

COURT OF APPEAL FOR ONTARIO

CITATION: Durham Condominium Corporation No. 45 v. Swan,
2015 ONCA 590
DATE: 20150901
DOCKET: C59938

Doherty, Pepall and Huscroft JJ.A.

BETWEEN

Durham Condominium Corporation No. 45

Applicant
(Respondent)

and

Leslie Arthur Swan

Respondent
(Appellant)

Howard Wright, for the appellant

Timothy Duggan, for the respondent

Heard: July 2, 2015

On appeal from the order of Justice Alexander Sosna of the Superior Court of Justice, dated January 18, 2013.

ENDORSEMENT

I

[1] The appellant is a unit owner in and a former director of the respondent condominium corporation. He appeals, with leave, from a costs order made

against him in the context of an application brought against him by the respondent.

[2] The respondent sought costs on a full indemnity basis in the amount of \$198,880.92, or on a partial indemnity basis in the amount of \$126,855.22. The appellant asserted that he was indemnified against costs and submitted that none should be ordered. The application judge, Sosna J., ordered the appellant to pay costs of \$45,000 to the respondent on a partial indemnity scale, inclusive of taxes and disbursements.

[3] For the reasons that follow, we would allow the appeal and return the matter to the application judge for reassessment in accordance with the instructions set out below.

II

[4] The respondent brought an application seeking the following orders under the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

- a) A declaration that the appellant is a vexatious litigant;
- b) A declaration that the respondent's Board of Directors has the authority to enter into contracts for third party management of the condominium;
- c) A declaration that the present property management company contract with MCD Enterprises (MCD) is binding; and
- d) An injunction prohibiting the appellant from having any contact with the respondent's Board of Directors, MCD, and its principal, Catherine Debbert.

[5] The respondent also sought the following relief under the *Condominium Act, 1998*, S.O. 1998, c. 19:

- a) A declaration finding that the appellant, as a Director with the condominium corporation, failed to carry out his duties and exercise the care and diligence required of that office; and
- b) An order that the appellant remove, at his expense, the satellite dish installed on the common elements appurtenant to his unit and to restore, at his expense, the common elements to the condition they were in prior to the installation of the satellite dish.

[6] The appellant brought a cross-application in which he sought the following orders:

- a) A declaration that Tammy Goan and Letitia Wise breached their duty of care as Board members of the condominium corporation;
- b) The removal of Goan and Wise from the Board;
- c) His reinstatement as Director and President of the Board;
- d) The appointment of an interim Director pending a meeting to elect new Directors; and
- e) Return of all documents held by MCD to the condominium corporation.

[7] The application judge dismissed the respondent's application that the appellant be declared a vexatious litigant and denied its application for an injunction barring the appellant from having any contact with the board of directors, MCD and its principal, but made several findings against the appellant. He found that the respondent's board of directors had the authority to enter into

contracts for third party management of the condominium; that the property management contract entered into by the board with MCD Enterprises was binding; and that the appellant failed to exercise the care, diligence and skill that a reasonably prudent person would exercise in carrying out his duties as a director of the condominium.

[8] The appellant's cross-application was dismissed in its entirety.

[9] The key issue in dispute is whether the appellant is entitled to be indemnified for the costs and expenses he has incurred in the litigation. The relevant provisions of the *Condominium Act* provide as follows:

37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,

(a) act honestly and in good faith; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 1998, c. 19, s. 37 (1).

38. (1) Subject to subsection (2), the by-laws of a corporation may provide that every director and every officer of the corporation and the person's heirs, executors, administrators, estate trustees and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,

(a) any liability and all costs, charges and expenses that the director or officer sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against the person for or in respect of anything that the person has done, omitted to do or permitted in respect of the execution of the duties of office; and

(b) all other costs, charges and expenses that the person sustains or incurs in respect of the affairs of the corporation. 1998, c. 19, s. 38 (1).

(2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith. 1998, c. 19, s. 38 (2).

