

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: November 15, 2021

CASE: 2020-00340N

Citation: Kong v Toronto Standard Condominium No. 1959 et al, 2021 ONCAT 109

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Laurie Sanford, Member

The Applicant,

Merg Kong

Self-Represented

The Respondent,

Toronto Standard Condominium Corporation No. 1959

Represented by Bradley Chaplick, Counsel

The Intervenor,

Toronto Standard Condominium Corporation No. 1862

Represented by Evan Holt, Counsel

DECISION ON COSTS

- [1] This has been an unusual case and some background is necessary to provide context for this motion for costs brought by the Respondent and the Intervenor. The Condominium Authority Tribunal (the “CAT”) is an online tribunal designed to provide easy and quick access for dispute resolution of a growing range of matters involving condominium corporations and their unit owners. The hearing in this matter originally began in December 2020. I dismissed the application in a decision dated March 4, 2021 and reported as *Kong v. Toronto Standard Condominium Corporation No. 1959*, 2021 ONCAT 18 (CanLII). The ground for dismissal was that the statutory limitation period for bringing the application had passed.
- [2] The Applicant Ms. Kong appealed the dismissal to the Divisional Court. On consent of the parties, the Divisional Court, in Court File No. 280/21, ordered the dismissal decision be set aside and that the matter be remitted to the Tribunal for a determination of the remaining issues in the Application, without reference to the limitation period. While the Court made no determination that the dismissal had

been wrong in law, I understood the remittal to mean that the Divisional Court wanted, and the parties had agreed to, a hearing on the merits of this case.

- [3] The matter then re-commenced on June 26, 2021, as a written hearing using the Tribunal's Online Dispute Resolution system, or CAT-ODR. After disclosure but before the parties submitted their testimony, Ms. Kong requested an oral hearing of the testimony and closing submissions as an accommodation for her disability. Ms. Kong suffers from an inability to bend, twist, or lift even moderate weights from the ground without discomfort. While this was an unusual method of hearing at this Tribunal, the parties consented to it. During a pre-hearing video conference, one of the parties offered to prepare exhibit books to be used during the hearing and the parties agreed to this. The hearing was scheduled via video conference for September 14, 15, 22, 23 and 27, 2021. The hearing commenced on September 14th and continued on September 15th but did not proceed on September 22nd due to the unexpected non-appearance of Ms. Kong. The hearing resumed on September 23rd and concluded on September 27th.
- [4] Ms. Kong is a unit owner in Toronto Standard Condominium Corporation No. 1959 ("TSCC1959"). She used to charge her electric vehicle in the visitor parking area which TSCC1959 shares with Toronto Standard Condominium Corporation No. 1862 ("TSCC1862"), the Intervenor. TSCC1959 and TSCC1862 stopped the practice of owners charging their vehicles in the visitor parking after it was determined that this was a violation of their respective declarations. Ms. Kong brought an application to the Tribunal for an order to either permit her to return to visitor parking area and charge her vehicle there or to direct TSCC1959 to install an electric vehicle charging station in her exclusive use parking space. In a decision released on October 18, 2021 and reported as *Kong v Toronto Standard Condominium Corporation No. 1959*, 2021 ONCAT 96, I dismissed Ms. Kong's application.
- [5] After that decision was released, both TSCC1959 and TSCC1862 requested that costs be awarded against Ms. Kong. The costs they are claiming appear to be exclusively legal fees. TSCC1959 also requested that Ms. Kong pay its disbursements. Ms. Kong made no reply to these submissions, but she did request her filing fees, in the amount of \$200, be awarded to her.
- [6] It is unusual at this Tribunal for legal costs to be awarded. Under Rule 46.1 of the Condominium Authority Tribunal Rules of Practice (the "Rules of Practice"), there must be "exceptional reasons to do so". Expenses and disbursements are more discretionary under Rule 45.1. That rule says that expenses directly related to a party's participation in a proceeding may be recovered as may costs that are

directly related to a party's unreasonable behaviour during the proceeding.

- [7] TSCC1959 is requesting costs of \$7,684, which it submits amount to less than 40% of the legal costs incurred. It submits that Ms. Kong's conduct during the hearing caused avoidable delays. It notes that Ms. Kong raised extraneous and irrelevant arguments. In its submissions, TSCC 1959 asserts that these extraneous matters added 2 days to the hearing. It also submits:

Ms. Kong persistently delayed the trial by returning to issues that had already been ruled irrelevant or objectionable, and ignored directions to move on to other subjects (**See:** Reasons for Decision, paragraph 4). TSCC 1959 submits that Ms. Kong's failure to follow the Tribunal's directions during trial amounted to approximately five unnecessary additional hours of trial time.

