**CITATION:** Ottawa-Carleton Standard Condominium Corporation No. 671 v. Friend et al., 2021 ONSC 7379
**COURT FILE NO.** 18-78035
**DATE:** 20211109

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Ottawa-Carleton Standard Condominium Corporation No. 671, Plaintiff

**AND**

Anthony Marcus Friend and Henriette Suzanne Friend, Defendants

**BEFORE:** The Honourable Justice Charles T. Hackland

**COUNSEL:** Cheryll Wood and David Lu, for the Plaintiff

Samuel F. Zakhour and Alana L. Guy, for the Defendants

**HEARD:** June 16-17, 21-23 and July 14, 2021

## REASONS FOR DECISION

### Introduction

[1] This is a summary trial to determine the amounts owing under two liens which were registered by the plaintiff condominium corporation on a condominium unit owned by the defendants.

[2] The Plaintiff, Ottawa-Carleton Standard Condominium Corporation No. 671 ("OCSCC 671" or the "Condominium Corporation"), is a condominium corporation comprised of 50 residential units, located at 260 Besserer Street in Ottawa. The defendants are the owners of unit 4 (PH4) and the related parking space (unit 22). I will refer to them as Mr. and Mrs. Friend.

[3] The Condominium Corporation commenced this action in October 2018 to enforce two liens it had registered against the units and to have the amounts due under the lien determined. The Certificates of Lien were registered on title on June 30, 2016, pursuant to section 85 of the *Condominium Act*, 1998, S.O. 1998, c. 19, for unpaid common expenses.

[4] Mr. and Mrs. Friend purchased their condominium unit in April 2007. They are a retired couple. Mrs. Friend suffers from dementia and is represented in this proceeding by Mr. Friend. Mr. Friend describes himself in his materials as an '85-year-old octogenarian'. He is an economist by training.

[5] Unfortunately, for at least the last 10 years Mr. Friend has engaged in a series of bitter disputes with the Condominium Board over a variety of issues, often trivial matters, involving his refusal to comply with the condominium's Rules, (eg. by storing his kayak in the parking garage and leaving his winter boots in the hall) and his opposition to decisions and actions of the Condominium Board dealing with building maintenance and operational issues.

[6] On a number of occasions, Mr. Friend has refused to accept the Condominium Board's decisions where they differ from his own views. While he pays his regular monthly common expense charges, he has continued to refuse to pay special assessments levied by the Condominium Board as well as various charge-backs to his unit, discussed below. He believes he is owed a fiduciary duty by the Board and its auditor and by the Board's solicitors and he has engaged with them at length about his issues, often in a prolix and confrontational manner. Very significant legal fees have been incurred, which the Condominium Board now seeks to have charged to his unit and to be covered by the liens. Mr. Friend also has had costs awarded against him, in favour of OCSCC 671, by various courts following several previous legal proceedings and a recent appeal. These court ordered costs are to be secured by the liens as required by section 134(5) of the *Condominium Act*, as discussed further below.

**The Issues**

[7] The Condominium Board originally sought summary judgement in this proceeding, to fix the sums due under the liens and to obtain an order for possession and sale of the condominium unit in the event the total amount found to be due is not paid. James J. heard the motion and declined to grant summary judgement. James J. noted in his endorsement dated November 4, 2019, "there were gaps in the record regarding the true state of the accounts between the parties and or how the moving party arrived at the amounts set out in the notice of sale". Instead, the court ordered a mini-trial on the following issues:

(a) the reasonableness of legal costs charged to the defendants' account and incorporated into the plaintiff's lien claim, not including court-ordered legal costs which are not reviewable by this Court;

(b) the proper calculation of interest charges, including whether the *Interest Act*, R.S.C., 1985, c. I-15 applies;

(c) the clarification / explanation of common expense or other charges that make up the claim for the lien, including how and why amounts changed over time; and

(d) ascertaining the ultimate balance due to the plaintiff from the defendants.

**Prior Legal Proceedings**

[8] James J.'s reference to "court ordered legal costs which are not reviewable by this court" refers to previous litigation between the parties in which court orders for costs were made against Mr. Friend. These costs orders are included in the lien as provided for in section 134(5) of the *Condominium Act* and can not be re-visited in this hearing. However, for context I will summarize the previous court proceedings.

[9] In September of 2013, an application was heard by Maranger J. see *Ottawa-Carleton Standard Condominium Corporation No.671 v. Friend*, 2013 ONSC 5775, concerning Mr. Friend's opposition to allowing the installation of a water metre in his unit. The Condominium Board had determined that water metres were to be installed throughout the condominium and 49 of the 50 unit owners had accepted this installation. Mr. Friend refused access to his unit for this purpose and declined to pay associated water billings. The court found Mr. Friend's opposition to the installation of the water metres to be unwarranted and found the Condominium had complied meticulously with the *Condominium Act*. The court observed "that a matter such as this ended up in court is unfortunate, the cost consequences here are 5 to 10 times the value of the claim".

[10] The court also dismissed Mr. Friend's oppression claim against the Board, asserted by way of cross-claim, finding that there was no evidence to support such a claim. The court stated: "the Friends are ordered to comply with all of the by-laws of the Corporation including not throwing snow from the balcony, not storing a kayak, canoe or other item in the parking unit, and any other

rules enacted by the condominium that apply to its unit owners". The court ordered $15,000 in costs payable by Mr. Friend. These costs were ultimately paid by Mrs. Friend who attended at the offices of the Condominium's solicitors to make payment, over Mr. Friend's objections. He attended at the offices of the Condominium's solicitors on that occasion in an unsuccessful effort to pressure Mrs. Friend into not paying the court awarded costs. Police were summoned to diffuse this incident.

