

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: April 14, 2022

CASE: 2021-00169N

Citation: Toronto Standard Condominium Corporation No. 1767 v. Isa Ahmed et al.,
2022 ONCAT 35

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

Member: Laurie Sanford, Member

The Applicant,

Toronto Standard Condominium Corporation No. 1767

Represented by Natalia Polis, Counsel

The Respondents,

Isa Ahmed

Represented by Sierah McDowall, Student-at-Law, and by Michael Smith, Student-at-Law

Yu Zhang

Represented by Sierah McDowall, Student-at-Law, and by Michael Smith, Student-at-Law

The Intervenor,

Jason Rosen

Self-Represented

Hearing: Written Online Hearing – July 28, 2021 to March 23, 2022

Teleconference sessions on February 2, 2022 and February 15, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] Who should pay? Who should pay the costs of cleaning the waste left by a dog which was permitted to repeatedly urinate and defecate on a balcony of Toronto Standard Condominium Corporation No. 1767 (“TSCC1767”)? Who should pay the costs of enforcing TSCC1767’s declaration and rules that forbid permitting animal waste on the common elements? Who should pay for the costs of this proceeding?

- [2] TSCC1767, which brings this application, submits that it should not pay these costs. Any costs that it would bear would be paid by all the condominium owners and, in TSCC1767's submission, "blameless unit owners" should not pay. The costs are substantial; TSCC1767 is seeking over \$17,000 for clean-up costs, enforcement costs and the legal costs of this application. TSCC1767 initially took the position that Mr. Ahmed and Mr. Zhang, the former tenants (the "Tenants"), and Mr. Rosen, the owner and landlord of the unit involved, should be jointly and severally responsible for the costs. It refers to its rules, which make the owner of the dog responsible for the damage caused and its declaration which makes the owner of the unit ultimately responsible for damage caused by a tenant.
- [3] The landlord, Mr. Rosen, submits that he should not pay as he has behaved responsibly and moved promptly to evict the Tenants. He submits that TSCC1767 on several occasions expressed appreciation for his efforts and advised him that it would not be seeking an order against him. He submits that the Tenants, as the owners of the dog, should pay these costs. He points to TSCC1767's Rule 5.13, which says that the owner of a dog is personally responsible for damages caused by his pet to the common elements.
- [4] The Tenants, who own the dog, say they should not pay these costs. They submit that they took all reasonable actions to mitigate the damages. They also submit that, as part of an agreement under which they agreed to leave the premises, they signed a settlement agreement with Mr. Rosen, in which they resolved all the outstanding issues associated with Mr. Rosen's eviction application. The Tenants argue that the doctrine of *res judicata* applies to protect them from further payment.
- [5] There are three types of costs that TSCC1767 seeks in this case: the costs of remediation; the costs of enforcing compliance with TSCC1767's governing documents, and the costs of this proceeding. Concerning the costs of remediation and the costs of enforcing compliance, for the reasons set out below, I conclude that the Tenants should pay these costs. I do not accept the contention that the Tenants attempted to mitigate the damages. Further, the doctrine of *res judicata* does not apply against TSCC1767 which was not a party to either the eviction action or the settlement. Concerning Mr. Rosen's liability, there is evidence that TSCC1767 told Mr. Rosen that it would not be seeking an order against him and there is also evidence that Mr. Rosen relied on this commitment. In the circumstances of this case, I find that TSCC1767 is bound by the commitments it made to Mr. Rosen. The costs of this proceeding, in the amount of \$200 in fees paid by TSCC1767 to the Tribunal, should be paid by the Tenants as it was their conduct which necessitated this hearing. The legal costs of this proceeding are

governed by the rules of practice of this Tribunal that were in effect at the outset of this hearing and during the time when most of the costs were incurred. The threshold for these costs is high and I conclude it has not been met. Therefore, no order for legal costs for this proceeding will issue.

