CITATION: MTCC No. 596 v. Best View Dining Ltd. et al, 2017 ONSC 5655
COURT FILE NO.: CV-17-570473
DATE: 20170922

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Metropolitan Toronto Condominium Corporation No. 596

AND:

Best View Dining Ltd. and 2465031 Ontario Limited

BEFORE: Madam Justice J.T. Akbarali

COUNSEL: *Megan Mackey* for the applicant

S. Pulver and J. Bartlett for the respondent Best View Dining Ltd.

N. Schernitzki for the respondent 2465031 Ontario Limited

HEARD: September 19, 2017

ENDORSEMENT

Overview

[1] This application involves a condominium corporation, a landlord and a tenant.

[2] The condominium is a mixed use building, with four commercial units and 76 residential units.

[3] The tenant, Best View Dining Ltd., operates a Japanese barbeque restaurant with tabletop grilling in one of the commercial units. The unit is owned by the landlord, 2465031 Ontario Limited.

[4] Almost immediately after the restaurant opened in May 2016, residents of the applicant, Metropolitan Toronto Condominium Corporation No. 596 ("MTCC 596"), began making complaints about excessive noise caused by the restaurant and its activities.

[5] As a result of those complaints, MTCC 596 and the tenant entered into an interim settlement agreement. Subsequently, all three parties entered into a second interim settlement agreement. Prior to the return of this application, the parties agreed to the form of a consent compliance order to address the noise issues that remain. However, the parties could not agree upon the costs of this application. These reasons deal with those costs.

Background

[6] Before the restaurant opened, the landlord and MTCC 596 entered into an agreement under s. 98 of the *Condominium Act, 1998,* S.O. 1998 c. 19, which allowed for renovations to take place in the leased unit.

[7] The renovations included removing the ceiling and ceiling insulation to expose the concrete ceiling slab, which is also the floor slab of the second floor, changes to the flooring in the restaurant, and changes to the ventilation and exhaust fan. The changes to the ventilation and exhaust fan were not contemplated by the s. 98 agreement and were done without knowledge of the landlord or MTCC 596. The tenant made the changes to meet requirements for its permits and because it required a stronger ventilation system due to the tabletop grilling offered at the restaurant.

[8] Significant noise issues were apparent immediately on the restaurant's opening. For residents on the second floor, these included the transfer of ambient noise from the restaurant and a range of disrupting noises sounding like bowling balls being dropped, knocking, banging, high heeled shoes on the floor, and carts being rolled across the floor. In their evidence filed on the application, residents describe feeling shattered and helpless, unable to fall asleep, being jolted awake, and suffering physical and mental effects from the lack of sleep. Some residents filed medical evidence on the application.

[9] In addition, the changes to the ventilation system led to noise and vibrations that disturbed residents in units 207, 507 and 607. The vibrations led to a crack in the ceiling of one of these units. There was concern about long-term structural damage from the vibrations.

[10] The residents deposed that the noises to which they were subjected were new. The respondents argue that there is evidence that the noise and ventilation issues pre-dated the renovations or the opening of the restaurant, and note that because of the consent compliance order, no findings have been made on the merits of the application. The respondents point to two emails in the record that make reference to earlier noise problems. I do not accept that these emails establish that there were earlier problems. First, the emails are hearsay, and no effort was made to justify their admission under the principled approach. Second, even if I were to accept these emails for the truth of their contents, at best they suggest there were earlier noise issues that had been resolved. Moreover, the tenant's own acoustic engineering reports conclude that the sound transfer to the residents' units is at objectionable levels.

[11] In any event, MTCC 596, the tenant and the owner have all made significant efforts to find the causes of the noises and address them. MTCC 596 commissioned multiple reports from various engineers. The tenant commissioned its own reports. The tenant has spent significant funds attempting to remedy the noise problems, including closing for two weeks while further renovations were done in the restaurant. All parties retained counsel to assist with the process of resolving the noise issues. As I noted, there are two interim settlement agreements that address

some of these issues. A Notice of Application was issued on February 28, 2017. The application record was prepared in June 2017.

[12] The parties' efforts addressed the transfer of ambient noise which is now within acceptable levels. However, notwithstanding certain changes that have been made, there remain noise issues relating to the ventilation system and relating to disrupting noises. The consent compliance order provides for further steps to be taken which will hopefully address the remaining issues.

The Parties' Positions

[13] MTCC argues that it is entitled to its full indemnity costs by reason of the s. 98 agreement, its declaration, rules and by-laws, and by virtue of s. 134(5) of the *Act.* It argues it would be unfair to require the residents of the condominium to pay for the costs of ensuring the landlord's and tenant's compliance with the s. 98 agreement, declaration, rules and by-laws.