[11] In 2015 and subsequently in 2016, Mr. Friend commenced actions in Small Claims Court against the Condominium, both of which attempted to challenge aspects of Maranger J.'s prior ruling and were dismissed as an abuse of process. There is a Small Claims Court costs order against Mr. Friend in the sum of $300.

[12] In April of 2019, the Condominium Board brought an urgent motion in this court seeking injunctive relief against Mr. Friend to prevent his ongoing harassment of the property manager, Board members and service providers and his abusive communications to individuals representing condominium management. Kane J., in reasons reported at *Ottawa Carleton Standard v. Friend,* 2019 ONSC 3899, carefully considered Mr. Friend's conduct during the period 2010 through 2019 and found that he was guilty of numerous instances of unreasonable conduct and of harassing Board members and service providers in a wide variety of incidents, including many that were brought up again in the present trial. Kane J. granted an interlocutory injunction prohibiting Mr. Friend from communicating with employees, contractors, members of the Condominium Board and their families, subject to limited exceptions involving the property manager and condominium solicitors.

[13] Remarkably, during the present hearing Mr. Friend said to the court that he had no intention of respecting Kane J.'s order and he would continue to communicate with whomever he wishes. He also volunteered that he had deliberately violated the injunction as a means of getting the issues back before the court. The Condominium Corporation did return the matter before Kane J. in April 2020, where a further hearing was conducted. The court found on the evidence that Mr. Friend's misconduct was continuing, and the injunction was made final.

[14] Two costs orders were made by Kane J. against Mr. Friend, on a full indemnity basis, in the amounts of $14,321 (June 28, 2019) and $12,270 (Nov. 19, 2020). These will be included in the amounts secured by the lien.

[15] Subsequent to the present hearing, the Court of Appeal rendered a decision on Mr. Friend's appeal of Kane J.'s rulings, see *Ottawa-Carleton Standard Condominium Corporation No. 671 v. Friend*, 2021 ONCA 666. The appeal was dismissed with costs awarded against Mr. and Mrs. Friend, fixed in the sum of $12,500. I sought and have considered further submissions from counsel as to the effect of the Court of Appeal's ruling on the issues dealt with herein. I find that the Court of Appeal's costs award will also be included in the lien, along with the earlier court awarded costs.

[16] The Court of Appeal's ruling contains this observation (at para. 1) which mirrors much of the evidence canvassed in the present proceeding.

> The appellant, Mr. Friend, has a long-standing dispute with the condominium corporation's Board of Directors and employees, dating back to 2011. He has refused to follow the condominium's by-laws and rules. He has interfered with contractors attempting to carry out work in the building. He has engaged in a campaign of harassment and rude and demeaning behaviour aimed at members of the Board of Directors and employees of the condominium. He has physically accosted the President of the Board.

**The Legal Framework**

[17] Common expenses are the lifeblood of a condominium corporation. Without this source of revenue, the operation of a condominium would grind to a halt. The Court of Appeal reviewed the legislative intent of Section 85 of the *Condominium Act*, dealing with the collection of common expenses, in *TSCC 1908 v. Stefco*, 2014 ONCA 696. The Court held that Section 85 is "designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of various stakeholders".

[18] Unit owners are required to pay their share of the common expenses, even when they are disputing such expenses or making a claim against the corporation. In default of payment of common expenses, the corporation has a lien against the owner's unit which may be enforced in

the same manner as a mortgage. That is the purpose of the present proceeding. The *Condominium Act* provides:

> Contribution of owners
>
> 84 (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration. 1998, c. 19, s. 84 (1).
>
> No avoidance
>
> (3) An owner is not exempt from the obligation to contribute to the common expenses even if,…(b) the owner is making a claim against the corporation;
>
> Lien upon default
>
> 85 (1) If an owner defaults in the obligation to contribute to the common expenses payable for the owner's unit, 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); 2015, c. 28, Sched. 1, s. 78 (1)
>
> Lien enforcement
>
> (6) The lien may be enforced in the same manner as a mortgage.

[19] The Condominium Corporation also relies on Articles 8.01 and 8.02 of the Condominium Declaration which define the indemnification obligations of unit owners for losses, costs and liabilities which have been incurred as a result of the unit owners' acts or omissions. Such costs are deemed to be common expenses of the unit owner and may be recovered as such. Articles 8.01 and 8.02 of the Declaration provide:

> 8.01 Each owner shall indemnify and save harmless Corporation from and against any loss, cost, damage, injury or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such owner, his or her family or any member thereof, any other resident of his or her unit or any guests, invitees or licensees of such owner or resident (including costs associated with damage to the property and any costs incurred by the Corporation in preparation for or pursuance of Court proceedings relating to any such act or omission) except for any loss, costs, damages, injury or

> liability caused by an insured (as defined in any policy or policies of insurance) and covered by the insurance arranged by the Corporation.
>
> 8.02 All payments pursuant to this Article are deemed to be additional contributions toward the common expensed of the particular unit owner and recoverable as such.

**Amounts Claimed Against the Defendants Which are to be Included in the Liens**

[20] The monetary amounts which the Condominium Corporation seeks to have included in the liens on Mr. Friend's unit may be divided into the following categories:

(a) Common expense arrears;

(b) Court ordered legal costs;

(c) Compliance legal costs;

(d) Interest; and

(e) Legal fees and disbursements incurred to enforce the lien in the present action.

**Common Expense Arrears**

[21] This category includes three special assessments levied by the Condominium Board which Mr. Friend has refused to pay and a variety of charge-backs the Condominium Board has levied against his unit and seeks to collect as common expenses and to be included in the lien. These are arranged in chronological order and are taken from the most up to date arrears statement, dated June 4, 2021 (exhibit 5).

