

[23] In fixing costs, the trial judge is not engaged in simply a mechanical exercise. She is not conducting an assessment and applying a tariff, but rather making a judicial determination using her best judgment, with some regard paid to what might occur on an assessment. She is not to scrutinize docket entries, but to consider the nature and factual and legal complexity of the case and the preparation for efficient use of court time. The goal is to reach a fair and reasonable costs award.

*Boucher v. Public Accountants Counsel (Ontario)*, 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.)

*Eagleson v. Dowbiggan* (1996), 4 C.P.C. (4<sup>th</sup>) 55 (Ont. Gen. Div.)

*De Bonth v. Revenue Properties Co.* (1996), 46 C.P.C. (3d) 93 (Ont. Gen. Div.)

[24] The Rule 57.01 factors applicable in this case are the principle of indemnity; the amount of costs that an unsuccessful party could reasonably expect to pay; the amount claimed; the complexity of the proceedings; and the importance of the issues. Costs should also be proportionate.

[25] The endorsement of Quigley, J., *York Condominium Corporation No. 345 v. Qi*, 2013 ONSC 4592 (CanLII), is of assistance in this case. He states the following at paragraph 9:

(9) Justice Lane made those observations in the context of [s. 134\(5\)](#) of the [Condominium Act](#) but as counsel for the defendants argued in her written submissions, I can see no reason that those principles would not be equally applicable here and require that legal costs in respect of the collection of common elements and similar expenses

under s. 85(1) of the *Act* would not also be required to be demonstrably reasonable and evidence-based: see *Mancuso v. York Condominium Corporation No. 216*, [2008 CanLII 31418 \(ON SC\)](#), 2008 CanLII 31418 (ONSC); *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005 CanLII 13778 \(ON CA\)](#), 2005 CanLII 13778 (ONCA) at paras. 32-33, 45; *Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited*, [2012 ONCA 417 \(CanLII\)](#) at para 84; *Durham Standard Condominium Corporation No. 187 v. Morton*, [2012 ONSC 5132 \(CanLII\)](#) at para. 19. The court observed in *TSCC No. 1633 v. Baghai* that [section 134\(5\)](#) does not give counsel license to spend the client's money with impunity. I agree with counsel for the defendants that no such authority is provided in [s. 85\(1\)](#) either.

[26] Those points have particular significance in this case. Costs must demonstrably reasonable. Further Sections 134(5) and 85(1) do not give counsel the licence to spend the client's money with impunity. (This includes monies spent as legal fees)

[27] Although it is not my role to perform an item-by-item analysis of the bill of costs, the plaintiff has provided a bill of costs broken down into categories. Certain categories are clearly not part of this straightforward action to recover unpaid condominium maintenance fees. This would include the categories of notice of sale and legal research; the motion to intervene; the attendance at commercial court.

[28] Under all the circumstances and in applying the legal principles regarding costs, costs are set in the amount of \$30,000.00 inclusive of fees, HST and disbursements.

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J. Ferguson, J.

**Date:** August 14, 2017

Appendix A,

Court File No. CV-16-557120

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

METROPOLITAN TORONTO CONDOMINIUM CORPORATION 1067

Plaintiff

and

1388020 ONTARIO CORP.

Defendant

**MINUTES OF SETTLEMENT**

WHEREAS Metropolitan Toronto Condominium Corporation 1067 ("MTCC 1067") commenced an action bearing Court File No. CV-16-557120 seeking:

- (a) Immediate possession of Units 9, 10, 11, 12, 13, 14, 15, 16 ("Condominium Units") all at Level 3 of Condominium building located at 4002 Sheppard Avenue East, Toronto, Ontario, M1S 4R5 ("4002 Sheppard") operated by the Plaintiff;
- (b) Liquidated damages in the amount of \$141,555.25 with pre and post judgement interest at a rate of 33% compounded monthly; and

(c) <sup>legal</sup> Costs and enforcement, administration and collection costs. 7/3

AND WHEREAS the Defendant 1388020 Ontario Corp. ("138") is the registered owner of said Condominium Units,




