

Case Name:

**Metropolitan Toronto Condominium Corp. No. 1385 v.
Skyline Executive Properties Inc.**

Between

Metropolitan Toronto Condominium Corporation No. 1385,
Farhar Ameeriar, Tom Baker, Peter Benum, Ramona Berndt,
Pearl Botbol, Joan Bowser, John Bowser, Alice E.
Briesmaster, Eva Bryan, Joseph Cabell, Rose Calla,
Maria-Carla Carrara, Kim T.R. Carter, David Chin,
Nicholas Choo-Son, Penelope Cookson, Renata D'Aliesio,
Clem D'Souza, Teresa D'Souza, Juven Duarte, Walter
Etna, Tonci Farac, Jane Farnan, Jamie Feehely, Roy
Forrester, Marla Friedman, Joan Friel, Ivy Fung, Jeremy
Gayton, Stephen S. Grasset, Annette Gratton-Firestone,
Michael Groden, Robin Guinness, Sandra Guinness, Carrie
Hackett, Ian R. Hackett, Daniel Hanequand, David W.
Hansen, Kate Hellin, Ronald S. Hikel, Holger Huls, Ilka
Huls, Judy Imm, Janet Jack, Richard James, Janet Kent,
John Kent, Tushar Kittur, Patrick S. Lall, Roxanne
Lall, John Lawson, Delfin Lazaro, Pilar Lazaro, Helen
Larsson, Jacques Le Blanc, Jacob Levman, Tom Longhurst,
Patricia MacDonald, Nora Madlangbayan, Gina Mani, Sean
Mani, Zeljko Marcan, Helen Matsos, Alexander McIntosh,
Kelly McIsaac, Colleen McLeod, Ellen Joanne Millard,
Suzanna Ng, Patricia O'Malley, Janice Paul, Lorraine
Pauls, Molly Peacock, Terry Pennock, Aleksandar
Popovic, Timothy Redmann, Astra Renwick, Rachel B.
Romero, Kate Rossi, Lawrence Rossi, Karen Roycroft,
Wilma Sarmiento, Amy Sedgwick, Sanjiv Shah, Marina
Silov-Marcan, Thanyaporn Sombati, John H. Skye, Rita
Skye, Thanyaporn Sombati, Norbert L. Stepien, Alenka
Stiglic-Farac, Helen Tavares, Julio Tavares, Greg
Thiel, Stephen Tinling, Carlo Tosti, Maria Tosti,
Clarita B. Umali, Lavinia Vasilache, Ian Waldron,
Michael Waring, Nancy Waring, Charles Wasilewski,
Margaret Mary Wasilewski, Nancy Watkins, Charlyn Wee,

Dan Wilson, Louise Wilson, Anna Caccamo Davies, Tom Davies, Elizabeth M. De Lory, James W. De Lory, Ann Foster, Kathy Garvin, Jane Glatt, Helen Keenan, Donna Lewis, Elaine Martinovic, Douglas McIntosh, Denis Michaud, Gene Schmidt, Karen Sparks, Leendert Stolk, Christine Van Duermen, Robert Vienneau, and Alice Wong, applicants by counter-application (appellants), and Skyline Executive Properties Inc., Front Street Properties Inc., Jacob Aboudi, Ezra Aharon, Ampayer Properties Inc., Daniel Avidor, Oren Balaban, Moshe Becher, Mordechai Ben-Ami, Sholmit Ben Shahar, David Ben Shahar, Michael Burdin, Boris Burdin, Malka Chesner, Yechezkel Chesner, Avraham Cohen, Aviram Cohen, Mordechai Cohen, Miriam Cohen, Tsion Elyasaf, Cohava Elyasaf, Varda Feldman, Mordechai Givon, Yoav Hammer, Chanita Jackson, Joseph Jackson, David Karny, Roni Karny, Marco Libsker, Yana Manelis, Ya'acov Manelis, Dalhia Martin, Moshe Molcho, Atalia Molcho, Yaffe Monefa, Levia Moore, Mordechai Moore, Dalia Munz, David Munz, Miriam Perl, Asher Perl, Noa Renert, Adam Renert, Dina Rolel, Igor Dyakov, Menashe Rosenfeld, Amit Rotem, Henryk Rottenberg, Drora Rottenberg, Yehudith Shapir, Ilana Shnabel, Jacob Tajtelbaum, Naomi Tajtelbaum, Michaeli Uri, Yehezkei Yehuda, Dina Yehuda, Amos Wolfson, and Oded Zucker, respondents by counter-claim (respondents)