**Common Expenses: $ 14,321.79**

*(1) (Mar 1/16 @ $754.07 – Special assessment;*
*(2) Oct 1/16 @ $5.02 – heating 2015*
*(3) Feb 16/18 @ $282.50 -pick up and storage of kayak;*
*(4) Jan 1/19 @ $612.93 – Special assessment;*
*(5) Oct 18/19 @ $3,284.61 - water extraction and remediation;*
*(6) Nov 8/19 @ $542.40 -security services for caulking project;*
*(7) Nov 8/19 @ $1,942.19 - additional management services;*
*(8) Jan 2/20 @ $1,201.19 -caulking replacement;*
*(9) Jan 2/20 @ $300.57 carpet wash;*

*(10) Jun 18/20 @ $389.85 -smoke detector replacement;*
*(11) Oct 20/20 @ $739.70 – Godfrey Roofing;*
*(12) Feb 1/21 @ $735.51 – Special assessment;*
*(13) 13.Jun 3/21 @ $ 3531.25 – additional management services)*

[22] The evidence in chief of the parties was put in through affidavits. The plaintiff's evidence in chief was contained in five affidavits filed by the plaintiff's property manager, Ms. Renwick. She also testified in chief and was cross-examined. Similarly, Mr. Friend testified in chief and was cross-examined on his two affidavits. I found Ms. Renwick's evidence to be reliable, well organized and supported by relevant receipts and appropriate documentation. Mr. Friend unfortunately tended to make speeches, lost his train of thought, repeated himself and was very difficult to follow. His explanations for his continuing refusal to pay the amounts in dispute were vague and tangential. As explained below, he asked to address the court, late in the hearing and conceded that a number of these charges should be recognized as valid and owing.

[23] Items 1, 4 and 12 on the above list resulted from special assessments decided upon by the Condominium Board and levied as common expenses against all unit owners. In accordance with section 84 of the *Condominium Act* and the corporation's Declaration and By-law No.1, owners must pay special assessments. Item 1 ($754.07) was the amount attributable to the Friend's unit, as part of a special assessment of $ 30,757 necessitated by an operating cost deficit incurred by the condominium the previous year. Mr. Friend, in his testimony, was unable to provide any understandable explanation about why he was refusing to pay this amount. He simply observed that he had advised the Board that there were preferable ways to cover an operating deficit, such as utilizing the reserve fund for building repairs. In his affidavit, Mr. Friend deposed that the amount was "illegitimate" because he had paid an amount in December 2013 which "covered 24 times over(sic) the special assessment of $716". This appears to be an assertion that Mrs. Friend's payment of the costs awarded by Maranger J. in an earlier proceeding, were somehow relevant to this special assessment. He also deposes that the special assessment included unrecovered legal costs from his own prior litigation and were "not expenses incurred for the benefit of the Corporation or the owners".

[24] In any event, on the 4th day of the hearing Mr. Friend asked to address the court and formally admitted that he now recognized he should be required to pay the 3 special assessments (items 1,4

and 12) as well as item 5 (invoice for $3,284.61) which represents a charge-back for a service provider's invoice for attending his unit to clean up after an accidental water spill which Mr. Friend had caused by attaching a hose to his sink and forgetting that he had done so. His affidavit and oral evidence was to the effect that he refused to pay the invoice because the condominium's management company had taken so long to pass the invoice along to him that it was too late for him to recover reimbursement from his own insurance company. It was established in cross-examination that this explanation was false, and the invoices were provided to Mr. Friend in a timely way following the incident. Item 9 ($300.57) is a carpet cleaning charge-back arising from the same flooding incident.

[25] Item 2 was a $5.02 heating charge which Mr. Friend admitted not paying. However, he pointed out that he had tried to pay this sum by handing the property manager a bag of nickels. The property manager understandably refused to accept payment in this form. Item 10 relates to the replacement cost ($389.85) of the smoke detector in his unit, installed by condominium management. Mr. Friend does not recall anyone replacing the device but does not contest that it was replaced. Item 3 is a charge back for an invoice for $282.50 for the cost incurred by the property manager of arranging for picking up and storing Mr. Friend's kayak which he had refused to remove from his underground parking area. He refused to abide by the condominium's rule against storing kayaks etc. in the underground parking, notwithstanding a previous court order. Mr. Friend's refusal to co-operate with condominium management on the kayak storage issue was simply an act of contempt against the Condominium Board and against the court.

[26] Item 6 ($542.40) is the costs of providing security to permit contractors to safely get onto Mr. Friend's balcony for a caulking job being carried out on the building exterior, in the face of his opposition to the project and lack of co-operation in refusing the contractor's admission to his unit. Mr. Friend testified that he had a perfect right to go onto his balcony while the contractors were working there to view and discuss their work and saw no merit in the expressed safety concerns. Item 7 ($1,942.19) is the property manager's invoice for her time in re-arranging the contractor's attendances, meeting with the engineer, contractor and security and meeting legal counsel. I am satisfied that the re-scheduling of this work and engagement of security guards so that the project could be completed safely was warranted in the circumstances. Item 8 ($1201.19)

is a charge-back from the caulking contractor for time expended when they were not permitted into Mr. Friend's unit. I am also satisfied that the Condominium Board and its property manager acted reasonably in incurring these expenses and that they are properly charged to the unit owner under Articles 8.01 and 8.02 of the Condominium Corporation's Declaration. As noted previously, these sections confirm that owners are to indemnify the corporation for their acts and omissions that result in costs to the corporation.

