

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: August 30, 2022

CASE: 2022-00178N

Citation: Toronto Standard Condominium Corporation No. 2630 v. Fernandes, 2022 ONCAT 94

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

Member: Monica Goyal, Member

The Applicant,

Toronto Standard Condominium Corporation No. 2630
Represented by Matthew Varao, Paralegal

The Respondent,

Michael Fernandes

Hearing: Written Online Hearing – May 11, 2022 to July 18, 2022

REASONS FOR DECISION

A. INTRODUCTION

- [1] The Applicant, Toronto Standard Condominium Corporation No. 2630 (“TSCC 2630”) filed an application with the Condominium Authority Tribunal (“CAT”) against the Respondent unit owner for breach of the Corporation’s by-laws, declaration and rules (“Governing Documents”) relating to parking and storage, noise, odour, smoke and/or vapour, other types of nuisances, annoyances or disruptions, and compliance issues.
- [2] The Respondent, Michael Fernandes, did not join the case, so the case went to Stage 3 – Tribunal Decision as a default proceeding on May 11, 2022. When he failed to join the case at the onset of Stage 3, I asked the Tribunal staff to contact him. They received no response to their attempts to contact him by email and phone. Mr. Varao confirmed that notices of the proceeding were personally delivered to Mr. Fernandes, and I am satisfied that he was properly served. Therefore, the hearing in this matter proceeded without Mr. Fernandes’ participation and my decision is based solely on the evidence and submissions of TSCC 2630.
- [3] For the reasons set out below, I find that Mr. Fernandes has violated the provisions of TSCC 2630’s Governing Documents pertaining to smoking and vapour, noise, parking and storage, odour, and other types of nuisance,

annoyance or disruption. I order that Mr. Fernandes comply immediately with TSCC 2630's Governing Documents. I also order Mr. Fernandes to pay the indemnification fees owing to TSCC 2630 of \$565. Lastly, I order Mr. Fernandes to pay Tribunal fees of \$150 and costs of \$2,767.10 to TSCC 2630 within 30 days of the date of this decision.

B. BACKGROUND

- [4] On or around May of 2021, the management of TSCC 2630 began receiving complaints about Mr. Fernandes' smoking, drinking, use and storage of a barbecue in a non-designated area, and the litter from his activities.
- [5] Over the next few months, the behavior worsened and there were complaints of loud noises from his unit late at night. Mr. Fernandes also began parking in a fire route impeding waste collection service from accessing garbage containers.
- [6] The condominium manager for TSCC 2630 sent Mr. Fernandes several notices to cease smoking, parking in the fire route, creating a nuisance of noise and litter, and improperly storing his equipment.
- [7] Mr. Fernandes appears to have known about the notices, as he did respond to the manager twice by email. In one of the emails, instead of saying he would take steps to abate or cease the behaviour, Mr. Fernandes complained of other issues he was experiencing.
- [8] In a letter dated September 10, 2021, the lawyer for TSCC 2630 wrote to Mr. Fernandes demanding he comply with the Governing Documents, which he did not do.

C. ISSUES & ANALYSIS

- [9] The issues to be addressed in this matter are:
 1. Is the Respondent in violation of the provisions of TSCC 2630's Governing Documents which forbid parking vehicles in prohibited areas, the improper storage of equipment, and creating a nuisance of noise, odour or other offensive action?
 2. If the Respondent is in violation of the provisions of TSCC 2630's Governing Documents, then should he pay indemnification costs of \$565.00 to TSCC 2630?
 3. What legal costs, if any, should be awarded to TSCC 2630?

Issue 1: Is Michael Fernandes in violation of the provisions of TSCC 2630's Governing Documents which forbid parking vehicles in prohibited areas, the improper storage of equipment, and creating a nuisance of noise, odour or other offensive action?

[10] TSCC 2630 has a duty, pursuant to section 17 (3) of the Condominium Act, 1998, (the "Act"), to ensure compliance with its rules.

[11] Pursuant to section 117 (2) of the Act the Respondent has a duty to not carry out or permit any unreasonable noise that is a nuisance or any other prescribed nuisance, annoyance or disruption in a unit, the common elements or the assets of the corporation.

[12] Pursuant to section 119 (1) of the Act, the Respondent has a duty to comply with the Condominium Act and the Governing Documents of TSCC 2630.

Parking of Vehicles in Prohibited Areas

[13] The CAT has jurisdiction under Ontario Regulation 179/17 ("O. Reg 179/17") to hear disputes related to parking.