B. BACKGROUND

- [6] Mr. Rosen is a unit owner in TSCC1767. In January, 2021, the Tenants moved into the unit with a Mastiff dog. The Tenants permitted the dog to urinate and defecate on the exclusive use common element balcony adjoining the unit. The owner of the unit below testified that the dog's waste spilled onto his balcony, staining his balcony furniture. He testified that the stench made the balcony unusable. Other owners of TSCC1767 wrote that they had been sprayed by the dog's waste as they walked on the common elements. Other balconies were soiled by the dog's waste. There were numerous other complaints about the dog. There was also evidence that the dog had urinated in the building's elevator. Permitting an animal to relieve itself on common elements is against both the declaration and the rules of TSCC1767.
- [7] On February 1, 2021, Mr. Rosen began a multi-month attempt to take action against the Tenants. He served the first Notice of Termination under the *Residential Tenancies Act*, 2006, S.O. c. 17 ("RTA"). The Tenants cleaned up during the 7-day cure period under the RTA. From then through March, Mr. Rosen took multiple steps to deal with the issue. The Tenants repeatedly promised to do better and on one occasion expressed feelings of guilt about the situation but they continued to let their dog soil the balcony. Around this time, TSCC1767 contracted with a cleaning service to clean up the mess, which by that point had spread to other balconies.
- [8] In the first two weeks of April, 2021, Mr. Rosen worked with TSCC1767 to solve the problem. TSCC1767 expressed appreciation for Mr. Rosen's actions and for how seriously he was taking the problem.
- [9] On or about April 21, 2021, TSCC1767 declared the dog a nuisance under its rules 5.8 and 5.11, which give TSCC1767 that authority, and required the Tenants to remove the dog. On May 6, 2021, after advising TSCC1767 of his intention, Mr. Rosen served a second Notice of Termination and filed an eviction application before the Landlord and Tenant Board ("LTB"). Also on May 6th, TSCC1767 served notice on the Tenants that they were in default of their obligation to remove the dog.
- [10] In early May, 2021, TSCC1767 commenced this application. On August 21, 2021,

in a settlement of the action before the LTB, the tenants agreed to vacate the unit by October 14, 2021. Thereafter, this application continued on the question of who should pay the costs of clean-up after the dog, the costs of enforcing compliance with TSCC1767's declaration and rules and the cost of this proceeding.

C. ISSUES & ANALYSIS

[11] There are three types of costs that have been incurred by TSCC1767 in this matter and the question in respect of each is who will pay these costs and what is the legal basis for imposing them. The issues may be summarised as follows:

1. Who should pay the costs of cleaning the animal waste left by the dog?
2. Who should pay the costs of enforcing TSCC1767's declaration and rules against permitting animal waste on the common elements?
3. Who should pay the costs of this proceeding?

[12] The Tribunal has the jurisdiction to determine these issues under subparagraphs 1(1)(d)(i) and (iv) of Ontario Regulation 179/17 to the *Condominium Act, 1998*. The Regulation grants to the Tribunal jurisdiction to hear and decide disputes concerning a condominium corporation's governing documents that "prohibit, restrict or otherwise govern pets or other animals in a unit, the common elements . . .". Having the jurisdiction to deal with these disputes, subparagraph 1(1)(d)(iv) extends that jurisdiction to provisions that govern indemnification of or compensation for a party to the dispute. Finally, under subparagraph 1.44(1) 3 of the *Condominium Act, 1998* (the "Act"), the Tribunal may order a party to pay compensation to another party for damages incurred "as a result of non-compliance", in this case, non-compliance with TSCC1767's governing documents.

Issue 1 – Who should pay the costs of cleaning the animal waste left by the dog?

[13] TSCC1767 submitted cleaning invoices in the amount of \$3,044.60. Mr. Rosen submits that these costs are excessive and that he had quotes for the clean-up that were one third of the cost. However, either Mr. Rosen or the Tenants could at any time have used this less expensive option to remediate the situation and they chose not to. It should be noted that TSCC1767 paid not only to clean up Mr. Rosen's balcony but also the balconies below the unit which were soiled. TSCC1767 submits that it had the responsibility, in the absence of action by either Mr. Rosen or the Tenants, to maintain the common elements and, in light of the multiple complaints by other unit owners, took the required action. TSCC1767's

rule 5.4, which is discussed below, clearly places the onus for cleaning upon the “person accompanying the pet”, failing which the Property Manager may have the area cleaned, with the costs charged back to the resident or owner of the relevant unit. I accept TSCC1767’s explanation of the actions it took and accept the costs of cleaning up after the dog at \$3,044.60 as reasonable.