[27] Item 11 ($739.70) is a charge-back from Godfrey Roofing for their attendance to remediate a roof leak in his unit, reported by Mr. Friend. Mr. Friend would not permit the contractors to access his unit because property management had not secured his advance approval or a protocol for admission. This wasted expense was appropriately charged to the Friend's unit. Lastly, item 13 ($3,531.25) is a detailed invoice from the property manager for extra services (25 hours of her time) rendered by her to the Condominium Corporation to provide information and assistance to condominium counsel in relation to this proceeding.

[28] In summary, I find that the Condominium Corporation has established on the balance of probabilities, on the evidence presented together with Mr. Friend's admissions, that the common expense charges listed above and charge-backs collectible as common expenses were reasonably incurred and are properly charged against the Friend's unit. These charges, in the sum of $14,321, are covered by the liens filed against the defendant's unit.

**Court Ordered Legal Costs**

[29] Court ordered costs in the sum of $39,391 are recoverable under the liens, as follows:

> $300 awarded by Small Claims Court in August 2018; $14,321(awarded by Kane J.) in June 2019; $12,270 (awarded by Kane J.) in November 2020 and $12,500 awarded by the Court of Appeal in October 2021. These court awarded costs are to be added to the common expenses of the owner pursuant to sec. 134(5) of the *Condominium Act*.

[30] With respect to the Court of Appeal matter, the Condominium Corporation also claims additional legal fees in the sum of $5,430.51, which represents the balance of their solicitor's account for the appeal, after deducting the assessed party and party costs awarded by the court ($12,500). This claim is available to the Condominium Corporation under section 134(5) of the

*Condominium Act*, which refers not only to cost orders made against a unit owner being added to the owner's common expenses, but also "any additional actual costs to the corporation in obtaining the order". However, on my review of the solicitor's invoice, this further amount is largely accounted for by time expended on an unsuccessful attempt to oppose Mr. Friend's motion for an extension of time to bring his appeal. I see this as a discretionary and unnecessary expense and therefore not reasonably incurred. I exercise my discretion to disallow it.

**Compliance Legal Costs**

[31] Under this heading, the corporation claims $1,000 for a compliance letter sent to Mr. Friend on August 23, 2018 and $734.50 for another compliance letter sent to him on August 23, 2019. The Condominium Corporation further claims the sum of $17,725.61 relating to a legal account dated February 25, 2020. The first of the compliance matters concerned Mr. Friend's kayak storage issues in which the Condominium Corporation removed and stored his kayak offsite. The second matter pertained to a letter dated February 26, 2019 from the Condominium Corporation's counsel to Mr. Friend, demanding that he desist from contacting and harassing board members and their families. The letter also addressed the issue of Mr. Friend's "ongoing placement of boots in the hallway". The letter also states, the corporation has incurred over $650 plus HST in legal fees related to this matter" and warned "these fees will be added to the common expenses for your unit, and will be subject to ongoing lien and Power of Sale proceedings should they not be paid." These amounts have never been paid.

**February 25, 2021 Invoice for $17,725.61**

[32] It will be recalled that Articles 8.01 and 8.02 of the Corporation's Declaration confirm that owners are to indemnify the corporation for acts and omissions of that owner that result in costs to the corporation.

[33] Pursuant to Articles 8.01 and 8.02, the Condominium Corporation seeks to charge against Mr. Friend's unit certain legal fees charged to the Condominium Corporation by its solicitors, in the sum of $17,725.61. These are said to be compliance legal costs and the Condominium Corporation is entitled to indemnification against the unit owner so far as the charges relate to "acts and omissions of that owner that result in costs to the corporation".

[34] These legal fees are contained in invoice 22914 (exhibit 14), rendered by the Condominium Corporation's solicitors on February 25, 2021. This 12-page invoice covers legal services provided to the Condominium Corporation over an approximate three-year period, from February 2, 2018 to December 18, 2020. The invoice is labelled 'compliance' and is headed "OCSCC 671 Friend 2016 PH4 260 Besserer 22495–11". As the heading suggests, the legal services docketed to this invoice relate to the various compliance issues involving Mr. Friend and the legal advice provided to the Condominium Board and to its property manager in relation to those issues.

[35] The invoice reflects that the Condominium Corporation's two lawyers involved in the present proceeding provided most of the services, with some supervisory involvement of a senior partner 'NH'. The account summary reflects that NH docketed 5.7 hours at billing rates of between $365-385 per hour; DL, a junior lawyer docketed 13.4 hours at billing rates between $190-200 per hour and CW, the principal lawyer on the file, docketed 37.7 hours at a billing rate of between $260-270 per hour. In my view, this is a reasonable solicitor and client account for the services rendered. These are reasonable hourly rates and reflect an appropriate delegation of responsibility for the activities undertaken. I am also satisfied that the services all relate to the conflictual issues with Mr. Friend, including reviewing and responding to many emails from him and dealing with the operational conflicts concerning his kayak, his leaving boots in the hall, his lack of cooperation concerning the caulking work on the building's exterior, including his refusal to admit service providers to his unit and the contempt of court issues ultimately brought before Kane J.

[36] On the other hand, Mr. Friend was not provided with this account in an unredacted form until just before the opening of trial. The Condominium Corporation's solicitors had maintained a claim of solicitor and client privilege with respect to the contents of this account until I ordered its production in an unredacted form for trial fairness reasons. Mr. Friend testified that he was unaware and shocked at the amount of legal fees which the plaintiff was seeking to charge against his unit. While this may be so, he was also being willfully blind to the reality that the Condominium Corporation's solicitors were spending a great deal of time engaging with him about his issues and were obviously incurring significant legal fees.