[14] TSCC 2630 submits that Mr. Fernandes, on numerous occasions, parked in the fire route and as such is in violation of the Rules 9 (a) and (b) of TSCC 2630 which state:

(a) No vehicles, equipment or machinery, other than motor vehicles shall be parked or left on any part of the Common Elements and without limiting the generality of the foregoing, no parking areas shall be used for storage purposes.

(b) Parking is prohibited in the following areas: (i) fire zones; (ii) traffic lanes; (iii) delivery and garbage areas; and (iv) roadways.

[15] TSCC 2630 submitted numerous email communications evidencing complaints from unit owners about Mr. Fernandes parking in the fire route in violation of the parking rule. One unit owner indicated that Mr. Fernandes had been parking in the fire route for weeks. Management for TSCC 2630 sent a notice to Mr. Fernandes that outlined how his improper parking blocked the garbage trucks.

[16] On a balance of probabilities, the evidence provided in this proceeding by TSCC 2630 establishes that Mr. Fernandes has contravened Rule 9 (a) and 9 (b).

Improper Storage of Belongings

[17] The CAT has jurisdiction pursuant to O. Reg 179/17 to hear disputes related to storage.

[18] TSCC 2630 submits that Mr. Fernandes on numerous occasions improperly stored his barbecue in common areas in violation of the Declaration at section 4.2 (f) which states:

No barbecues may be used indoors or outdoors, save and except barbecues are permitted on balconies, patios, decks or roof terraces for Residential Units provided that the barbecues only use natural gas (not propane) and the balcony, patios, decks or roof terraces for those aforementioned Residential Units has been equipped with a natural

gas line with a "quick disconnect" for barbecue use which has been provided by the Declarant or approved by the Board;

[19] TSCC 2630 submitted numerous emails from other unit owners, which said that Mr. Fernandes had relocated his barbecue from the permitted areas such as the balcony, patio, deck, or roof terrace to the landscaped bushes in the common areas in violation of Declaration section 4.2 (f).

[20] Further, TSCC 2630 submits that Mr. Fernandes on numerous occasions improperly stored his tires in two bike racks in violation of section 4.5 (a) of its declaration which states:

(a) Each Stacked Bike Storage Unit shall only be used for the storage of a single bicycle that shall not constitute a danger or nuisance to the residents, the Residential Units or the Common Elements. The Board may from time to time restrict the categories of items that may be stored or used in the Stacked Bike Storage Units. Each Unit Owner shall maintain his/her Stacked Bike Storage Unit in a clean and sightly condition. Each Owner of a Stacked Bike Storage Unit shall permit another Owner of a Stacked Bike Storage Unit, access through their respective Unit in order to allow each Stacked Bike Storage Unit Owner access to their Stacked Bike Storage Unit to install and remove their respective bicycle.

[21] TSCC 2630 submitted email communication and a photograph from a unit owner showing the improper use of the bike storage unit by Mr. Fernandes who was storing his tires in two bike racks.

[22] On a balance of probabilities, the evidence provided by TSCC 2630 establishes that Mr. Fernandes has contravened storage requirements in sections 4.2 (f) and 4.5 (a) of the Declaration.

Nuisance, Annoyance and Disruption

[23] The CAT has jurisdiction pursuant to O. Reg 179/17 to hear disputes related to any nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets of the corporation.

[24] TSCC 2630 submits that Mr. Fernandes has acted unreasonably in creating a noise, odour and offensive action and as such is in violation of sections 3.1 and 4.2 (d) of its Declaration and Rule 2.

[25] The Declaration at section 3.1 states:

Subject to the provisions of the Act, this Declaration, the By-Laws and any Rules, each Owner has the full use, occupancy and enjoyment of the whole or any parts of the Common Elements, except as herein otherwise provided.

However, save and except as expressly provided or contemplated in this Declaration to the contrary, no condition shall be permitted to exist, and no activity shall be carried on, within any Unit or upon any portion of the Common Elements that:

- (i) will result in a contravention of any term or provision set out in the Act, this Declaration, the By-Laws and Rules of the Corporation;
- (ii) ...
- (iii) will unreasonably interfere with the use and enjoyment by the other Owners of Common Elements and/or their respective Unit;

[26] The Declaration at section 4.2(d) states:

In the event the Board determines, in its sole discretion, acting reasonably, that any noise, odour or offensive action is being transmitted to another Unit and that such noise, odour or offensive action is an annoyance and/or a nuisance and/or disruptive (regardless of whether that Unit is adjacent to or wherever situated in relation to the offending Unit), then the Owner of such Unit shall at his/her own expense take such steps as shall be necessary to abate such noise, odour or offensive action to the satisfaction of the Board. In the event the Owner of such Unit fails to abate the noise, odour or offensive action, the Board shall take such steps as shall be necessary to abate the noise, odour or offensive action and the Owner shall be liable to the Corporation for all expenses incurred by the Corporation in abating the noise, odour or offensive action, which expenses are to include reasonable solicitor's fees on a solicitor and his/her own client basis;

[27] Rule 2 states:

(a) Owners and their families, guests, visitors, servants and agents shall not create nor permit the creation or continuation of any noise or nuisance which, in the opinion of the Board or the Manager, may or does disturb the comfort or quiet enjoyment of the Units or Common Elements by other Owners or their respective families, guests, visitors, servants and persons having business with them.

