

COURT OF APPEAL FOR ONTARIO

CITATION: York Region Standard Condominium Corporation No. 1253 v.
Hashemi, 2017 ONCA 557
DATE: 20170630
DOCKET: C62479

Rouleau, Pepall and Roberts JJ.A.

BETWEEN

York Region Standard Condominium Corporation No. 1253

Applicant (Appellant)

and

Seyed Pouria Hashemi and Pauline Hashemi,
Sheva Gindil and Darynell Gindil

Respondents (Respondents in Appeal)

Timothy Duggan and Spencer Toole, for the appellant

Wendy Greenspoon-Soer and Monica Unger-Peters, for the respondents

Heard: March 23, 2017

On appeal from the judgment of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated June 30, 2016.

REASONS FOR DECISION

Introduction

[1] The appellant condominium corporation (“YRSCC”) appeals from an award of \$18,000 in damages made in its favour against the respondent condominium unit owners and also seeks leave to appeal an award of \$17,000 in full indemnity

costs made under s. 134(5) of the *Condominium Act, 1998*, S.O. 1998, c.19 (the “Act”).

Facts

[2] The respondents leased their condominium to tenants who vandalized the common elements of YRSCC.

[3] YRSCC commenced an application against the respondents and their tenants claiming declaratory and injunctive relief, an eviction order, damages representing the cost of repairs, and costs. After several court appearances, the tenants left the property and did not participate further in the court proceedings. Before the application judge, the respondents conceded liability and the only contested issues left to be determined were damages and costs. YRSCC claimed \$33,381.28 in damages and an award of costs of \$52,637.56.

Application Judge’s Decision

[4] The application judge first addressed the issue of damages. He observed that under s. 17 of the Act, a condominium corporation is required to take reasonable steps to ensure compliance with the Act and this includes incurring reasonable costs to remedy any transgressions by unit owners or their tenants. He considered the invoices submitted to be disproportionate to the damage suffered and the action taken in response to fix it. Unit owners should be charged for repairs, not upgrades. Although YRSCC was entitled to rectify the damage, it

had a duty to do so proportionately. He provided examples relating to the painting of two stairwells, the installation of security cameras, and window cleaning. He concluded that these charges were unreasonable and a breach of YRSCC's duty under the Act. He therefore awarded \$18,000 in damages rather than \$33,381.28 claimed by YRSCC.

[5] He then turned to the issue of costs. He was unwilling to order the \$52,637.56 that YRSCC requested. He stated:

A partial indemnity basis for the costs, using Rule 57.01 of the *Rules of Civil Procedure* and *Boucher v Public Accountants Council (Ontario)*, 2004 CanLII 14579 (ON CA), (2004), 71 O.R. (3d) 291, should be fixed at \$12,000.00. I take into account the previous numerous appearances and preparation required. I also note that the bulk of this application was rendered moot. However, in fixing costs under s. 134(5) of the Act, the full indemnity costs of the corporation in obtaining compliance at \$17,000.00 as being the appropriate actual costs incurred. This is based [on] only partial recovery of the actual damages sought.

[6] The application judge therefore awarded \$17,000 in costs rather than \$52,637.56 claimed by YRSCC.

Analysis

(a) Damages

[7] The appellant YRSCC acknowledges that it has a duty pursuant to the Act to act reasonably in connection with repairing damage caused by vandalism but submits that the application judge erred in holding that it had breached its duty

and declining to award the amount it had claimed. YRSCC argues that the respondents had not put the issue of breach of statutory duty in issue and there was no evidence on which the application judge could reasonably rely in finding a breach of duty or in finding that the amount claimed for repairs was unreasonable.

[8] Based on the evidence before him, including the invoices which he reviewed, it was open to the application judge to determine that several of the expenditures that YRSCC made were disproportionate. Whether YRSCC had acted reasonably in incurring the damages it claimed clearly was in issue. The application judge's role was not to simply rubber stamp the request made by the condominium corporation. In support of his determination, he identified compelling examples of disproportionate expenditures. We agree with the appellant that a finding of breach of statutory duty was not sought by the respondents. That said, there was no need to find a breach of duty; the finding of disproportionality was available regardless of any such breach. In any event, the judgment appealed from is silent on such a breach. An appeal is from an order or judgment, not from the reasons for judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

[9] However, we find that the application judge erred in finding that the installation cost of security cameras was unreasonable. He concluded that two invoices, each for \$7,458, were duplicates and unreasonable. But, the affidavit

evidence revealed that the contractor had split the total cost of his services between two invoices and did not charge twice for the same service. The expense of \$7,458 therefore should be added to YRSCC's damages award.