[37] I also infer that Mr. Friend formed the idea that he was free to direct his frequent prolix and combative email communications to the Condominium's solicitors. Mr. Friend testified that for

part of this period he was self-represented because his previous solicitors had terminated their relationship with him. It would appear that Mr. Friend and the Condominium's solicitors engaged in these communications to avoid or minimize the serious conflicts that had developed in connection with Mr. Friend's direct interactions with the property manager or board members. Many of Mr. Friends e-mails to the solicitors were written in an offensive manner and contained groundless allegations of negligence, fraud and misconduct, to which the solicitors reasonably believed they had a professional obligation to respond.

**The Mediation Issue**

[38] Counsel for Mr. Friend raised in cross-examination and in oral and written argument the point that the Condominium Board was unwilling to engage in mediation with Mr. Friend and that Mr. Friend had raised the suggestion of mediation in a number of his communications. I agree that the documentary evidence confirms this to be true. Mr. Friend's counsel submitted that section 132(4) of the *Condominium Act* requires that the parties attempt to mediate disputes of the type which are present in this case. Section 132(4) states:

> Disagreements between corporation and owners
>
> (4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively. 1998, c. 19, s. 132(4).

[39] Also relevant is section 134 of the *Condominium Act*, dealing with compliance orders, which provides:

> Compliance order
>
> 134(1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules ... 1998, c. 19, s. 134(1); 2000, c. 26, Sched. B, s. 7(7).
>
> Pre-condition for application
>
> (2) If the mediation and arbitration processes described in section 132 are required, a person is not entitled to apply for an order under subsection (1) until

> the person has failed to obtain compliance through using those processes. 1998, c. 19, s. 134(2); 2015, c. 28, Sched. 1, s. 116 (2).

[40] The evidence establishes the Condominium Board declined to mediate with Mr. Friend because they viewed such an exercise as being bound to fail and a waste of time. They took this position primarily because Mr. Friend had made it broadly known that he would only consider resolving the disputes he had with the Condominium Board on the basis of payment to him of $50,000 and the Board was to abandon the lien proceeding or other steps to collect the special assessments and other common expense arrears. There was also the issue of what Kane J. found to be Mr. Friend's harassment of board members. Such conduct on Mr. Friend's part, was no doubt a disincentive to any efforts to mediate a solution to the matters in dispute. Counsel submitted the Condominium Board was also mindful of its lawful obligation under Article III(1)(b) of Condominium By-law no.1, which obligated the Condominium Board to collect common expense arrears, an obligation they were not prepared to abandon or bargain away.

[41] In any event, it is clear that the Condominium Corporation chose not to attempt to mediate the matters in dispute with Mr. Friend, notwithstanding his several requests for mediation. The obligation to mediate these issues was mandated in section 132(4) of the *Condominium Act*, quoted above. Under section 134(2) of the Act, the court is precluded from making a compliance order until the mediation process has taken place. In my view, the court is now being asked to make a compliance order in relation to the claim for legal costs incurred for compliance purposes i.e. the invoice for $17,725 noted above and the invoices for $734.50 and $1,000. Based on section134(2) of the Act, the court is precluded from making an award for compliance legal costs when mediation has not taken place.

[42] The Condominium Corporation submits that the compliance legal costs are recoverable under Articles 8.01 and 8.02 of the Condominium Declaration as they constitute costs or liability incurred by the corporation "resulting from or caused by an act or omission of the unit owner" and are therefore to be charged to the unit owner and recoverable as common expenses. I do not accept this submission. Compliance legal costs must be recovered in accordance with the *Condominium Act* and that is based on a court application which must be preceded by an attempt at mediation under section 132(4) of the *Condominium Act*. Condominium Declarations must be interpreted in

light of the provisions of the Act. Legal fees incurred to enforce compliance require a court order before they can be levied against an individual unit owner, unless they fall within Section 85(1) of the *Condominium Act*, see *Amlani v. York Condominium Corporation No.* 473, 2020 ONSC 194.

[43] For these reasons, I would disallow the compliance legal costs claimed by the Condominium Corporation ie. the claims for $19,460.11 ($17,725, $734.50 and $1,000.)

**Interest Calculation**

[44] The arrears statements provided to Mr. Friend disclosed that the Condominium Corporation was charging interest on common expense arrears at the rate of 12% annually, compounded monthly. The Condominium's By-law Article IX(4)(a) provides for a 12% annual interest rate and this by-law is contractually binding on unit owners such as Mr. and Mrs. Friend. The application of this interest rate was not challenged in the present hearing. I accept the application of this interest rate to the sums found to be owing and covered by the lien in this proceeding.

**The Evidence of Ryan Bensen**

[45] The defendants called the expert opinion evidence of Ryan Bensen, a forensic accountant. Counsel for the condominium Corporation vigorously opposed the admission of his evidence due to his alleged bias. I allowed this evidence to be heard on the understanding that I would rule on its ultimate admissibility as part of these reasons.

[46] I have exercised my discretion to admit Mr. Bensen's opinion into evidence, including his detailed report. In the court's view, his evidence satisfies the *Mohan* criteria (*R. v. Mohan*, [1994] 2 SCR 9) in that he is a qualified and experienced forensic accountant who has provided his undertaking concerning his duty of impartiality as required by Rule 4.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and he has diligently analysed a large amount of billing information and invoices, including a review of the bookkeeping issues, identifying some discrepancies which warranted discussion and provided a helpful analysis of the accrual of legal fees in reference to the various issues in dispute. I have also found this to be 'necessary' in the loose sense of being very helpful. The court should not be treated as a bookkeeper with the expectation or obligation to review piles of financial information unassisted, as would have been the case here. Mr. Bensen also identifies what he refers to as financial "governance issues", which

contributed a useful perspective in this unusual case. I would point out that allowing the admission of Mr. Bensen's testimony and his report into evidence does not mean that I necessarily accept his opinions and conclusions.