(b) No noise or odours shall be permitted to be transmitted from one Unit to another. If the Board determines that any noise or odours is being transmitted to another Unit and that such noise or odours is an annoyance or a nuisance or disruptive, then the Owner of such Unit shall at his expense take such steps as shall be necessary to abate such noise or odours to the satisfaction of the Board. If the Owner of such Unit fails to abate the noise or odours, the Board shall take such steps as it deems necessary to abate the noise or odours and the Owner shall be liable to the Corporation for all expenses hereby incurred in abating the noise or odours (including reasonable solicitor's fees).

[28] TSCC 2630 submitted numerous emails evidencing complaints from unit owners of the following behaviours by Mr. Fernandes:

1. Smoking that created a nuisance of odour. Mr. Fernandes was smoking in common elements and close to other units. The smoking was thus being transmitted to other units. The Management sent notices to Mr. Fernandes to smoke in accordance with municipal by-laws, away from the building.
2. Mr. Fernandes and either his friends or family was reported to have left ashtrays and cigarette butts in common areas, as well as beer bottles and cans in

common areas. This littering by Mr. Fernandes was deemed to be an offensive action that created an annoyance and disruption to the other unit owners.

3. Yelling, loud parties, and music playing, which created a nuisance of noise, disturbing the quiet enjoyment of the units and/or common elements. Several unit owners complained of disturbances by Mr. Fernandes from noise and yelling at various times at night from midnight to 6am in the morning.

[29] On a balance of probabilities, the evidence provided in these proceedings by TSCC 2630 establishes that Mr. Fernandes has contravened section 4.2 (d) of the Declaration and Rule 2 by creating a nuisance of odour and noise and annoyance through his offensive action of littering thereby disturbing the comfort and quiet enjoyment of other owners.

Issue 2: If Michael Fernandes is in violation of the provisions of TSCC 2630, then should he pay indemnification costs of \$565 to TSCC 2630?

[30] TSCC 2630 submits they should be indemnified for the cost of the legal letter written to Mr. Fernandes as he has violated section 4.2 (d) of the Declaration of TSCC 2630 and Rule 2.

[31] The Declaration of TSCC 2630 at section 6.1 states:

Each Owner shall indemnify and save harmless the Corporation from and against any loss, costs, 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 family, guests, visitors or tenants to or with respect to the Common Elements and/or all other Units, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments to be made by an Owner pursuant to this Article shall be deemed to be additional contributions toward common expenses payable by such Owner and shall be recoverable as such.

[32] Prior to engaging a lawyer, TSCC 2630 management gave notice to Mr. Fernandes regarding his improper conduct that contravened various Rules and sections of the Declaration on June 2, 2021, June 16, 2021, and July 22, 2021. The notices asked Mr. Fernandes to refrain from parking in prohibited areas, to remove his belongings that were stored improperly in common areas, and to cease his actions that created nuisances, annoyances and disruptions to the other unit owners.

[33] Mr. Fernandes did not comply with the notice and despite reasonable efforts by management, the Respondent ignored communication efforts and showed no signs of complying. On July 22, 2021, the management's notice to the Respondent warned him that if he failed to comply with the Governing Documents that a follow up letter would be sent from the TSCC 2630's lawyer at his expense. On September 10, 2021, the Respondent was sent a letter by TSCC 2630's lawyer. Given that TSCC 2630 attempted to gain Mr. Fernandes' compliance, provided

him time to respond, and only then when there was no satisfactory response, was the cost of the lawyer's letter incurred, I find that pursuant to section 6.1 of the Declaration that Mr. Fernandes should pay the indemnification cost of \$565.

Issue 3: What legal costs, if any, should be awarded to TSCC 2630?

[34] TSCC 2630 is requesting costs totalling of \$5,011.82 on a full indemnification basis, and \$2,917.10 on a partial indemnification basis. The costs comprise \$150 in Tribunal filing fees and the balance are costs for legal representation in this proceeding.