- [14] TSCC1767 initially took the position that Mr. Rosen and the former tenants should be held jointly and severally responsible for the costs of cleaning up after the dog. This position is consistent with the provisions of article 4.2(d) of its declaration, which states, “An Owner leasing his/her Unit shall not be relieved thereby from any of his/her obligations with respect to the Unit, which shall be joint and several with his/her tenant.” In its closing submissions, TSCC1767’s position appeared ambiguous. It is not clear if TSCC1767 continues to seek joint and several responsibility or if it now wishes Mr. Rosen alone to bear the liability.
- [15] TSCC1767 acknowledges that it has rules which hold the custodian of a dog responsible for cleaning up after it and the owners of a dog responsible for the damage caused by the animal. However, TSCC1767 argues that its declaration should take precedence. In addition to Article 4(d), the declaration contains several provisions holding a unit owner ultimately responsible for damage caused by occupants of a unit. TSCC1767 also submits that its declaration contains several provisions that impose an obligation on Mr. Rosen to indemnify it for damages caused by the Tenants.
- [16] Rules are required to be consistent with the declaration under subsection 58(2) of the Act. The question is whether TSCC1767’s rules as they relate to pets can be read in such a way as to be consistent with the provisions of the declaration.
- [17] Rule 5 deals with pets. The relevant provisions are as follows:

Rule 5.4 states:

Pets shall not be permitted to defecate, urinate or cause any damage whatsoever upon the common elements, including balconies and patios. In the event a common element is soiled or damaged by a pet, the person accompanying the pet shall clean up and/or repair the damage....Failing this the Property Manager may have the area cleaned and all costs associated may be charged back to the Resident/Owner of the unit wherein the pet resides.

Rule 5.13 states:

The owner of a pet shall be personally responsible for all costs associated with any damage or costs caused by their pet on any part of the common elements.

- [18] There is nothing overtly inconsistent between the declaration and the two pet rules set out above. There is nothing in the declaration that exempts the Tenants from any liability for the damage caused by their pets or forbids TSCC1767 from pursuing tenants for these damages. Nor is there any provision that holds an owner exclusively responsible for damages caused by tenants.
- [19] It is possible to find consistency between the pet rules and the declaration. One way to do this is to view these provisions as affording TSCC1767 a range of choices. It may choose to hold the owner of the pet “personally” responsible under rule 5.13, or the “person accompanying the pet” responsible for cleaning up after it under rule 5.4. TSCC1767 may also choose to hold the owner of the unit responsible, either jointly and severally with the tenants or individually, for the actions of the dog owners or tenants under the declaration. Assuming the choice is made in good faith, then TSCC1767 should be entitled to deference in the choice it makes, all other things being equal. The question is whether in this case all other things are equal. Mr. Rosen says they are not.
- [20] Mr. Rosen argues that there are special circumstances that should operate to absolve him from responsibility. He submits that he moved as quickly as he was permitted to under the RTA. In April and May he worked with TSCC1767 and advised it of his eviction application. TSCC1767 expressed appreciation for Mr. Rosen’s actions and for how seriously he was taking the problem.
- [21] On May 7th, TSCC1767 again acknowledged Mr. Rosen’s action, stating, “the Corporation appreciates and acknowledges the steps you have taken and are taking to obtain compliance....”. TSCC1767 went on to say, “the Corporation would not seek costs against you.” Around this time, TSCC1767 decided to bring an application to this Tribunal for the removal of the dog and for recovery of its costs. On May 12, 2022, counsel for TSCC1767 wrote to Mr. Rosen saying, “You will be added as an intervenor in the proceeding. Again, as mentioned, the Corporation is not seeking any order against you.”
- [22] At the outset of the hearing, TSCC1767 wrote, in its statement of the issues:
- The Corporation is cognizant that, at law, Mr. Rosen is the owner of the unit and thus may be responsible for the clean-up costs, compliance costs and this proceeding however it would be unjust to order costs strictly against Mr. Rosen as ultimately, it was the Respondents' deliberate actions or omissions which caused the underlying dispute and accumulation of costs.

TSCC1767 went on to say:

Although the above-noted provisions provide that the owners of units should

indemnify the Corporation, the Applicant submits that the Respondents should ultimately be responsible for the clean-up costs, the costs of trying to obtain compliance and the costs of these proceedings.