[47] I recognize that Mr. Bensen's evidence also contains a good deal of advocacy on Mr. Friend's behalf and also some opinions which tend more to psychology than accounting or responsible financial governance. Nevertheless, there is much in his report to assist the court in assessing reasonableness issues as they relate to the legal fees sought to be charged back to Mr. Friend's unit. His observations served to clarify Mr. Friend's position which, regrettably, Mr. Friend had great difficulty expressing or articulating in his testimony. While advocacy is certainly not the role of an expert witness, in the unusual circumstances of this case it assisted in enabling a thorough review and discussion of the issues and therefore assisted trial fairness. The cases recognize that the admission of expert evidence, once the *Mohan* criteria are met, then requires a discretionary weighing of the benefits of the evidence as against the possible prejudice, see *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (at para 36). There is no jury in this case and the court is quite capable of discounting some advocacy and some non-accounting based opinions from the expert, as may be required. I view the benefits of Mr. Bensen's evidence to achieving trial fairness in this case as outweighing any inherent prejudice it may entail.

[48] Mr. Bensen's evidence, as outlined in his report and in his testimony, presented the opinion that the Condominium Board has not lived up to its fiduciary and fiscal governance responsibilities insofar as it has either "obfuscated" or generally failed to report to the unit owners the full extent of the legal costs being incurred to deal with Mr. Friend's various issues. This criticism also is directed at the Board's auditors, a well-known accounting firm. He points out that the very significant legal fees sought to be charged back to the Friend's unit and to be included in the lien constitute about 90% of the total charge-back amounts. Stated otherwise, the various amounts sought to be charged-back to the Friend's unit are very modest in comparison to the associated legal fees that the Board has incurred with its solicitors to pursue compliance efforts and litigation about these matters. Mr. Bensen also highlights the possibility of double billing that arises from the difficult task of separating certain billings that would fall within the 'full indemnity' party and party costs assessed against Mr. Friend in the injunction proceeding, versus compliance legal costs

invoiced to the Board by its solicitors relating to several of the same issues which were brought up in the injunction hearing.

[49] I am unable to accept several of Mr. Bensen's propositions. He started with the premise that the first special assessment on March 1, 2016, which Mr. Friend refused to pay, which is in the sum of $30,757 (Mr. Friend's unit - PH 4 was invoiced for his share, being only $754.07), was inappropriate. He pointed out that the costs overrun that resulted in the Board levying this special assessment included an unexplained amount of $9,757, in addition to a disclosed amount of legal fees of $8,000 and certain disclosed administrative costs. He concluded that the $9,757 was in reality the balance of the legal fees incurred by the Condominium Corporation in the first legal proceeding in which the court had awarded partial indemnity legal costs against Mr. Friend. This costs award fell short of the full litigation costs incurred by the Corporation and indeed amounted to only about half of such costs and so this balance of incurred legal fees were being passed along to all unit holders as part of the special assessment.. He did not mention that if his view was correct the additional $9,757 could have been charged back to unit PH 4, rather than being shared by all of the unit owners as part of a special assessment. In any event, it was established in cross-examination that full details of the legal costs and expenditures and indeed all aspects of the special assessment were to be found in the Board's records, of which the Board's auditors were fully aware and were open for discussion at the annual general meeting of unit owners which Mr. Friend always attended. I do not accept that there was any attempt at 'obfuscation' of that issue in communications surrounding the March 1, 2016 special assessment.

[50] I also do not accept Mr. Bensen's opinion that unit owners were not being adequately apprised of the legal costs being accrued in the annual audited financial statements by the Corporation's auditors. I prefer the evidence of the Board's auditor that footnotes to the audited financial statements adequately disclosed that significant legal fees were being accrued in litigation with the unit owners of unit PH4 (appropriately, Mr. and Mrs. Friend were never identified by name) and recovery of these fees would be sought in the present lien action. The Board's auditor testified that the level of disclosure of ongoing litigation in notes to a financial statement are a matter of discretion.

[51] Mr. Bensen's opinion, in essence, was that if unit owners were made fully aware of the legal costs being accrued to pursue the unpaid special assessments and charge-backs against Mr. Friend's unit, they would have stopped attempting to pursue recovery because it would have been seen as not being cost effective in view of the modest underlying amounts involved, as against the legal fees that were accruing.

[52] I do not accept the proposition that good governance or cost benefit analysis should reasonably cause a condominium board to abandon collection efforts against a unit owner who refuses to pay common expense charges and other charge-backs mandated by the condominium declaration and by-laws, merely because the legal costs involved exceed the amounts owed by the unit holder. On the contrary, the Corporation's by-laws require that the payment of common expenses and lawful charges to the unit be collected. Otherwise, such costs are charged to innocent unit owners who have paid their own common expense charges. Such an approach would be unworkable and unacceptable and would encourage disregard for their financial obligations on the part of condominium owners.

[53] Mr. Bensen presented three scenarios based on his review of the solicitor's invoices, the first two of which start from the premise that the lien was out of time when originally registered against the Friend's unit. He also postulated that the existence of the invalid lien was the trigger or cause of the ongoing acrimony and disputes between Mr. Friend and the Board, so that the resultant legal fees were not reasonably incurred. For reasons discussed below, I hold that the lien was not registered out of time. I also do not accept the proposition that the lien was the cause of the ongoing conflict with Mr. Friend. Mr. Friend said no such thing in his testimony and the concept is not supported by the evidence.