- [8] Although TSCC1959 claimed some of the costs it incurred at the hearing might be categorised as "expenses" and governed by Rule 45 of the Rules of Practice, the supporting documentation provided suggests that the costs claimed are legal costs and therefore subject to Rule 46. The difference is that the award of legal costs imposes the higher threshold of "exceptional reasons".

- [9] TSCC1959 is also requesting recovery of its disbursements of \$1,027.62. Those disbursements consist of photocopying and courier costs for creating and distributing the exhibit books. It is claiming an entitlement to recover its disbursements on the grounds that it was a successful party and because, it submits, the exhibit books saved time at the hearing.

- [10] TSCC1862 was an Intervenor in this matter. Ms. Kong is not a unit owner in TSCC1862 but, as noted above, TSCC1862 shares the visitor parking with TSCC1959. The two condominiums jointly manage the visitor parking space through what they call the Two-Way Shared Facilities Agreement. TSCC1862 claims its legal costs in the amount of \$18,522.40. TSCC1862 submits that both during the written component of this proceeding and during the oral hearing, Ms. Kong's conduct was "grossly unreasonable and caused an unreasonable delay." It cites Ms. Kong's introduction and promotion of irrelevant factors, her providing "indirect responses and refusing to answer questions during cross-examination" and her non-appearance on September 22, 2021, among other things. TSCC1862 submits that Ms. Kong brought this application for an improper purpose; namely, to obtain a community benefit for all unit owners who drive electric vehicles.

- [11] TSCC1862 referred to its status as an Intervenor in this matter and suggested that it be treated as a respondent in the matter as it was obliged to participate fully in the proceeding. Under Rule 15.4 of the Rules of Practice, if an Intervenor joins a

case, they become a party for all purposes.

[12] Considering first Ms. Kong's request for her filing fees, because her application was dismissed in its entirety, she is not entitled to recover her filing fees.

[13] Turning to the question of the recovery of legal costs, TSCC1959 cited the case of *Mara Bossio v Metro Toronto Condominium Corporation 965*, 2018 ONCAT 6 where, at paragraph 50, the Tribunal held:

To find "exceptional reasons", I would need evidence that the Applicant had been grossly unreasonable, or had taken positions that unduly complicated this Application, or had acted in bad faith or with malice, or took some other step beyond being unsuccessful and unreasonable.

[14] The question is whether this threshold has been met. By way of context, the Tribunal is accustomed to dealing with self-represented parties. We understand that hearings are very stressful for them and that tasks such as deciding what matters are relevant and what cross-examination questions are permissible can be very difficult. We attempt to deal with this by providing the self-represented parties with instructions about every step of the hearing and by providing guidance during the various phases of a hearing.

[15] During the written portion of the hearing Ms. Kong did raise extraneous issues and was occasionally late in responding. However, her conduct, while by times unreasonable, did not go beyond that. I will disallow TSCC1862's claims for costs of the written portion of the hearing. I also am not persuaded that Ms. Kong was "seeking a community benefit" so much as seeking to benefit from what had previously been a benefit for a class of the community. In any event, I am not convinced that seeking that benefit was an improper purpose.

[16] During the oral hearing of testimony, Ms. Kong was well-prepared and had her questions written out. Again, while her introduction of extraneous subjects was unreasonable it did not, of itself, rise to the level of the sorts of "exceptional reasons" required to support an award of legal costs. Ms. Kong did become "grossly unreasonable" when she persistently ignored my directions to stop pursuing irrelevant matters and to move on to issues that were germane. With several witnesses, Ms. Kong returned to matters that had previously been found to be objectionable. She overtalked objections and overtalked my attempts to get her back on track. TSCC1959 estimates that her disregard for instructions and rulings added five hours to the hearing. My best estimate of the time wasted through Ms. Kong's repeated refusal to follow instructions or comply with rulings is closer to two- and one-half hours. I concede that it certainly felt longer.