[10] The respondent adopted By-law No. 1 in furtherance of the s. 38(1) authorization. Section VI(13) of this by-law provides as follows:

Every director or officer of the Corporation and his heirs, executors and administrators and estate and effects respectively, shall from time to time and at all times be indemnified and saved harmless out of the funds of the Corporation from and against:

- a) all costs, charges and expenses whatsoever which such director or officer sustains or incurs in or about any action, suit or proceedings which is brought, commenced or prosecuted against him for or in respect of any act, deed, matter or thing whatsoever made, done or permitted by him in or about the execution of the duties of his office;
- b) all other costs, charges and expenses which he properly sustains or incurs in or about or in relation to the affairs thereof;

except for dishonest or fraudulent act or acts.

[11] The application judge criticized the appellant's conduct. He found that the issues raised in the respondent's application and the appellant's cross-application were contentious largely because of the appellant's numerous challenges to the law and facts, and rejected the appellant's submission that he was a well-intentioned whistleblower as "self-serving and groundless". The

application judge found that the appellant's "inflexible and strident interpretation of the duties of the Board put the proper management of the condominium at risk", and that throughout he "conducted himself in an inflexible, confrontational, dogmatic and counterproductive manner".

[12] In the key passage concerning the availability of indemnification, the application judge stated, at para. 16 :

On these findings Swan's submission that DCC 45 has the statutory and contractual duty to indemnify him for his costs pursuant to Section 37(1)(a) of the *Condominium Act* because as a Director, he acted "honestly and in good faith" is dismissed. This submission fails to recognize this court's findings that Swan as a Director "failed to exercise the care, due diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Given Swan's confrontational inflexibility and misguided assessment of his duties as Director, Swan failed to meet this standard and rendered the Board dysfunctional.

[13] In this court, the appellant argues that he enjoyed full indemnity and that his claim to indemnification should not have been rejected. The respondent argues that the application judge correctly concluded that the appellant had breached s. 37(1) of the *Condominium Act* as a whole. Alternatively, the respondent submits that indemnification is available only if a director is properly carrying out the business of the condominium in the execution of his obligations as a director, and the appellant was not doing so. The respondent submits,

further, that indemnification is not available for an action brought by the appellant.

[14] This court is at a significant disadvantage in dealing with this matter. Neither party in this case took out a judgment following the application judge's decision, and during oral argument there was considerable uncertainty as to nature of the judgment that would have issued.

[15] Nor is it clear how the application judge set the figure of \$45,000, or what that figure covers. Neither the judge's reasons nor the parties' costs submissions indicate how much of this amount is attributable to the respondent's application or the appellant's cross-application.

[16] The main difficulty, however, is that the application judge's decision on the applicability of the indemnity provided by the respondent's by-law is ambiguous. It is not clear whether the application judge made a finding of bad faith, negligence, or both. The two matters appear to have been conflated. Although the application judge clearly finds that the appellant failed to comply with s. 37 of the Act, (para. 46 of his reasons for judgment), it is not clear whether this conclusion was triggered by s. 37(1)(b) or s. 37 (1)(a) and (b).

[17] If the appellant were found to have acted in bad faith – dishonestly or fraudulently, in the language of the by-law – he would be disentitled to the protection of the indemnity (in so far as it otherwise applies). By contrast, a

finding of negligence alone would mean that the appellant was protected by the indemnity (again, in so far as it otherwise applies).

[18] The appellant invited this court to substitute an alternative costs award, but it is not possible to do so on the information before the court. Accordingly, the appeal is allowed and the costs order is set aside. The matter is remitted to the application judge to determine the following:

1. the applicability of s. 37(1)(a) and (b) of the Act and the by-law to the facts of this case;
2. whether, and the extent to which, the indemnity applies;
3. the quantum of costs and expenses, if any, covered by the indemnity; and
4. the breakdown of the costs as between the application and the cross-application.

[19] The appellant is entitled to costs on this appeal of \$6,000, inclusive of taxes and disbursements, regardless of the outcome of the case before the application judge. Should the application judge determine the appellant is entitled to indemnification for the costs of this appeal on a dollar for dollar basis, this amount (\$6,000) will be deducted (assuming it has been paid by the respondent). Should costs be awarded to the respondent, the costs payable to the appellant

on this appeal (\$6,000) will be set off against the costs awarded by the application judge.

“Doherty J.A.”

“S.E. Pepall J.A.”

“Grant Huscroft J.A.”