[54] However, Mr. Bensen's third scenario was of assistance to the court. This scenario assumes the lien is valid and he then tracks and critically discusses the accrual of legal fees. He verifies the bills, identifies several billing errors, which existed but had been corrected. He usefully raises several issues: (1) the unfortunate lack of any attempt at mediation, (2) the difficulty of segregating compliance legal fees from the full indemnity costs assessed and awarded in the injunction proceedings so as to avoid double recovery of legal costs and (3) the imbalance between the

amounts sought to be collected and the legal fees being expanded. He provided spreadsheets and graphs tracking the docketing which provided a useful perspective in this difficult case.

[55] Mr. Bensen's report suffered from two important limitations; (1) he had unfortunately received only redacted dockets from the condominium's solicitors, which greatly limited any appreciation of what the time dockets pertained to and (2) he commented on the non-legal fee items based on Mr. Friend's instructions to him as to why they had not been paid. I find that most of what Mr. Friend told him was misinformation. In fact, Mr. Friend admitted to owing many of these expenses in a concession made to the court, late in the trial.

[56] In summary, Mr. Bensen's testimony assisted the court in a limited but useful way in appreciating the complex financial information presented to the court and in relating the solicitor's billing records to the various issues with Mr. Friend and the several court proceedings. His evidence assisted the court to follow and understand some of the perspectives Mr. Friend attempted to express in his testimony.

**Legal Fees and Disbursements in the Present Lien Action.**

[57] The Condominium Corporation seeks to recover its legal costs expended for the enforcement of the lien in this proceeding. As noted previously, the *Condominium Act*, sec. 85, provides for a lien against an owner's unit for default in payment of common expenses for the amount of such expenses together with "*all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount*."

[58] As noted previously, some discussion took place at trial as to whether the two liens filed by the Corporation were out of time. The issue was not pursued by counsel for Mr. Friend in argument nor in written submissions, nor was it raised in the motion for judgement before James J. It was not identified as an issue for resolution in this mini-trial. However, the issue was brought up in the expert's report prepared by Mr. Bensen. Mr. Bensen's point was that condominium management served a notice of special assessment on Mr. and Mrs. Friend on December 22, 2015, resulting in a liability of $711.37 in respect of Mr. Friend's unit. The special assessment was to be paid by March 1, 2016. Mr. Friend refused to pay this assessment, the condominium's solicitors

subsequently served a notice of lien on June 17, 2016 and registered two liens thereafter on June 30, 2016, in relation to the default in payment of the special assessment. Mr. Bensen pointed out that the *Condominium Act* provides that a lien for unpaid common expenses expires three months after the default or defaults that gave rise to the lien, unless the Corporation registers a certificate of lien within that time. He noted that the notice of lien was served approximately 3.5 months after the default, and the lien registration occurred 4 months post default.

[59] I do not accept Mr Bensen's conclusion that the liens were registered out of time. The Condominium Corporation followed the common accounting practice of applying any payments for common expenses to the earliest arrears, thereby bringing forward the default. This was explained by the corporation's auditor in her testimony and acknowledged as an acceptable practice by Mr. Bensen in cross-examination.

[60] This timing issue has been discussed in several cases. In *Toronto Condominium Corp. 1462 v. Dangubic*, 2018 ONSC 491, which is very similar to the present case, the defendant argued that the lien was out of time because the claim first arose on November 24, 2015 and the lien was not registered until March 29, 2016, so the three month period within which to register the lien had passed. This was also a case where the condominium corporation used the same accounting system as in the present case.

[61] The Court in *Dangubic* reviewed the relevant caselaw, (which I consider to be applicable in the present case) and stated at paras. 13-15:

> [13] In *York Condominium Corporation No. 482 v Christiansen*, 2003 CanLII 11152 (ONSC), [2003] OJ No 343, at para 44, the court made it clear that **the arrears can be allocated in whatever way the condominium corporation sees fit. It is for the creditor, not the debtor, to apply its accounting method to the monthly payments made.**
>
> [14] This approach was adopted and further elaborated upon by Gilmore J. in *Durham Condominium Corp. No. 56 v Stryk*, 2013 ONSC 2196. There the unit owner in arrears put forward an argument that is almost identical to the Defendant's argument here – i.e. that monthly payments made by a condominium owner in arrears of common expenses should be allocated to the most recent amount owing. Gilmore J. reasoned that **there is nothing wrong with the condominium corporation crediting any payments in a chronological way against the oldest outstanding expenses first, including**

> **common expenses owing due to a special assessment and not part of the ordinary monthly expenses.** She specifically held, at para 44, that: As payments came in from the defendant each month for her common expenses, the default rolled forward every thirty days. **Doing otherwise would fetter the corporation's ability to apply funds to outstanding debts owed to them as they see fit**…
>
> [15] I adopt the same approach here. I also note that in the ledger produced by the Plaintiff that accompanied registration of the lien, the ongoing payments made by the Defendant are calculated in this way. The amounts owing and the credits reflecting monthly payments are added to and deducted from chronologically, from the oldest to the most recent moving forward. There is nothing surprising about this approach. **It conforms to what prior case law has authorized. Accordingly, the debt owed by the Defendant rolled forward every month that he remained in arrears of common expenses, as did the 90 day period for registering the lien. The lien was therefore not out of time when registered on March 29, 2016.**
>
> [Emphasis Added.]

[62] I would respectfully adopt the court's reasoning in *Dangubic* and the cases cited therein and hold that the condominium liens in the present case were registered within the required three month time limitation in view of the acceptable accounting practice followed by the Condominium Corporation of first applying payments to the longest outstanding common expense amounts due.