[2005] O.J. No. 1604

Docket: C42382

**Ontario Court of Appeal
Toronto, Ontario**

D.H. Doherty, J.I. Laskin and J.L. MacFarland J.J.A.

Heard: March 10, 2005.

Judgment: April 28, 2005.

(62 paras.)

On appeal from the order of Justice J.L. Lax of the Superior Court of Justice dated

August 16, 2004:
[2004] O.J. No. 3360.

Counsel:

Mark H. Arnold for the appellants

Michael A. Spears for the respondents

The judgment of the Court was delivered by

D.H. DOHERTY J.A.:—

I

¶ 1 This appeal raises a question of statutory interpretation of first impression. Section 134(5) of the Condominium Act, 1998, S.O. 1998, c. 19 (the "Act") provides:

If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit [emphasis added].

¶ 2 The focus of the appeal is the words:

Any additional actual costs to the corporation in obtaining the order.

¶ 3 The appellant, Metropolitan Toronto Condominium Corporation No. 1385 ("MTCC"), operates a 189 unit residential condominium. The respondent, Skyline Executive Properties Inc. ("Skyline"), owns or manages numerous units in the condominium. MTCC and Skyline have been involved in a longstanding dispute over Skyline's use of its units. MTCC claimed that Skyline rented out its units on a short-term basis and operated a hotel-like business in contravention of the condominium Declaration and the rules of the condominium.

¶ 4 In December 2002, MTCC obtained a judgment from Hoillet J. of the Superior Court declaring that Skyline was in breach of the condominium Declaration and the rules of the condominium: [2002] O.J. No. 5117. The judgment also required Skyline to comply with the Declaration and the rules. This court affirmed that judgment in December 2003, although it varied the cost order made against Skyline: [2003] O.J. No. 5116.

¶ 5 Early in 2004, MTCC advised Skyline that pursuant to s. 134(5) of the Act, MTCC had added about \$205,000 to the common expenses of the units owned or managed by Skyline. MTCC placed a lien in that amount on the units pursuant to s. 85(1) of the Act. MTCC advised Skyline that if payment was not forthcoming, it would institute power of sale proceedings.

¶ 6 Skyline brought a motion for a declaration that the lien was invalid and for an order requiring MTCC to discharge the lien. Skyline contended that it had paid the costs ordered against it in the proceedings in the Superior Court and the Court of Appeal, and that none of the amounts liened by MTCC were additional actual costs incurred by MTCC in obtaining the judgment from Hoillet J.

¶ 7 The motion judge declared the lien invalid and ordered it discharged. In her reasons she held that the phrase "additional actual costs ... in obtaining the order" in s. 134(5) of the Act did not include:

- * costs beyond assessed costs for any legal work for which the court did, or could have awarded costs to MTCC pursuant to the costs grid in the Rules of Civil Procedure;
- * costs incurred in responding to an appeal from the order;
- * costs expended on the enforcement of the order;
- * costs expended on legal matters unrelated to the obtaining of the order; and
- * administrative and managerial costs that MTCC had failed to demonstrate were "additional" costs incurred in "obtaining the order".

¶ 8 I would allow the appeal. My interpretation of s. 134(5) differs from that of the motion judge in two respects. First, I think s. 134(5) speaks separately to "an award of costs" on the one hand, and "additional actual costs" on the other hand. "An award of costs" refers to the costs that the court orders one litigant to pay to another litigant. "Additional actual costs" can encompass those legal costs owing as between the client and its own lawyer beyond the costs that the court had ordered paid by an opposing party. To the extent that the legal bills owed by MTCC to its own lawyers exceeded the costs awarded against Skyline, MTCC could properly add those amounts to the common expenses of the Skyline units as long as MTCC could demonstrate that those additional legal costs were incurred in obtaining the compliance order.