[10] Apart from this adjustment, we see no reason to interfere with the damages award.

(b) Additional Actual Costs

[11] Turning to the issue of the costs award, there were two dimensions to the request for costs advanced by YRSCC. First, it claimed the costs of the application based on r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Second, it claimed its additional actual costs based on s. 134(5) of the Act. The latter provides that “[i]f 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”.

[12] In *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2005), 253 D.L.R. (4th) 656 (Ont. C.A), Doherty J.A. explained at para. 8 that “an award of costs” refers to the costs that the court orders one litigant to pay to another litigant whereas “additional actual costs” can encompass those legal costs owing as between the client and its own lawyer beyond the costs that the court has ordered paid by an opposing party.

[13] In seeking additional actual costs under s. 134(5) of the Act, YRSCC advised the trial judge that the order requested had three components: damages, costs and s. 134(5) costs; and that the standard for r. 57 costs was that described in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) whereas the standard for s. 134(5) costs was a solicitor and his own client assessment. YRSCC also directed the trial judge to the case of *Toronto Standard Condominium Corp. No. 1633 v. Baghai Development Ltd.*, 2012 ONCA 417, 293 O.A.C. 123 which addresses the distinction between the two types of costs. The application judge considered an order of \$12,000 to be an appropriate partial indemnity cost award under r. 57 and ultimately ordered an additional \$5,000 under s. 134(5) of the Act for a total full indemnity cost award of \$17,000.

[14] YRSCC argues that the application judge misapprehended and misapplied the provisions of s. 134(5) of the Act in his assessment of costs. In particular, it submits that he assessed YRSCC's costs as between the parties, rather than as between a solicitor and his client. As a result, the application judge failed to award "any additional actual costs", which YRSCC incurred in obtaining the compliance order, as required under s. 134(5) of the Act.

[15] The application judge considered YRSCC's "full indemnity" costs but appears to have focussed on the costs as between the parties without reference to the additional actual costs. This is evident from his reference to partial

recovery of the actual damages sought and to the fact that the bulk of the application had been rendered moot. Partial recovery would have little or no impact on entitlement to actual costs and mootness would not detract from the actual additional costs incurred to obtain the compliance order. Had he considered additional actual costs, then costs such as administrative and managerial costs that were associated with obtaining the order would have been eligible for assessment as “any additional actual costs”. In his analysis, the application judge should have distinguished between “an award of costs” and “additional actual costs”, as stipulated in s. 134(5), and as this court explained in *Skyline* and *Baghai*. Instead, he conflated the two.

[16] However, YRSCC did not file the necessary underlying evidentiary materials supporting the claim for all of its additional actual costs and did not seek an adjournment to address this deficiency in the record. As noted at para. 56 of *Skyline*, the burden is on the condominium corporation to demonstrate that the costs claimed were actually incurred in obtaining the order. YRSCC did not fully meet this burden. As this court observed in *Baghai*, at para. 84: “the provision for ‘additional actual costs’ does not automatically lead to whatever amount is claimed” because s. 134(5) “does not give counsel licence to spend the client’s money with impunity”.

[17] Of the \$52,637.56 claimed for costs, YRSCC established entitlement to approximately \$34,000. In the result, the order on costs is varied and increased

from \$17,000 to \$34,000 so as to account for actual additional costs established by YRSCC.

(c) Reasons

[18] Lastly, the reasons were spartan in nature. However, an application judge is not required to address every factual issue. Here, read in the context of the record as a whole, the reasons identify why and how the application judge arrived at his decision and they also allow for effective appellate review.

Disposition

[19] In summary, the appeal is allowed and the damages award is increased from \$18,000 to \$25,458. Leave to appeal costs is granted. The costs appeal is allowed and the costs award is increased from \$17,000 to \$34,000.

[20] As YSSRC was the successful party on this appeal, the respondents shall pay its costs fixed in the amount of \$9,500 inclusive of disbursements and applicable taxes.

“Paul Rouleau J.A.”

“S.E. Pepall J.A.”

“L.B. Roberts J.A.”