[14] The tenant argues that it has made significant, reasonable, good faith efforts to resolve the issues, and should not be made to bear the entirety of the costs, although it accepts that some costs are properly payable by it to MTCC 596. It suggests $25,000 is appropriate, and seeks that the order of payment be without prejudice to its ability to claim these costs from the landlord[1].

[15] The landlord argues that the consent compliance order to which MTCC 596 has agreed prevents it from seeking its costs under s. 134(5) of the *Act* and that MTCC 596 can claim only its full indemnity costs under s. 131 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 and r. 57.01 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194. The landlord also argues that it is not in breach of its obligation to take all reasonable steps to eliminate the noise from the restaurant.

Issues

[16] This application requires me to determine the following issues:

a. Is MTCC 596 precluded from seeking its costs under s. 134(5) of the *Act* by virtue of the consent compliance order?

b. What are the costs to which MTCC 596 is entitled?

Is MTCC 596 precluded from seeking its costs under s. 134(5) of the *Act* by virtue of the consent compliance order?

[1] The tenant and landlord each have applications against each other to address the costs incurred as a result of the noise issues. Those applications were originally scheduled to be heard together with MTCC 596's application, but on consent, they have been adjourned.

[17] Section 134(5) of the *Act* provides:

> 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.

[18] This provision allows a corporation that has obtained a compliance order under the *Act* to not only recover its damages or costs as ordered by the court, but any additional actual costs it incurred in obtaining the order. Because those amounts can be added to the common expenses for the unit, in effect, the provision allows the corporation to place a lien on the unit to secure payment.

[19] The landlord argues that the consent compliance order allows MTCC 596 to claim full indemnity costs on the usual costs analysis, but does not allow MTCC 596 to claim its additional actual costs under s. 134(5). It relies on paragraph 10 of the consent compliance order, the relevant part of which reads:

> THIS COURT ORDERS that the cost order made by the judge on this application shall include all costs relating to this dispute that the Applicant is permitted to charge against the Unit, up until the date the order is made. The Applicant is not entitled to any additional costs under in [sic] section 134(5) of the *Condominium Act*, 1998, S.O. 1998, c. 19 relating to this order.

[20] In my view, this paragraph does not preclude MTCC 596 from seeking, before me, its additional actual costs in this proceeding. Rather, it provides that MTCC 596 can only recover the amount I order in costs, and only this amount can be charged against the Unit. MTCC 596 cannot seek recovery of any additional actual costs, incurred up to the date the order is made, beyond those I order in these reasons.

[21] I reach this conclusion because the first sentence of the paragraph makes clear reference to "all costs…that the Applicant is permitted to charge against the Unit". Costs under s. 134(5), including additional actual costs, are "costs…that the Applicant is permitted to charge against the Unit". At the same time, the second sentence refers to "additional costs", i.e., costs over and above those that I order, not "additional actual costs".

[22] Therefore, the consent compliance order does not preclude MTCC 596 from seeking all its additional actual costs under s. 134(5). I turn next to consider the basis for MTCC 596's claim to its costs.

The Basis for MTCC 596's Claim for Costs

[23] There is no dispute that MTCC 596 has a duty to take all reasonable steps to ensure that owners and occupiers of units comply with the *Act*, and MTCC 596's declarations, by-laws and rules: s. 134(1) of the *Act*.

[24] MTCC 596 claims it is entitled to its full costs in reliance on the s. 98 agreement it entered into with the landlord, its declaration, by-laws and rules.

[25] The s. 98 agreement, to which the tenant is not a party, provides:

> …It is the Owner's responsibility to ensure compliance with the Act and the Corporation's declaration, by-laws and rules. In the event that there are any reasonable complaints of noise or other disturbances from any resident subsequent to the renovations, it is the Owner's responsibility to take all reasonably necessary steps, at the Owner's sole cost and expense, to eliminate the noise, nuisance and/or other disturbance. In addition, if any noise, nuisance or other disturbances arise in the Unit, which was not present prior to the renovations, it is the Owner's responsibility to take all necessary steps at the Owner's sole cost and expense to eliminate such noise, nuisance or disturbance.

[26] The s. 98 agreement also provides:

> Any and all reasonable costs, charges, damages or expenses, including… legal costs and disbursements, incurred by the Corporation, together with any interest thereon, with respect to the common elements, any units or otherwise, as a result of…
>
> 2. the failure of the Owner to comply with the terms of this Agreement;
>
> … [sic]
>
> The Owner agrees that the above noted costs shall be shall be [sic] paid by the Owner within twenty (20) days of being billed for same and shall be deemed to be common expenses attributable to the Unit, and shall be recoverable as common expenses, together with interest and any legal costs incurred by the Corporation.