AND WHEREAS there is an internal dispute between interest holders in 138 which has resulted in a Commercial Court proceeding bearing Court File No. CV- 12-9938-00CL (“Commercial Court Proceedings”),

AND WHEREAS pursuant to the Order of Mr. Justice Hainey of June 20, 2017, MTCC 1067 was granted intervenor status in the Commercial Court Proceedings “with respect to the outstanding condominium fees” (“Hainey J. Order”),

AND WHEREAS Birinder Ahluwalia (“Dr. Ahluwalia”) who is a shareholder of 138 wishes to resolve matters with MTCC 1067 on behalf of 138,

The Parties herein are entering into these Minutes of Settlement:

- (a) The Parties hereby acknowledge and admit the truth of the recitals as set out above.
- (b) The Parties agree that the total amount of the <sup>Principle</sup> ~~principle~~ <sup>unit</sup> condominium fees due and owing is \$114,794.10 as of July 4, 2017 (<sup>Principle</sup> ~~Principle~~). 
- (c) The Defendant will not oppose judgment as it relates to the said amount.
- (d) All other claims made by the condominium corporation as of today’s date have been resolved with no further claims or actions as it relates to any and all other claims whether known or unknown as of today’s date, apart from interests, costs and claims for administration, enforcement and collection costs as set out in paragraph (e ) below

(e) The Parties agree that submissions will be made to the court as it relates the Plaintiff's claim:

- (i) for interest on the Principle;
- (ii) for costs on a full indemnity basis;
- (iii) to recover its "Administrative, Enforcement and Collection Charges" as part of its costs.

*The Plaintiff shall receive judgment from Defendant for such amount as is awarded for costs*

(f) Upon Judgment and the Writ of Possession being obtained, both shall not be enforced for a period of six (6) months on the following terms:

- (i) Birinder Ahluwalia will consent to the sum of \$112,000.00 currently being held in the account of Teplitsky, Colson LLP, in trust be released to the Plaintiff and be made payable to Bernard Gasee, in trust, pursuant to the terms of the Hainey J. Order;
- (ii) Birinder Ahluwalia shall personally make payments of the remaining sum being the amount of the Judgment, less \$112,000.00 by October 1, 2017 ("Payments");
- (iii) The said Payments shall be payable to the Plaintiff's lawyer, Bernard Gasee, in trust;
- (iv) Upon full payment of the above, the Judgment and the Writ of possession shall be assigned to Birinder Ahluwalia or as directed by him;

*interest, and expenses enforcement costs and administrative fees as noted above*

*by certified funds*


(v) Notwithstanding the above, if any Payments are more than 30 days in default, the Plaintiff may enforce its Judgment for possession and any Writ of Possession for the subject Condominium Units. *including* and any writ of execution. *9B*

(vi) The Parties may return to the court, on seven (7) days written notice to counsel, for further directions or any further directions or assistance as required to implement the terms of the settlement, *including if there is a future default after July 4, 2017 for more than 30 days within the next 6 months.* *7B*

(vii) The Assignment Agreement shall be in the form attached hereto as Schedule A. *after this agreement.*

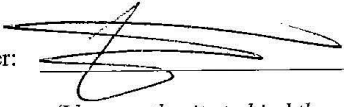
DATED AT TORONTO, this *8th* day of August, 2017

**METROPOLITAN TORONTO  
CONDOMINIUM CORPORATION  
1067**

Per:   
*Counsel*  
(I have authority to bind the corporation) or by counsel for the Plaintiff *Boase*

DATED AT TORONTO, this ..... day of August, 2017

**1388020 ONTARIO CORP.**

Per:   
*Counsel for*  
(I have authority to bind the corporation) or by counsel for the Defendant *1388020*  
*Ontario Corp*  
*Barrister*  
*Abkhazia.*

**ASSIGNMENT AGREEMENT** made as of this .... day of ....., 2017.

**B E T W E E N:**

**METROPOLITAN TORONTO CONDOMINIUM CORPORATION 1067**

(the "Assignor")

OF THE FIRST PART

**BIRINDER AHLUWALIA**

(the "Assignee")

