

CITATION: Carleton Condominium Corporation No. 32 v. Yakovlev, 2021 ONSC 5483
COURT FILE NO.: CV-21-86241
DATE: 2021/08/11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Carleton Condominium Corporation No. 32, Applicant

AND

Mikhail Yakovlev, Svetlana Yakovleva, and Nastasiya Yakovleva, Respondents

BEFORE: Justice R. Ryan Bell

COUNSEL: Nancy Houle and David Lu, for the Applicants

Laman Meshadiyeva, for the Respondents

HEARD: In writing

COSTS ENDORSEMENT

Introduction

[1] In my Reasons for Decision released on May 4, 2021 (2021 ONSC 3323), I found:

- (i) the respondents contravened Carleton Condominium Corporation No. 32's rule prohibiting noise that disturbs the comfort and enjoyment of others, and thereby breached s. 119 of the *Condominium Act, 1998*, S.O. 1998, c. 19;
- (ii) the respondents breached s. 117 of the *Condominium Act* by engaging in aggressive and harassing behaviour;
- (iii) the respondents failed to comply with the City of Ottawa's Temporary Mandatory Mask By-law; and
- (iv) the respondent Nastasiya Yakovleva contravened CCC 32's rule prohibiting parking on the common elements, and thereby breached s. 119 of the *Condominium Act*.

[2] I made declarations that the respondents were in breach of ss. 117 and 119 of the *Condominium Act* and CCC 32's governing documents. I also made an order requiring the respondents to comply with the *Condominium Act* and CCC 32's governing documents and to cease and desist from conduct that contravenes the *Condominium Act* and CCC 32's governing documents.

[3] As part of its application, CCC 32 requested an order that the respondents pay all costs and expenses incurred by it due to the respondents' breaches and an order that if the amount were not paid within three weeks, the amount would be added to the common expenses for the respondents' units. In my Reasons for Decision, I determined that the issue of costs would be determined in writing. The parties have filed written submissions.

Positions of the Parties

[4] CCC 32 seeks full indemnity costs incurred on the application in the amount of \$17,645.67. CCC 32 relies on s. 134(5) of the *Condominium Act* and CCC 32's Declaration. CCC 32 states that despite its warnings, the respondents failed, repeatedly, to comply with their obligations and duties under the *Condominium Act*, CCC 32's governing documents, and the Mask By-law. CCC 32 submits that the steps taken by it to seek the respondents' compliance were reasonable and necessary, and other "innocent owners" should not be put to expense as a result of the respondents' non-compliance. The respondents also failed to accept a Rule 49.10 offer which, if it had been accepted, would have avoided the application hearing.

[5] The respondents state that they are not in a position to pay the costs requested by the applicant due to "their significant economic hardships." They assert that they can only pay \$4,500 "to settle this matter." They also take the position that the applicant has a sufficient amount "in the reserve fund" to address the costs incurred, to which they say they have contributed "in a timely manner and on a monthly basis."

Statutory and Regulatory Framework

[6] The fixing of costs is a discretionary decision under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Rule 57.01(1) of the *Rules of Civil Procedure* sets out the factors the court may consider in exercising its discretion under s. 131 to award costs. Rule 57.01(4) specifically provides that nothing in the rule affects the authority of the court to award costs on a full indemnity basis.

[7] Ordinarily, a successful litigant will be entitled to an order for costs against an unsuccessful party unless there is good reason to depart from the general principle. Ordinarily, an award of costs is made on a partial indemnity basis or, in rare and exceptional cases, on a substantial indemnity basis. Even more rare are costs awards made on a full indemnity basis.

[8] In a compliance proceeding under s. 134 of the *Condominium Act*, the court is given an additional power in relation to legal costs incurred by a condominium corporation. Sections 134(3) and (5) of the *Condominium Act* provide:

- (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.

(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.

[9] In *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CanLII 13778 (ON CA), at para. 8, the Court of Appeal for Ontario confirmed:

...s. 134(5) speaks separately to “an award of costs” on the one hand, and “additional actual costs” on the other hand. “An award of costs” refers to the costs that the court orders one litigant to pay to another litigant. “Additional actual costs” can encompass those legal costs owing as between the client and its own lawyer beyond the costs that the court had ordered paid by an opposing party. To the extent that the legal bills owed by the [the condominium corporation] to its own lawyers exceeded the costs awarded against [the unit owner], [the condominium corporation] could properly add those amounts to the common expenses of the [unit owner’s] units as long as the [condominium corporation] could demonstrate that those additional legal costs were incurred in obtaining the compliance order.