¶ 9 I also do not agree that the costs associated with the defence of a compliance order from attack on appeal are not costs associated with "obtaining the order". The phrase "obtaining the order" should be read as including the maintaining of that order on appeal.

¶ 10 I do agree, however, with the motion judge that the enforcement of a compliance order is properly distinguished from the obtaining of that order and that costs incurred in

the enforcement of a compliance order are not covered by s. 134(5). I also agree with the motion judge that costs that are not related to the obtaining of the compliance order, but instead relate to other legal matters involving the same units, cannot be added to the common expenses under s. 134(5). Lastly, I agree with the motion judge that while administrative or managerial expenses could potentially be captured by s. 134(5), MTCC failed to demonstrate that the claimed administrative and managerial expenses were "additional actual costs" that were incurred in "obtaining the order".

II

The Procedural History

¶ 11 The condominium developer turned over control of the condominium corporation to the elected board of directors in September 2001. At that time, Skyline owned or managed 54 of the 189 units. Skyline rented out fully furnished and serviced units on a short-term basis. Some of the rentals were for the weekend, others for the week, and still others for a month or longer. MTCC claimed that Skyline's operation contravened Article III(1)(a) of the condominium Declaration, which provided that units should be used only as private single family residences. In March 2002, the board of directors passed a rule prohibiting commercial and transient use of the units, and specifically prohibiting leases for less than six months. That rule, referred to as Rule E, reflected concerns expressed by the condominium board and many unit owners that Skyline's business compromised building security and undermined attempts to develop a sense of community within the condominium.

¶ 12 In May 2002, Skyline commenced an application in the Superior Court seeking, among other things, an interlocutory injunction to prevent the enforcement of Rule E. The motion for an interlocutory injunction was refused. Skyline continued to acquire ownership or control of units in the condominium and initiated attempts to force a meeting of the unit holders for the purpose of repealing Rule E.

¶ 13 MTCC brought a counter application under s. 134(1) of the Act in October 2002, seeking an order directing Skyline to comply with the condominium Declaration and rules. By this date, Skyline owned or controlled about 94 units. MTCC was successful on the counter application. By judgment dated December 20, 2002, Hoillet J. upheld the validity of Rule E, and declared that the rental of units for commercial and/or transient use breached that rule and also breached the condominium Declaration. He further prohibited Skyline from leasing or renting the units for commercial and/or transient use and appointed an administrator under s. 131 of the Act to enforce his judgment.

¶ 14 Hoillet J. ordered costs of the application to MTCC on a substantial indemnity basis and subsequently fixed those costs at \$58,000.00.

¶ 15 Skyline appealed. By endorsement dated December 12, 2003, this court

dismissed the appeal except as it related to costs. The court varied the costs order and directed that MTCC should have its costs assessed on a partial indemnity basis. In June 2004, an assessment officer fixed those costs at \$38,000.00.

¶ 16 This court awarded costs of the appeal to MTCC in the amount of \$10,000.00.

¶ 17 Skyline has paid the \$38,000.00 assessed as the costs of the proceedings before Hoillet J., and the \$10,000.00 awarded as costs by this court.

¶ 18 In February 2004, MTCC advised Skyline that it would add all additional costs "incurred in this enforcement process" to the common expenses of all of the units owned or managed by Skyline. MTCC took the position that the additional costs began in September 2001 with the election of the condominium board of directors and continued through until the order of the Court of Appeal in December 2003.

¶ 19 On April 12, 2004, MTCC advised Skyline that it had registered a lien against all of the Skyline units in the amount of some \$205,000.00, and that if the funds were not promptly paid, MTCC would commence power of sale proceedings.