[35] TSCC 2630's Counsel submits that the corporation is entitled to full indemnification for its costs; as required by section 17 (3) of the Act, it took all reasonable steps to obtain Mr. Fernandes' compliance with its Rules. Mr. Fernandes was given multiple notices from both management and TSCC 2630's legal counsel and had ample opportunity to comply and his refusal to do so left the corporation with no choice but to file its application with the Tribunal.

[36] The authority of the Tribunal to make orders is set out in section 1.44 of the Act. Section 1.44 (2) states that an order for costs "shall be determined...in accordance with the rules of the Tribunal." The cost-related rules of the Tribunal's Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[37] TSCC 2630 was successful in this case and therefore, in accordance with Rule 48.1 of the Rules of Practice, I will order a cost award of \$150 in respect of the Tribunal fees paid by TSCC 2630.

[38] With respect to the legal fees the TSCC 2630 incurred relating to this proceeding, I am guided by the Tribunal's "Practice Direction: Approach to Ordering Costs" which includes, among other factors to be considered, the provisions of the governing documents and whether the parties had clear understanding of the potential consequences for contravening them.

[39] *In Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463 (CanLII), a case in which the Court found the respondent to be in breach of the corporation's pet rules, the Court wrote:

The Corporation repeatedly warned the respondent of the cost consequences of enforcement proceedings. The respondent failed to respond to any communication from

the corporation or to comply with its directions. Therefore, the costs are to a large extent the consequences of the respondent's own actions.

No part of these costs should be borne by the respondent's neighbours who are blameless in this matter. The Corporation declaration provides that any owner is bound to indemnify the corporation for any loss occasioned by his or her action. For these reasons it is appropriate that the corporation's costs be on a full recovery basis.

[40] In *Peel Condominium Corporation No. 96 v. Psofimis*, 2021 ONCAT 48 (CanLII), the Tribunal awarded 100% of the applicant corporation's requested legal costs. The Tribunal noted that the corporation was required to request an order from the Tribunal "only because Mr. Psofimis deliberately and repeatedly ignored the condominium's numerous attempts to request his voluntary compliance. He disregarded notices, emails and letters"

[41] In the case before me, Mr. Fernandes received multiple notices in June and July of 2021 advising him of the TSCC 2630's noise, storage and parking rules and requesting his co-operation and compliance. These notices were followed by a letter from the TSCC 2630's legal counsel. The legal letter advised him that the costs incurred to obtain his compliance would be payable in accordance with section 6.1 of its Declaration and he would be billed for the costs of producing the legal letter. However, he continued to violate TSCC 2630's noise, storage and parking rules after receipt of notices and the legal letter. He did not participate in this proceeding although he was given multiple opportunities to do so. There is no evidence that Mr. Fernandes cooperated. Mr. Fernandes' actions indicate that he has little regard for his obligations as a condominium owner or his responsibilities as a neighbour in a condominium community. On the other hand, as a result of Mr. Fernandes not participating in the case, the case moved straight to the hearing and as such the Applicant spent less time than they would have spent if the Respondent had participated in the case.

[42] Legal fees not awarded as costs are ultimately paid by all owners of a corporation. It would be neither reasonable nor fair if the owners whose quiet enjoyment of their premises was disrupted by what I can only describe as Mr. Fernandes' wilful refusal to comply with TSCC 2630's rules were to be liable for all of the corporation's cost of obtaining Mr. Fernandes' compliance. I have reviewed the legal fees billed to TSCC 2630 for this proceeding and find that paying the partial indemnity legal fees is reasonable, especially as the proceeding was shortened by the non-participation by the Respondent. In the circumstances of this case, I do not need to rely on the indemnification provision of the corporation's rules. Given the specific facts of the case, I am ordering Mr. Fernandes to pay costs of \$2,767.10, of the legal fees the corporation incurred with respect to this proceeding.

ORDER

[43] The Tribunal Orders that:

1. Under section 1.44 (1) 1 of the Act, Michael Fernandes shall comply with section 117 (2) of the Act and sections 3.1, 4.2 (d) and (f), 4.5 (a) of the Toronto Standard Condominium Corporation No. 2630's Declaration as well as rules 2, 4 (f), and 9 (a) and (b) of TSCC 2630's Rules.
2. Under section 1.44 (1) 3 of the Act, Michael Fernandes shall pay compensation of \$565.00 to Toronto Standard Condominium Corporation No. 2630 within 30 days.
3. Under section 1.44 (1) 4 of the Act, within 30 days of the date of this Order, Michael Fernandes shall pay Tribunal fees of \$150 and legal costs of \$2,767.10 to Toronto Standard Condominium Corporation No. 2630.

Monica Goyal
Member, Condominium Authority Tribunal

Released on: August 30, 2022