[27] MTCC 596 also relies upon the declaration which provides, in Art. III, s. (1)(g):

> No noise shall be permitted to be transmitted from one unit to another. In the event the Board of Directors of the Corporation determines that any noise is being transmitted to another unit and that such noise is an annoyance and/or a nuisance and/or disruptive…then the owner of such unit shall at his own expense, take such steps as shall be necessary to abate such noise to the satisfaction of the Board of Directors of the Corporation. In the event the owner of such unit fails to abate the noise, the Board of Directors shall take such steps as shall be necessary to abate the noise and the unit owner shall be liable to the Corporation for all expenses incurred by the Corporation in abating the noise which expenses are to include reasonable solicitor's fees.

[28] MTCC 596 relies upon the by-laws, noting by-law 10.4, entitled "Indemnification by Owners":

> (c) each owner shall indemnify and save the Corporation harmless from and against any and all damages, loss and/or cost, which the Corporation may suffer or incur resulting from, or caused by an owner, or any person, thing or animal for whom or for which the owner is responsible including, but not limited to:
>
> (i) all legal costs and disbursements; and
>
> (ii) all costs incurred by the Corporation:
>
> (A) To redress, rectify and/or obtain relief from any injury or damages;
>
> (B) By reason of breach of the Act, declaration, by-laws and/or any rules of the Corporation in force from time to time; and/or
>
> (C) In relation to the enforcement of any rights or duties pursuant to the Act, the declaration, the by-laws and/or the rules of the Corporation;
>
> (d) all amounts for which the unit owner is responsible pursuant to this by-law shall form part of the contributions to the common expenses payable for the particular unit.

[29] MTCC 596 relies upon the rules, and in particular, rule 2.5 which provides that residents and their guests must not make noise or create a nuisance that disturbs the comfort or quiet enjoyment of other residents. It provides that:

> Any costs incurred by the Corporation as a result of an Owner's/Resident's failure to comply with this provision, including, but not limited to legal fees and disbursements, shall be recoverable in accordance with Rule 1.1.

[30] Rule 1.1 provides that:

> Any and all losses, costs or damages, including, but not limited to, all legal fees, disbursements and taxes, incurred by the Corporation by reason of a breach of the any [sic] provision in the Corporation's Governing Documents in force from time to time, by any Owner and/or Resident, or any person, thing or animal for whom or for which the Owner and/or Resident is responsible, shall be borne and/or paid for by the Owner and/or Resident and may be fully recovered by the Corporation against the Owner in the same manner as common expenses or as may be provided in the Act…

[31] Individually and collectively, MTCC 596 argues, these instruments provide a basis for liability of the owner. The tenant's liability for costs grows from the rules, because they apply to residents. (The tenant has accepted its responsibility to pay costs, but as noted, disputes quantum and seeks to be able to claim the costs it is ordered to pay against the landlord.)

[32] The respondents argue that the consent compliance order is not an admission of liability of a breach of the declaration, by-law or rules. However, the evidence in the record is overwhelming that there is noise emanating from the restaurant or its activities that is disturbing other residents, to the extent that in some cases, it is causing some of the residents to suffer physical and mental health issues. As I have noted, even the tenant's acoustic engineering report acknowledges that there is sound transmission that is objectionable. The evidence establishes a breach of the noise provisions in the declaration and the rules[2].

[33] The owner argues that it is not in breach of the s. 98 agreement, declaration, by-law or rules because it has behaved reasonably in trying to redress the problem. Only the s. 98 agreement requires the owner to take "all reasonably necessary steps" to abate the noise. The requirement to abate the noise in the declaration and rules is not qualified by a reasonableness requirement[3].

[34] I thus conclude that the owner is responsible for MTCC 596's costs of "taking such steps as are necessary to abate the noise" as set out in the declaration. The owner and tenant are responsible for MTCC's costs of enforcing compliance with the rule that requires residents "not to make noise or create a nuisance that disturbs the comfort or quiet enjoyment of other residents". These include the additional actual costs under s. 134(5) of the *Act*. The right to recover these costs as if they were common expenses payable for the owner's unit arises out of the declaration, the by-laws and the rules.

Principles Relating to the Assessment of Costs

[35] When considering the quantum of MTCC 596's costs, the starting point is that condominium corporations are "normally awarded full indemnity costs on successful application so as to avoid other unit owners having to subsidize the expense resulting from the conduct of the respondents": *Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited,* 2012 ONCA 417 at para. 83; *WNCC No. 70 v. Farena et. al,* 2012 ONSC 5877 at para. 6 (S.C.J).