¶ 20 In response to inquiries by Skyline, MTCC provided the following break down of the amount claimed:

- * Mr. Arnold's legal fees -- \$108,524.00;
- * Mr. Elia's legal fees -- \$41,164.59;
- * other legal costs -- \$11,391.74;
- * administrative costs -- \$20,502.22; and
- * managerial services -- \$28,167.00.

¶ 21 Mr. Arnold and others in his firm acted for MTCC in its dispute with Skyline. Accounts submitted by Mr. Arnold totalled \$147,102.00. MTCC deducted the amount which it said Skyline had paid by way of costs (\$38,578.00), yielding a net amount owing of \$108,524.00. Mr. Arnold's accounts for work done prior to the judgment of Hoillet J. in December 2002 totalled \$61,991.00. Accounts submitted by him for work done after the judgment was obtained totalled \$72,388.00. [See Note 1 below]

Note 1: I cannot reconcile the various amounts referred to in the motion record. Luckily for me and the parties, I do not have to try.

¶ 22 Mr. Elia did solicitor's work for MTCC and assisted Mr. Arnold in the dispute with Skyline. Mr. Elia's accounts that were provided to support the claim of \$41,164.59 covered work done between December 1, 2001 and November 30, 2003. Accounts

totalling about \$30,000.00 referred to work done after the judgment was obtained from Hoillet J. in December 2002.

¶ 23 The "other legal costs" totalling \$11,391.74 referred to costs arising out of three legal matters, and costs paid to the administrator appointed under the judgment of Hoillet J. The three identified legal matters were distinct from and had no connection with MTCC's efforts to obtain the compliance order under s. 134(1). For example, one of those matters involved a trademark issue. The judgment of Hoillet J. required MTCC to pay the administrator's fees.

¶ 24 The \$20,052.22 described as administrative costs consisted of the costs arising out of conducting certain unit owners' meetings, as well as printing, telephone, mailing and courier costs. The amount also included borrowing costs arising out of a loan that MTCC claimed was necessitated by the ongoing dispute with Skyline.

¶ 25 The managerial services totalling \$28,167.00 referred to work done by two employees of the property management company employed by MTCC. To support this claim, MTCC provided time sheets for these employees for 2003. It also indicated that it had doubled the amount reflected in these time sheets to account for "two and a half years worth of time stolen from the Corporation".

III

MTCC's Arguments

¶ 26 Most of the argument in this court and all of the reasons of the motion judge addressed s. 134(5) of the Act. Before turning to those submissions, I will dispose of two other arguments advanced by MTCC in its factum.

(i) The Collateral Attack Argument

¶ 27 MTCC argued that Skyline's motion challenging the lien registered by MTCC constituted an impermissible collateral attack on paragraph 10 of the judgment of Hoillet J. That paragraph reads:

Orders that the condominium corporation may add to the common expenses of the units owned by the Respondents by Counter-Application, any costs awarded to the condominium corporation pursuant to this Judgment, together with any additional costs to the condominium corporation in obtaining the Judgment pursuant to s. 134(5) of the Condominium Act, R.S.O. 1998, c. 19.

¶ 28 Paragraph 10 parrots the language of s. 134(5) and adds nothing to the rights bestowed on MTCC by that section. Skyline's motion did not challenge paragraph 10 of

Hoilett J.'s judgment or in any way seek to vary that judgment. Instead Skyline attacked the lien on the basis that no amount should have been added to the common expenses owed by Skyline since it had paid the costs orders and MTCC had incurred no additional actual costs in obtaining the compliance order.

¶ 29 Skyline's motion was not a collateral attack on the judgment of Hoilett J. It was properly brought as a motion within the application that led to the judgment of Hoilett J.

(ii) The Indemnity Argument

¶ 30 MTCC argued in its factum that the lien registered against the Skyline units could be justified under Article VIII(5) of the condominium Declaration. That article required unit owners to indemnify MTCC for "any costs" suffered by it as a result of a breach of the condominium rules by the unit owner.

¶ 31 The lien registered by MTCC is a creature of statute created by s. 85(1) of the Act. That section reads:

If an owner defaults in the obligation to contribute to the common expenses, 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 [emphasis added].