[10] As Stinson J. observed in *Metropolitan Toronto Condominium Corporation No. 933 v. Lyn*, 2020 ONSC 3853, at para. 8, through s. 134(5), courts have awarded the equivalent of full indemnity costs to a successful condominium corporation on a compliance application.

[11] CCC 32’s Declaration confirms at Articles XV(d)(1) and XV(n) that the respondents are contractually bound to fully indemnify the corporation for costs incurred due to their breaches or their occupants’ breaches of the corporation’s governing documents. In particular, Article XV(n) provides that all solicitors’ charges incurred by CCC 32 in taking action against an owner shall immediately become due and payable by the owner and can be recovered as common expenses. The respondents, as unit owners, are contractually bound by these provisions.

Analysis

[12] It is within the court’s discretion to determine whether costs awarded at this stage constitute “litigant to litigant” costs or “all costs” pursuant to s. 134(5) of the *Condominium Act*. I agree with CCC 32 that it is more efficient for the court to make a determination of all costs at this time. The amount the respondents are called upon to pay under s. 134(5) of the *Condominium Act* is squarely before me.

[13] In addition to s. 134(5) of the *Condominium Act*, I have considered the following factors in exercising my discretion to award full indemnity costs.

[14] First, CCC 32 was entirely successful on the application.

[15] Second, CCC 32 made a Rule 49.10 offer to settle which, if the offer had been accepted, would have dispensed with the hearing of the application. The terms of the offer were explained in counsel's detailed covering letter – of considerable importance given that the respondents were, at the time, not represented by counsel. In brief, the terms of the offer were:

1. The parties would agree to a court order on consent requiring that the respondents comply with the *Condominium Act*, CCC 32's governing documents, and any applicable COVID-19 restrictions, carry out the sale of their units (in process), and vacate their units by the closing date of the sale. The respondents would be prohibited from living at CCC 32 after the closing date and the application would be adjourned to allow the respondents time to carry out the sale.
2. The respondents would pay CCC 32 \$1,400 for legal fees.
3. CCC 32 would discontinue the application without costs when all terms of the settlement were met.

[16] The covering letter specifically noted the possibility of a substantial award of costs should the matter proceed to a hearing – “drastically higher than the \$1,400 currently on offer” – and referred to the possibility that these costs “would be recoverable from you in full.”

[17] Third, I agree with CCC 32 that compliance with the *Condominium Act*, CCC 32's governing documents, and the Mask by-law is integral to CCC 32's successful operation. Condominium corporations have a statutory duty to take all reasonable steps to ensure that owners and the occupants of units comply with the *Condominium Act* and the corporation's governing documents: *Condominium Act*, s. 17(3). CCC 32 also has a duty to ensure that no unsafe condition or activity that is likely to cause harm to persons or property is permitted to continue: *Condominium Act*, s. 117. Given that a condominium corporation has a duty and is required under the *Condominium Act*, to take all reasonable steps to ensure compliance, it should be fully indemnified: *Ottawa Carleton Standard v. Friend*, 2019 ONSC 3899, at para. 133. The principle that the corporation is to be kept whole as to reasonable costs incurred in proceedings to enforce statutory obligations, thereby protecting the corporation and non-defaulting unit owners, applies in this case: *Carleton Condominium Corporation No. 396 v. Burdet*, 2015 ONSC 1361, at para. 44.

[18] Fourth, in considering the reasonable expectations of the respondents, I agree with and adopt the statement of Myers J. in *MTCC No. 580 v. Mills*, 2021 ONSC 3440, at para. 16:

...s. 134(5) of the *Condominium Act*, 1998 makes the unit owner liable for all costs incurred by the condominium corporation unless I rule some of the costs to be unreasonably charged (and hence unlawful). So, if they are

found to have committed wrongdoing, condominium unit owners should expect to be fully liable for all of the corporation's costs as a matter of law.

[19] In this case, the respondents were advised as to the possibility of full indemnity costs being awarded against them. In addition, the respondents should have expected to be fully liable for the corporation's costs pursuant to the terms of CCC 32's Declaration. In the circumstances, I do not credit the respondents' claim that they are not in a position to pay CCC 32's full indemnity costs. The other unit owners at CCC 32 ought not to be required to be put to expense as a result of the respondents' non-compliance.

[20] I have reviewed the corporation's detailed bill of costs. I am satisfied that all steps taken by CCC 32 as described in the bill of costs were reasonable and necessary to seek the respondents' compliance with their obligations. CCC 32 is entitled to its costs of this proceeding on a full indemnity basis in the amount of \$17,645.67. I order the respondents to pay CCC 32 costs in the amount of \$17,645.67, inclusive of disbursements and taxes.

Justice R. Ryan Bell

Date: August 11, 2021

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Released: August 11, 2021