- [23] I am persuaded that Mr. Rosen relied on these statements during the hearing. For example, on September 23, 2021 during a discussion of the issues to be decided in this case, Mr. Rosen wrote, ‘Accordingly, I do not believe the Applicant intended to have an order issued against [me].... nor do I think there is a legal basis for the CAT to issue an order against me.’ On October 12, 2021, Mr. Rosen wrote, “I believe that the issue of my liability was removed by [TSCC1767] when I was named as an intervenor and my conduct as a condo owner/landlord was not brought into issue.” Mr. Rosen chose not to testify or to call witnesses. He did disclose documents showing the actions he had taken to evict the Tenants from his unit. It was not until mid-November that Mr. Rosen became actively involved with the hearing.
- [24] Words have meaning. While some of TSCC1767’s statements were ambiguous about whether it would seek any costs or damages against Mr. Rosen, the repeated assurances from TSCC1767 would be understood by a reasonable person as meaning that TSCC1767 did not intend to seek those costs or damages from him. Mr. Rosen relied on those statements and, in the circumstances of this case, TSCC1767 should be bound by them.
- [25] The Tenants submit that they should not pay the clean-up costs. They submit that they took “every reasonable step to mitigate and resolve all alleged instances of non-compliance”. The only evidence they advanced in support of this statement was the testimony of the man who walked the dog starting in April, 2021. This man testified that he walked the dog around five or six times a week. The dog walker did not make himself available for cross-examination. Therefore, his testimony can be given little weight. In contrast, TSCC1767 introduced the testimony and written statements of numerous unit owners about the persistent problems caused by the dog being permitted to defecate and urinate on the balcony. I do not accept the Tenants’ submission that they took reasonable steps to mitigate the damage.
- [26] The Tenants refer to a settlement agreement (the “LTB Settlement Agreement”) between themselves and Mr. Rosen in the action before the LTB, which, they submit, should be binding against both Mr. Rosen and TSCC1767. The Tenants did not disclose the LTB Settlement Agreement. They referred to it early in the proceedings but Mr. Rosen objected to its disclosure on the grounds of “settlement privilege”. At the time, I ruled that the LTB Settlement Agreement might be referred to for the limited purpose of ensuring that any terms of settlement of this proceeding by the parties did not conflict with the terms of the LTB Settlement

Agreement. When the hearing proceeded without a resolution of the issues, the Tenants did not request that they be allowed to introduce the LTB Settlement Agreement. Instead, the Tenants paraphrased the LTB Settlement Agreement in closing submissions.

- [27] Both the Tenants and Mr. Rosen, despite having an opportunity to give testimony and call witnesses, sought to introduce evidence in their submissions. Both sought to introduce financial evidence and, as noted above, the Tenants referred to the LTB Settlement. The law is clear that in an adjudicative hearing where the parties may testify or call witnesses, attempts to introduce testimony in submissions will be disallowed. I have not considered this evidence.
- [28] It is not necessary to introduce the LTB Settlement Agreement in order to understand the Tenants' arguments. It is their submission that the issues in this hearing are the same as the issues before the LTB, namely, whether they should pay the cleaning expenses and legal costs relating to their dog and, if so, in what amount. They submit that the resolution reached in the LTB Settlement Agreement should be binding on TSCC1767 under the doctrine of *res judicata*.
- [29] The doctrine exists to protect judicial decisions, including, as in this case, settlements incorporated into orders of boards or tribunals, from collateral attacks. However, *res judicata* applies where either the parties or their proxies are the same. That is not the case here. While Mr. Rosen shared with TSCC1767 an interest in seeing the Tenants removed from the unit, their interests were different when it came to questions of, for example, damage to the unit itself or issues, if any, of rent payment. It is relevant to note that it was TSCC1767, not Mr. Rosen or the Tenants, which incurred the cost of cleaning up the balcony. TSCC1767 was not a party to the LTB Settlement Agreement and should not be bound by it. The doctrine of *res judicata* does not apply here. In the circumstances of this case, I conclude that TSCC1767 was correct when it wrote that the Tenants should "ultimately be responsible for the clean-up costs....".

Issue 2 - Who should pay the costs of enforcing TSCC1767's declaration and rules against permitting animal waste on the common elements?