¶ 32 A s. 85(1) lien is triggered by a default on an obligation to contribute to common expenses. The indemnification right created by Article VIII(5) of the condominium Declaration does not affect the unit owners' obligation to contribute to common expenses, and a failure to meet the indemnification obligation does not constitute a default on an obligation to pay common expenses.

¶ 33 The indemnification provision in the condominium Declaration offers no support for the lien registered by MTCC.

(iii) The Interpretation of s. 134(5)

¶ 34 Section 134(1) provides for an order enforcing compliance with the Act, the condominium Declaration or the rules of the condominium. The order may be sought by the condominium corporation or an owner, occupier or tenant of a unit. If the court makes a compliance order, it may direct that the offending party pay "the costs incurred by the applicant in obtaining the order" (s. 134(3)(b)(ii)).

¶ 35 Section 134(5), the section in issue here, applies only to condominium corporations and only where the condominium corporation has obtained an award of

damages or costs under s. 134(3). For convenience I repeat s. 134(5):

If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit [emphasis added].

¶ 36 Section 134(5) had no equivalent in the predecessor legislation. Section 49 of that legislation, The Condominium Act, R.S.O. 1990 c. C.26 did provide for compliance orders but did not specifically address the payment of costs incurred by condominium corporations in obtaining and enforcing compliance orders.

¶ 37 The affidavit material filed by MTCC and Skyline reveals that during the consultative process leading up to the enactment of the present legislation in December 1998, various groups addressed what they saw as the need to provide for the recovery by condominium corporations of any costs associated with the obtaining and enforcing of compliance orders against unit owners. These groups submitted that since condominium corporations were duty-bound to enforce compliance with their declarations and rules for the benefit of all unit owners, they should not bear any of the costs associated with obtaining and enforcing court orders requiring such compliance. These groups argued that the offending unit owners should have to compensate the condominium corporation for all costs incurred in obtaining and enforcing compliance orders against those unit owners.

¶ 38 Section 134(5) went some way towards addressing the concerns expressed in these submissions. The section declares that the corporation may recover both "an award of costs" and "any additional actual costs". Clearly, the language of s. 134(5) contemplates recovery by the condominium corporation of costs beyond those that are addressed in a court order so long as those costs were actually incurred by the condominium corporation and were incurred in obtaining the compliance order.

¶ 39 Not only does s. 134(5) give a condominium corporation a broad right of recovery for costs incurred in obtaining compliance orders, it also provides an effective enforcement mechanism for the collection of those costs. The section declares that the "award of costs" and the "additional actual costs" may both be added to the common expenses for the unit. If the amounts are not paid, the condominium corporation may register a lien against the unit. The lien is enforceable in the same way as a mortgage (s. 85(2), s. 86(6)). Section 86 of the Act gives a s. 85(1) lien priority over almost all other encumbrances including mortgages. Consequently, if the costs described in s. 134(5) are not paid, the condominium corporation can recover that amount through the sale of the unit.

¶ 40 My review of the terms of s. 134(5) leads me to agree with counsel for MTCC's

submission that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

¶ 41 Recognition of the remedial purpose behind s. 134(5) does not however answer all questions of statutory interpretation. The legislature chose to implement its purpose using certain words. Those words described the scope of the claim that can properly be made by MTCC. As recently observed by Bastarache J. in dissent in *Marche v. The Halifax Insurance Co.*, 2005 SCC 6 at para. 59-60: the interpretative process begins with the determination of the ordinary meaning of the words used. The ordinary meaning refers to the meaning, if any, that is apparent after a first, but careful reading of the provision.

¶ 42 Section 134(5) distinguishes between "an award of costs" and "additional actual costs". The latter is to be added to the former to arrive at the total amount that shall be added to the common expenses owed by the offending unit owner. There is no difficulty with the ordinary meaning of "an award of costs". The phrase refers to costs orders made by a court or made after a court ordered assessment. MTCC has two awards of costs, \$38,000.00 awarded after the assessment of costs on the application, and \$10,000.00 in costs awarded by the Court of Appeal.