- [17] Another area where Ms. Kong crossed the line between being “merely” unreasonable and grossly unreasonable was in her non-attendance at the hearing on September 22nd. This hearing date had been set and agreed to in August and confirmed several times in the previous hearing days. She sent no notice that she would not be attending. The other parties’ representatives and counsel were in attendance. We waited for 30 minutes for Ms. Kong to appear. The Tribunal attempted to contact her by telephone and e-mail. TSCC1959 attempted to contact her as well and even sent a security guard to the door of her unit to see if she was home.
- [18] The following day, when Ms. Kong attended at the hearing, she took no responsibility for her absence and did not apologise for her conduct. Instead, she explained that my repeated statements that I wanted to complete the hearing during the week of September 20th rather than let it continue into September 27th had left her with the impression that the best way to accomplish this objective was to take off one of the two days scheduled for that week. No one else in attendance interpreted my remarks in this way. It is fortunate that this was a videoconference hearing and the participants had joined from their respective workplaces. Only 30 minutes were wasted. It is appropriate that Ms. Kong pay the legal costs for this time. I conclude that Ms. Kong should pay three hours of the legal costs of each of TSCC1959 and TSCC1862. That amounts to \$1,275 to TSCC1959 and \$720 to TSCC1862, with HST to be added to both amounts.
- [19] TSCC1959 disbursed \$1,072.62 in preparing and distributing the exhibit books. All parties agreed to have these books prepared and they saved time at the hearing. It is appropriate that all parties should contribute equally to the cost. I will therefore order both TSCC1862 and Ms. Kong to pay one third of the disbursement, or \$357.54, to TSCC1959.
- [20] Parties to a proceeding have a responsibility to make the hearing proceed as expeditiously as possible. I asked TSCC1959 and TSCC1862 to explain in their costs submissions why they neither moved at the outset to dismiss this application on jurisdictional grounds nor moved following disclosure to dismiss the matter on the grounds that there was no reasonable prospect of success.
- [21] TSCC1959 made submissions on both questions, which TSCC1862 adopted. Concerning a possible motion to dismiss on jurisdictional grounds, TSCC1959 made several submissions. First, it submitted that it had spent significant time and resources in the earlier stages of this proceeding and had the matter been dismissed at the outset, Ms. Kong might have commenced the same proceeding in a new forum. Second, TSCC1959 interpreted the Divisional Court decision as a

directive to hear this matter on its merits. Third, TSCC1959 was of the view that at least part of Ms. Kong's application fell within the Tribunal's jurisdiction, specifically the "interpretation of the visitor parking restrictions in TSCC1959's declaration and rules and the issue of whether owners should be permitted to park in visitor parking for the purpose of charging electric vehicles."

[22] The first submission is not persuasive. Either the matter was within the jurisdiction of the Tribunal, or it was not. If the matter was properly before another tribunal, that should not have been a factor in deciding whether to move to dismiss this application as being beyond the jurisdiction of the Tribunal. If anything, this is an argument in support of bringing a motion to dismiss. Concerning the second submission, I agree with TSCC1959's interpretation of the Divisional Court ruling as I reached the same conclusion that we were to hear the matter on its merits. TSCC1959's third point is an interesting one. It is true that initially part of Ms. Kong's application fell into the Tribunal's jurisdiction under either subparagraph 1(1)(d)(ii) or (iii) of Ontario Regulation 179/17 (the "Regulation") of the *Condominium Act, 1998* (the "Act"). These subparagraphs confer on the Tribunal the jurisdiction to deal with disputes regarding provisions of the declaration, by-laws or rules of a condominium corporation that govern vehicles or parking. Initially, Ms. Kong took the position that certain provisions set out in Ontario Regulation 48/01 and incorporated into the declarations of both TSCC1959 and TSCC1862 obliged the condominium corporations to provide electric vehicle charging stations to their unit owners. During the oral hearing, she appeared to abandon this argument and moved to the position that those provisions "repealed" the restrictions against using the visitor parking that are in the declarations of the condominium corporations. When Ms. Kong took this second position, I concluded that our jurisdiction was "tenuous". However, I agree with TSCC1959 that the application initially was brought for an interpretation of the provisions of the declaration and rules in determining whether unit owners could have access to the visitor parking. I accept this explanation for why the condominium corporations did not move to dismiss on jurisdictional grounds.

[23] On the question of why the condominium corporations did not move to dismiss the matter on the grounds of "no reasonable prospect of success" following disclosure, TSCC1959 argued that the Rules of Practice do not expressly provide for such a motion, and it was not until the hearing was about to begin that a decision was released in which the issue was considered. I accept these arguments and note that it was not until the second day of the hearing, when Ms. Kong made some concessions during cross-examination, that it became clear that the issue in this case was not whether Ms. Kong might have access to an electric vehicle charging station but rather who should pay for it. Immediately, TSCC1862 moved to shorten

the hearing time by withdrawing its witness. TSCC1959 called its witnesses to address the issues that were specific to it. I am persuaded that both condominium corporations acted responsibly in not unduly prolonging this proceeding and had valid reasons not to bring a motion to dismiss the matter prior to the oral hearing.