[36] However, the provision for "additional actual costs" does not mean a corporation is entitled to whatever amount it claims. "Section 134(5) does not give counsel license to spend the client's money with impunity": *Baghai* at para. 84. Costs must be reasonable and properly incurred: *Toronto Standard Condominium Corp. No. 2032 v. Boudair,* 2016 ONSC 509 at para. 28 (S.C.J.), 262 A.C.W.S. (3d) 600.

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[2] It may also establish a breach of s. 12 of the s. 98 agreement, but it is not necessary to decide that issue.

[3] The requirement in s. 12 of the s. 98 agreement that "reasonably necessary steps" be taken relates to noise or other disturbances subsequent to the renovation. Section 12 also states that, where noise was not present prior to the renovations, the owner must take all "necessary steps". Earlier in these reasons I found that the noise did not predate the renovation. The reasonable behaviour of the owner may thus be irrelevant for purposes of the s. 98 agreement but it is not necessary to decide this issue.

Should the costs awarded be decreased because the respondents acted reasonably and in good faith?

[37] The tenant argues that it behaved reasonably and in good faith. It spent significant funds and time and made good faith efforts to resolve the noise issues. As a result, it argues it is unfair that it should bear the full burden of the costs. The court should encourage reasonable behaviour by not penalizing those who engage in it with an order to pay full indemnity costs.

[38] The owner also argues that it behaved reasonably and responsibly, and as a result, should not be responsible for MTCC 596's full indemnity costs. The owner relies on *Boudair.*

[39] In my view, *Boudair* is distinguishable. In *Boudair,* Diamond J. was considering whether an owner had acted reasonably under s. 119(2) of the *Act* which requires that an owner "shall take all reasonable steps to ensure that an occupier of the owner's unit…shall comply with this *Act*, the declaration, the by-laws and the rules". As I have already noted, the obligation an owner or resident has under the declaration and rules to remedy the noise is not qualified by a reasonableness standard. Accordingly, in *Boudair*, the owner met his statutory obligation. In this case, MTCC 596 seeks costs based on its entitlement under the declaration, by-laws and rules. The declaration and rules provide that the noise must be abated. Reasonable steps that fail to abate the noise do not satisfy the landlord's or the tenant's obligation under those instruments.

[40] I do not agree that MTCC 596's right to its additional actual costs is necessarily lessened by the fact that the respondents acted reasonably and in good faith. Reasonableness is relevant to the enquiry in that the costs MTCC 596 claims must be reasonable. If those costs are unreasonable in view of the reasonable conduct of the respondents, the costs may be reduced. But reasonable costs are not reduced just because the respondents behaved reasonably. I consider the reasonableness of MTCC 596's costs in my analysis of quantum, below.

[41] I disagree that this conclusion is inconsistent with the policy promoting settlements. It was in the respondents' interest to behave reasonably to keep MTCC 596's costs down. Had they behaved unreasonably when faced with the noise complaints, they would have been faced with a greater costs claim from MTCC 596.

[42] The expectation of other residents is that they will not have to pay for the costs of ensuring another owner complies with the declaration and rules. That expectation, grounded in those same instruments, does not change when the non-compliant owner or resident acts reasonably.

[43] Accordingly, I decline to reduce MTCC 596's costs on the basis that the respondents acted reasonably and made good faith efforts to address the noise problems.

Should the costs awarded be decreased because MTCC 596 failed to attempt to mediate the dispute?

[44] The respondents also argue that MTCC 596 could have adopted a more conciliatory approach by mediating the dispute. The *Act* does not require mediation in this case because a

tenant is involved: *Peel Standard Condominium Corporation No. 767 v. 2069591 Ontario Inc.*, 2012 ONSC 3297 at para. 34. Nevertheless, the respondents argue MTCC 596 could have chosen mediation.

[45] In this case, the parties engaged in significant settlement efforts, as is demonstrated by the two interim settlement agreements and the consent compliance order. The evidence does not support a conclusion that the condominium corporation declined overtures to negotiate in favour of a litigious approach. The Notice of Application was issued in February 2016; affidavits were not prepared until June 2016. In these circumstances, I conclude that mediation would not have made a difference.

[46] Moreover, while the respondents acted in good faith to attempt to resolve the issues, there were disagreements between counsel as to the extent of the issues. Even before me, one respondent referred to the "alleged" noise problems. MTCC 596 did not act unreasonably in commencing its application or moving it forward. It was faced with urgent and serious complaints from its residents who were growing desperate from lack of sleep. The record demonstrates MTCC 596 was faced with threats of litigation against it by its own residents. It was entitled to push to resolve the noise issues steadfastly, as it did.