¶ 43 As the motion judge observed, the phrase "additional actual costs" in s. 134(5) can encompass costs, legal and non-legal, that are not assessable. The more difficult question is whether those words can also capture actual legal costs to MTCC referable to legal work that was the subject of a court ordered assessment of costs or a cost order made by a court.

¶ 44 In determining how to read the phrases "award of costs" and "additional actual costs" in s. 134(5), it is appropriate to consider how those words would be read by those familiar with those terms. As all lawyers know, a costs award in favour of a party, even when made on a substantial indemnity scale, will not necessarily reflect the actual amount of fees properly billed to that party by his or her own lawyer. Usually, there will be a significant difference between the amount of a costs award made to a party and the actual legal costs incurred by that party. As Armstrong J.A. recently observed in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 at para. 26 (C.A.) when discussing the assessment of costs as between parties to litigation:

Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant [emphasis added].

¶ 45 Reading the words of s. 134(5) as informed by the well-recognized distinction between costs that are awarded between parties and costs that are payable as between a party and its own lawyer makes the meaning clear to me. "Additional actual costs" will refer to those legal costs properly owed by MTCC to its lawyers above and beyond the amounts awarded for costs by the court or in a court ordered assessment. Those "additional legal costs" are properly added to the common expenses of the unit pursuant to s. 134(5) so long as they were incurred "in obtaining the order". As actual legal costs refers to those costs properly claimed by a lawyer against his or her own client, the principles governing the assessment of legal bills as between a lawyer and his or her client, should govern any dispute between MTCC and Skyline as to the propriety of any part of the legal bills relied on by MTCC in support of a claim for "additional legal costs" under s. 134(5): see Mark M. Orkin, *The Law of Costs*, 2nd ed., looseleaf (Aurora, Ont: Canada Law Book Inc., 2004) at 602ff. [See Note 2 below]

Note 2: It may be that Skyline could apply to the court to have MTCC's legal bills assessed under s. 9 of the Solicitors Act, R.S.O. 1990 c. S.15: See Orkin, *supra*, at 305.3(4)

¶ 46 A reading of s. 134(5) that allows MTCC to claim its actual legal costs in obtaining the compliance order as part of the common expenses of the Skyline units is consistent with the remedial purpose of s. 134(5). That reading effectively shifts the financial burden associated with obtaining a compliance order from the "innocent" condominium corporation and unit owners to the "guilty" unit owner who necessitated the obtaining of the compliance order.

¶ 47 My interpretation of s. 134(5) can be demonstrated by reference to MTCC's claim as it related to Mr. Arnold's legal bills up to the date MTCC obtained the compliance order from Hoilett J. in December 2002. Mr. Arnold's bills for that period totalled \$61,991.00. Costs for the application were assessed against Skyline on a partial indemnity basis at \$38,000.00. Applying s. 134(5) to this component of Mr. Arnold's bills, MTCC would be entitled to add to the common expenses of the Skyline units, \$38,000.00 (the costs award) plus as additional actual costs whatever part of the \$23,991.00 (\$61,991.00 minus \$38,000.00) it was determined was both expended in obtaining the compliance order and would be properly payable to Mr. Arnold on an assessment of his bills by MTCC. MTCC would of course have to deduct from that amount whatever amount had already been paid by Skyline.

¶ 48 The motion judge rejected the interpretation I place on s. 134(5) primarily because, in her view, including costs for legal services that had been the subject of court assessed costs beyond the amount ordered by the court, would render the court's authority to determine costs meaningless. She said at paragraph 30:

In view of this, "additional actual costs" cannot include any amount for legal costs that could have been awarded by the court under the costs grid and the Rules of Civil Procedure. This would render meaningless the court's jurisdiction to award costs, which is a precondition to the operation of the subsection. Accordingly, once costs are awarded, a condominium corporation may not add to the common expenses of a unit-owner as additional actual costs under section 134(5), assessable legal costs that were sought, but not awarded [emphasis added].