- [30] TSCC1767 claims costs of \$1,412.51 for the costs of enforcing compliance with its governing documents, including costs of ordering the removal of the dog from the premises. Mr. Rosen takes the position that these costs are too high. He submits that TSCC1767 knew that he was taking action at the LTB and they should have awaited the outcome of that matter. TSCC1767 submits that it was not a party to the LTB proceeding and could not have predicted its outcome. I conclude that there was no reason for TSCC1767 to wait. In fact, given the number of complaints

it was receiving and the refusal of the Tenants to comply with the notice directing them to remove the dog, there were compelling reasons to proceed with this application.

- [31] TSCC1767 submitted documentary evidence showing that it sent four notices to both Mr. Rosen and the Tenants before deeming the dog a nuisance and requiring its removal under rules 5.8 and 5.11, which give TSCC1767 that authority. When the dog was not removed, TSCC1767 retained counsel. It was TSCC1767's position that its counsel sent only one notice before commencing this application in order to keep costs of enforcing compliance with its governing documents down. After reviewing the costs involved, I conclude they were reasonable under the circumstances and I agree that the costs of enforcing compliance were \$1,412.51.
- [32] The same reasoning applies to the imposition of the costs of enforcing compliance as applied in relation to the clean-up costs. Mr. Rosen should not have to pay those costs in the circumstances of this case. The Tenants are responsible for them as it was their persistent non-compliance with the rules of TSCC1767 that led directly to these costs being incurred.

Issue 3 - Who should pay the costs of this proceeding?

- [33] This application was commenced when the previous "Condominium Authority Tribunal Rules of Procedure, September 21, 2020" were in effect. I conclude that these are the applicable rules as they were in effect at the outset of the hearing and during that time when most of the costs were incurred.
- [34] TSCC1767, as the successful Applicant, is entitled to its costs of filing this application in the amount of \$200 under Rule 45.1(a). Since it was the Tenant's conduct which necessitated this application, it is appropriate that they should pay these costs.
- [35] TSCC1767 claims legal costs of \$12,490.31. It should be noted that TSCC1767 based its submissions on the current Rules of Practice which were effective January 1, 2022. However, as noted above, it is the previous Condominium Authority Tribunal Rules of Procedure, September 21, 2020 which I will apply. Rule 46.1 of those rules states, "The CAT will not order a User to pay to another User any fees charged by that User's lawyer or paralegal, unless there are exceptional reasons to do so."
- [36] TSCC1767 argued that the Tenant's persistent disregard for the rules, over a 5-month period, is justification for an award of costs. Generally, the costs of a proceeding are the costs incurred during the hearing itself. I see no reason to

deviate from this general practice.

[37] The “exceptional reasons” test set out in Rule 46.1 is a very high bar to clear. There were extraordinary delays in this proceeding. There were a number of factors causing the delay. One of these was the practice of the Parkdale Community Legal Services, which provided the two students-at-law who represented the Tenants, to rotate their students every couple of months. Every rotation required an adjournment of at least a month. While this slowed proceedings, it did not add appreciably to the costs. Other delays were caused by technical problems with the online system by which most of the hearing was conducted. These problems were not caused by any party. Finally, from time to time both Mr. Rosen and the Tenant’s representatives were non-responsive. However, the case moved ahead without their input when necessary. I conclude that the test of “exceptional reasons” has not been met.

D. CONCLUSION

[38] It is appropriate that the Tenants should pay the costs of cleaning-up after their dog, the costs of enforcing compliance with the rules of TSCC1767 and the costs of filing this proceeding with the Tribunal. It was their dog, and their refusal to comply with the pet-specific rules, which caused these costs to be incurred. TSCC1767 should be bound by commitments it repeatedly made to Mr. Rosen not to seek an order against him.

E. ORDER

[39] The Tribunal orders that within 60 days of the date of this Order, the Tenants will pay to TSCC1767:

1. The amount of \$3,044.60 for the costs of cleaning the balconies soiled by the Tenant’s dog;
2. The amount of \$1,412.51 for the costs of TSCC1767 enforcing compliance with its rules, and
3. The amount of \$200 for the costs paid to this Tribunal by TSCC1767 for bringing this application.

Laurie Sanford
Member, Condominium Authority Tribunal

Released on: April 14, 2022