[63] With respect to the matter of the Condominium Corporation's entitlement to have included in the lien its reasonable legal costs incurred in the present proceeding in pursuit of common expense arrears, the Condominium Corporation has received invoices from its solicitors in the total sum of $84,767.16 (exhibits 15-16) which represents legal fees and disbursements incurred in this proceeding from its inception in October 2018 to June 4, 2021. This does not include the costs of this trial, which will be the subject of further submissions following the release of these reasons.

[64] Upon review of these two invoices, it can be seen that they consist of a total of approximately 100 hours of Mr. Lu's time and about 177 hours of Ms. Wood's time at their billing rates of $210 and $285 per hour respectively. I consider these billing rates to be reasonable. The services performed seem to relate to the present proceeding and appear to be reasonable and appropriate. It is not always possible to be certain whether or not some of the docketed entries belong to the full indemnity costs award made in the injunction proceeding, by Kane J.

Unfortunately, this has been a heavily contested matter both procedurally and substantively and the costs of litigation are high. There was a summary judgement motion and several case conferences. It was not until mid trial that Mr. Friend finally admitted to owing the three special assessments he has all along refused to pay. In my view, he bears responsibility for the significant collection costs in the current enforcement proceedings. Legal fees aside, Mr. Friend should have paid the other common expense charges claimed and avoided the situation where the Condominium Board had to pursue the present lien enforcement proceeding.

[65] The Condominium Corporation submits that the legal costs they have incurred in this matter are reasonable for the following reasons: (quoting their memorandum of argument)

> a. This is not the first time that the Defendants have refused to comply with their obligations under the Act, the Corporation's governing documents, and/or Court Orders. In fact, there is a clear pattern of the Defendants disregarding their obligations which results in the Corporation taking action to enforce compliance.
>
> b. The Corporation had no choice but to take legal action to recover the amounts owing as the Defendants categorically refused to make payment and challenged the Corporation to take legal action.
>
> c. The Corporation tried to seek compliance without costs escalating, and the costs remained relatively low for two years after the default. However, after the continued refusal of the Defendants to pay (what they have ultimately agreed to pay – the 2016 Special Assessment), the Corporation had to take steps to enforce.
>
> d. The Corporation incurred significant additional costs in trying to move the matter forward, correct inaccuracies or respond to additional last minute issues raised by the Defendants, and respond to numerous other breaches by the Defendants.
>
> e. This action has involved over 15 days of Court Appearances (leaving aside the proceedings before Justice Kane).

[66] I substantially agree with the Condominium Corporation's submissions noted in the previous paragraph. I also find that the services listed in the two legal invoices were reasonable and necessary to move this matter forward to quantify and collect the amounts owing under the lien and to respond to the issues raised by Mr. Friend. Mr. Friend's counsel have provided to the court, copies of several invoices representing their fees charged to Mr. Friend for their services, apparently for comparison purposes. These reflect much lower amounts than charged by the

Condominium's solicitors. I have not been provided with the relevant time dockets to compare with the detailed invoices furnished by the Condominium's solicitors. It appears that Mr. Friend is being charged a negotiated fixed fee not based on time expended. I am unaware of what hourly rates these two junior counsel are charging or for what services. I reject the suggestion that any meaningful conclusions can be drawn from this very incomplete information.

[67] I find that the legal fees and disbursements incurred by the Condominium Corporation under invoices dated January 1, 2021, (ex.15) and June 4, 2021,(ex.16), totalling $84,767.16, are to be reduced by 25% to allow for the likelihood of some overlap with the court awarded full indemnity costs in the injunction proceeding and to reflect considerations of proportionality which I consider to apply to the charging of legal fees generally. The amount of $63,575 will be allowed, together with the trial costs, yet to be assessed.

**Summary and Disposition**

[68] The court finds that the amounts secured by the liens herein as common expense arrears and other proper charges against the unit owned by Mr. and Mrs. Friend (Unit 4, Level 7, OCSCC No. 671) and the associated parking unit, (Unit 22, Level A) are in the total sum of $117,287 together with interest calculated at the rate of 12% annually, compounded monthly, as provided for in the condominium's by-law No. 1, article IX(4)(a), which consists of the following:

- Common expense arrears-$14,321.79
- Court ordered legal costs of other proceedings between the parties, $39,391.
- Compliance legal costs-$nil
- Interest-TBD
- Legal fees and disbursements in the present proceeding-$63,575. plus costs of this trial TBD.

[69] An order will issue declaring the above amounts to be common expenses owing by Mr. and Mrs. Friend and will be deemed to be included in the liens registered against the condominium

units noted above, together with trial costs to be fixed by this court upon further written submissions to be received from the Condominium Corporation within 10 days of the release of these reasons and responded to by Mr. Friend's counsel within 10 days of receiving the Condominium Board's costs submission.

[70] I may be spoken to as to the timing of the issuance of the requested Writ of Possession and Sale of the condominium unit or the timing within which the liens are to be discharged in the event Mr. Friend undertakes to pay all amounts due under the liens as fixed by this judgement, or with regard to any other aspect of the formal judgement.

Hackland J.

Mr. Justice Charles T. Hackland

**Date:** November 9, 2021

**CITATION:** Ottawa-Carleton Standard Condominium Corporation No. 671 v. Friend et al., 2021 ONSC 7379
**COURT FILE NO.** 18-78035
**DATE:** 20211109

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**RE:** Ottawa-Carleton Standard Condominium Corporation No. 671, Plaintiff

**AND**

Anthony Marcus Friend and Henriette Suzanne Friend, Defendants

**COUNSEL:** Cheryll Wood and David Lu, for the Plaintiff

Samuel F. Zakhour and Alana L. Guy, for the Defendants

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**REASONS FOR DECISION**

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Justice Charles T. Hackland

**Released:** November 9, 2021