Quantum of Costs

[47] MTCC 596 claims its costs for (i) the various engineering reports it commissioned; (ii) the costs of putting up two residents in hotels during sound testing; and (iii) legal fees and disbursements.

The Engineering Reports

[48] The respondents argue that MTCC 596 unreasonably commissioned multiple reports, many of which were not disclosed to the respondents concurrent with their preparation. They argue that obtaining multiple reports was not reasonable.

[49] MTCC 596 described each of the reports it commissioned. I am satisfied the reports were not duplicative and were reasonably commissioned. However, I am concerned that there was some duplication of work in the preparation of the reports.

[50] MTCC 596 explained that at some point, it became frustrated with one engineering firm it had retained which was not producing its reports as quickly as MTCC 596 required. As a result, MTCC 596 changed engineering firms. In my view, some reduction for duplication of work in bringing the new engineers up to speed is warranted. MTCC 596 claims a total of $28,679.70. In my view, to account for the duplication between the engineering firms, a reduction of $1500.00 is appropriate. Accordingly, MTCC 596 is entitled to recover $27,179.70 for its engineering reports.

Hotel Costs

[51] MTCC 596 incurred costs to relocate two residents to a hotel when sound testing was being conducted in their units. The total costs claimed under this head are $630.39. In my view, these amounts are reasonable and properly recoverable.

Legal Fees

[52] MTCC 596 claims significant legal fees, in the amount of $72,099.79. These fees represent two attendances at Civil Practice Court, reviewing multiple reports from MTCC 596's and the tenant's engineers, negotiations that led to the two interim settlement agreements and the consent compliance order, and significant work preparing the application record, which consists of five volumes of evidence (including the supplementary application record), a factum and a book of authorities.

[53] When looked at practically, MTCC 596 was substantially successful in its application, obtaining much of the relief it sought.

[54] I do not accept the respondents' submission that the work done was unreasonable in the face of their reasonable, good faith efforts to resolve the noise problems. MTCC 596 held off preparing the application record until June 2016, more than a year after the restaurant opened and the noise complaints began. The efforts at settlement resulted in amelioration of some of the issues. By June 2016, faced with the continuing complaints of its residents to whom it had to answer, MTCC 596 acted reasonably in pursuing its application. The legal fees and disbursements were thus properly incurred.

[55] However, just because the steps MTCC 596 took were reasonable does not mean that the amount of legal fees it seeks to recover are reasonable. The fixing of costs remains a discretionary decision under s. 131 of the *Courts of Justice Act*, to be exercised in accordance with the factors laid out in r. 57.01 of the *Rules of Civil Procedure*. These factors include the principle of indemnity, the expectations of the unsuccessful party and the complexity of the issues. Overall, the court must consider what is fair and reasonable in fixing costs: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), 2004 CanLII 14579.

[56] Although condominium corporations may be entitled to more than an ordinary award of costs by reasons of s. 134(5) of the *Act*, reasonableness remains a touchstone of the analysis: *Baghai* at para. 85. As I earlier noted, "section 134(5) does not give counsel license to spend the client's money with impunity": *Baghai* at para. 84.

[57] MTCC 596 has spent significant sums in legal fees and disbursements to deal with this complex matter. The tenant argues that MTCC 596's costs are excessive. It points to the involvement of three lawyers on the file and argues there has been duplication of efforts and billings for inter-office meetings.

[58] I have reviewed the invoices for legal fees and the steps disclosed in them are reasonable. However, there are no dockets or other evidence that would allow me to understand how much time was spent on varying tasks. Without the dockets, I cannot conclude that there was no duplication between the different timekeepers on the file. While I have no doubt that counsel

invested significant time into this application, I am concerned that the amount claim is too high to be fair and reasonable.

[59] In my view, $60,000.00 in legal fees, disbursements and H.S.T. are fair and reasonable.

Conclusion

[60] MTCC 596 is entitled to claim its s. 134(5) additional actual costs in this proceeding. In the result, I find that it is entitled to costs in the amount of $87,810.09, being the total of $27,179.70 for engineering reports, $630.39 for hotel costs and $60,000.00 for legal fees, disbursements and H.S.T.

[61] Because the tenant is responsible for all the costs pursuant to the rules, and the landlord is responsible for all the costs pursuant to the declaration, by-law and rules, I order that the landlord and tenant are jointly and severally liable to MTCC 596 for the costs owing. This determination does not preclude either of them from seeking the amount they pay in respect of MTCC 596's costs from the other in their ongoing applications.

Akbarali J.

Date: September 22, 2017.