OF THE SECOND PART

**WHEREAS** 1388020 Ontario Corp. (the "Debtor"), is the sole registered owner of eight condominium units on level 3 of 4002 Sheppard Avenue East, Toronto, Ontario M1S 4R5 ("4002 Sheppard");

**AND WHEREAS** the Assignor is the condominium corporation for 4002 Sheppard;

**AND WHEREAS**, as at **August 8, 2017**, the Debtor was indebted to the Assignor for common expenses, interest and fees/costs pursuant to Article XI of By-Law No. 1 of the Assignee;

**AND WHEREAS**, on July 21, 2016, the Assignee commenced an action as against the Debtor for, *inter alia*, damages in the amount of \$141,155.25, being the amount owing to it as of July of 2016, bearing Court File No. CV-557120 (the "Action");

**AND WHEREAS**, on **August 8, 2017**, the Debtor will not and/or did not oppose Judgment in the Action in the total amount of \$112,000.00 as the outstanding Principle and having made submissions on the issue of interest and costs, and the court making a determination of same ("Judgment");

Schedule A

**AND WHEREAS** the Assignee has agreed to purchase from the Assignor and the Assignor has agreed to sell the Judgment and the Assignee has requested an assignment of the Judgment and the Action by reason thereof;

**AND WHEREAS** the Assignor and Assignee are herein collectively referred to as the Parties or any one of them as the Party;

**NOW THEREFORE THIS AGREEMENT WITNESSETH** that for good and valuable consideration (the receipt and sufficiency whereof is hereby irrevocably acknowledged), the parties hereto agree as follows:

1. The Assignee agrees to pay the Assignor a sum equal to the amount of the Judgment before receiving this Assignment Agreement executed and the Assignor fulfilling the terms as set out below.
2. The Assignor does hereby assign all of its right, title and interest in and to the Indebtedness and the Action to the Assignee without recourse of any kind whatsoever to the Assignor.
3. The Assignee hereby undertakes and agrees at the assignees expense to register such documents, file such statements and give such notices as may be reasonably required or prudent as a result of this transaction.
4. The Parties hereby agree and undertake each to the other to execute at assignee's expense such further and other documents or assurances as may be reasonably necessary to give effect to the assignment of the Indebtedness and the Action.
5. The Parties hereby acknowledge that this Assignment Agreement contains the entire agreement between the Parties, that the terms of this Assignment Agreement are contractual including the "recital" provisions, are not a mere recitals and any breach of

and the "non-recital  
provision"  
JB

Schedule A

these terms may be enforced against any Party in breach, and may give rise to a damages claim against any such Party, or any of them, enforceable by a further legal proceeding.

6. The Parties acknowledge that they have carefully read this Assignment Agreement, have had opportunity to seek the advice of a lawyer as to the nature and effect of the Assignment Agreement, understand all of the terms in this Assignment Agreement, and have executed this Assignment Agreement voluntarily and with knowledge of the consequences thereof.
7. This Assignment Agreement shall be construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable herein.
8. This Assignment Agreement shall be binding upon the parties hereto and their respective heirs, successors and assigns, including Birinder Ahluwalia and 1388020 Ontario Corp.
9. This Assignment Agreement may be executed in one or more counterparts and that each such counterpart shall be valid as if executed by all, when all have been executed and that when taken together, the Parties agree the counterparts shall form one entire agreement binding on the Parties. The Parties agree to accept faxed or PDF copies of each other's respective signatory page(s), it being agreed herein that each party which sends the fax or PDF acknowledges being bound by this Assignment Agreement.

DATED at Toronto, Ontario, this ..... day of ....., 2017

**METROPOLITAN TORONTO  
CONDOMINIUM CORPORATION 1067**

\_\_\_\_\_  
Witness

Per: \_\_\_\_\_

*(I have authority to bind the corporation)*

Schedule A

DATED at Toronto, Ontario, this ..... day of ....., 2017

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Birinder Ahluwalia

METROPOLITAN TORONTO CONDOMINIUM  
CORPORATION 1067  
Plaintiffs

-and-

1388020 ONTARIO CORP.

Defendants

Court File No. CV-16-557120

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**  
  
PROCEEDING COMMENCED AT  
TORONTO

**MINUTES OF SETTLEMENT**

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