- [24] Finally, TSCC1959 moved to have any costs and disbursements not paid within 30 days of the date of this order added to the common expenses attributable to Ms. Kong's unit. The significance of adding costs to the common expenses is that it would permit TSCC1959 to register a lien against Ms. Kong's title if the funds were not paid. TSCC1862 moved to have any costs not paid to it within 30 days added to the common expenses of TSCC1959 to permit TSCC1959 to collect the funds on behalf of TSCC1862, including by way of a lien on title.
- [25] Under subsection 1.45(2) of the Act, when the Tribunal orders an owner to pay compensation to a condominium corporation, then that corporation may add the amount of the costs awarded to the common expenses payable to the owner's unit. It is not necessary for me to explicitly order that any amounts not paid by Ms. Kong to TSCC1959 be added to her common expenses but TSCC1959 has requested such an order and I will make it. In view of the amounts involved, I will allow Ms. Kong 60 days to make these payments.
- [26] As regards TSCC1862, the situation is more complex. TSCC1862 requested that its costs, if unpaid, be added to Ms. Kong's common expenses and collected by TSCC1959 on its behalf. TSCC1862 submits that the only reason it was involved in this proceeding was to enforce the provisions of its declaration that relate to the visitor parking. It partners with TSCC1959 in the management of this shared parking area. TSCC1862 submits that it was obliged to participate in the full course of the hearing, despite its limited role. It cannot add the costs awarded to it to Ms. Kong's common expenses, should she fail to pay them, because Ms. Kong is not a unit owner of TSCC1862.
- [27] Since TSCC1862 has no ability to add costs payable by Ms. Kong to her common expenses, the question becomes whether TSCC1959 may do so on its behalf. Specifically, is there anything in the Act, the Regulation, the declaration of TSCC1959 or the Two-Way Shared Facilities Agreement which would give me the jurisdiction to direct TSCC1959 to add amounts not owing to it to Ms. Kong's common expenses and to collect such amounts on behalf of TSCC1862? I conclude that there is not.
- [28] I find nothing in the Act that would permit such an order. Under subparagraph 1(1)(iv) of the Regulation, the Tribunal has the jurisdiction to rule on provisions of the declaration that govern the indemnification or compensation of a condominium

corporation regarding a dispute over the interpretation of its declaration in the matters of parking or vehicles. As noted above, Ms. Kong originally brought this application for an interpretation of the terms of the declarations of TSCC1959 and TSCC1862 regarding electric vehicle charging stations. She raised other grounds, including a claim under the *Human Rights Code*, but those issues arose in the context of her application to have the declaration interpreted as obliging the condominium corporations to give her access to an electric vehicle charging station.

[29] In paragraph 16 of Schedule E to TSCC1959's declaration, the following are considered common expenses:

All costs and expenses (including legal fees on a substantial-indemnity scale or solicitor and client basis, together with all applicable disbursements) incurred by the Corporation in the course of enforcing any of the provisions of the declaration, by-laws and/or rules of the Corporation from time to time (including the provisions of the Two-Way Shared Facilities Agreement and the Shared Roadway/Walkway Agreement respectively, and all other agreements binding on the Corporation or expressly authorized or ratified by any of the by-laws of the Corporation), and effecting compliance therewith by all unit owners and their respective residents, tenants, invitees and/or licensees [save and except for those costs and expenses collected or recoverable by the Corporation against any unit owner(s) in the event of any breach of the provisions of the declaration, by-laws and/or rules, pursuant to the general indemnity provisions of section 49 of the declaration, or any other applicable provisions of the declaration entitling the Corporation to seek reimbursement of costs or indemnification from any owner(s)] .

[30] While this provision refers to the Two-Way Shared Facilities Agreement, it does not confer on TSCC1959 the right to collect amounts owing to TSCC1862 in the enforcement of the terms of that agreement. Nor is there a reference to TSCC1959 having that right in the Two-Way Shared Facilities Agreement itself. I found nothing in the declaration of TSCC1959 that conferred an authority to collect, by way of a charge on common expenses, any other amount owing to TSCC1862, including amounts spent to enforce the declaration of TSCC1862. The parties did not direct me to any provision which would permit such an arrangement. I conclude that TSCC1959 cannot add amounts owing to TSCC1862 to Ms. Kong's common expenses if these amounts are unpaid.

ORDER

[31] I order and stipulate the following:

1. Within 60 days of the date of this order, Ms. Kong will pay the amount of \$1,275 in legal fees to TSCC1959 together with HST for a total of \$1,440.75.
2. Within 60 days of the date of this order, Ms. Kong will pay the amount of \$357.54 to TSCC1959 for disbursements.
3. Under subsection 1.45(2) of the Act, TSCC1959 is entitled to add the amounts set out in paragraphs 1 and 2 of this order to the common expenses of Ms. Kong's unit.
4. Within 60 days of the date of this order, Ms. Kong will pay the amount of \$720 in legal fees to TSCC1862 together with HST for a total of \$813.60.
5. Within 30 days of the date of this order, TSCC1862 will pay the amount of \$357.54 to TSCC1959 for disbursements.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: November 15, 2021