¶ 49 With respect, this analysis misses the distinction made in *Boucher*, supra, between costs as fixed or assessed between parties to litigation and a litigant's actual legal costs. In assessing MTCC's costs of the application or fixing its costs of the appeal, the court looked to what was fair and reasonable as between the parties and not to the legal costs actually incurred by MTCC. In determining what amounts MTCC could add to the common expenses of the Skyline units, the Legislature recognized the difference between the two measures of costs described in *Boucher*, supra. The Legislature declared that both assessed costs and actual costs could be added to the common expenses. By providing that costs beyond assessed costs could be added to common expenses, the Legislature did not interfere with the court's jurisdiction to assess costs as between the litigants.

¶ 50 It is true that by virtue of s. 134(5), MTCC could resort to the s. 85 lien enforcement mechanism to collect both the costs awarded and its additional actual legal costs. I do not accept however, that the availability of this enforcement mechanism in any way derogates from the court's jurisdiction to determine the appropriate award of costs as between the parties. The costs awarded to MTCC are what costs are in any case, the measure of the costs properly payable by one litigant to the other, and are enforceable by MTCC against Skyline in the same manner as any other money judgment.

¶ 51 My conclusion that "additional actual costs" in s. 134(5) can include legal costs beyond those ordered or assessed by the court does not mean that all legal costs properly owed by MTCC to its lawyers can be added to the common expenses of the Skyline unit. As the motion judge held, the section refers only to costs incurred "in obtaining the order". Those who made the case for an enforcement provision like that contained in s. 134(5) before the enactment of the present Act, argued that it should include costs associated with either obtaining or enforcing the compliance order. However, the Legislature chose to include only the word "obtaining" in s. 134(5). The process of obtaining a court order is distinct from the process of enforcing that order. On a plain reading of s. 134(5), it does not extend to costs associated with the enforcement of the compliance order. MTCC's legal costs are recoverable only if properly charged by its lawyers and incurred in obtaining the order.

¶ 52 Although enforcement costs are not part of the costs referred to in s. 134(5), they may come into play in determining the proper amount of the s. 85(1) lien. That section provides that where an owner has defaulted on an obligation to pay common expenses,

the condominium corporation may register a lien against the unit in the amount of the unpaid common expenses plus:

[A]ll reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

¶ 53 Consequently, if a unit owner defaults on the common expenses, the s. 85(1) lien can include enforcement costs that fall within the language of the section. The motion judge did not have to address this issue as she found that no amount was properly added to the Skyline common expenses pursuant to s. 134(5). There was, therefore, no default by Skyline on its obligation to pay common expenses capable of triggering the s. 85(1) lien.

¶ 54 I turn next to the motion judge's treatment of the appeal costs. She held that none of MTCC's costs of the appeal taken by Skyline from the compliance order could be included in s. 134(5). She reached that conclusion for two reasons. First, she held that because the Court of Appeal had assessed costs at \$10,00.00, no additional legal costs could be charged under s. 134(5). For reasons already stated, I would reject this reasoning.

¶ 55 The trial judge also appears to have rejected claims for costs associated with the appeal because these costs were incurred after the order was obtained and therefore, could not be said to be costs "in obtaining the order". The phrase "in obtaining the order" describes a process that culminates in a valid, enforceable, final compliance order. As long as the validity of the order is in issue, I think that the relevant proceedings before the court are all part of the process of "obtaining the order". For example, had Hoilett J. refused to grant the compliance order and had MTCC successfully appealed that refusal, there could be no doubt that MTCC's costs of the appeal would be costs incurred "in obtaining the order". I see no reason why the consequences should be different for MTCC where it was successful on the initial application and Skyline chose to put the validity of the order in issue by way of appeal.

¶ 56 I can deal briefly with the motion judge's treatment of administrative and managerial costs. She correctly held that the words "additional actual costs" in s. 134(5) could extend to non-legal costs so long as those costs were incurred in obtaining the order. She also correctly held that MTCC had the burden of demonstrating that the administrative and managerial costs claimed by it were actually incurred in the obtaining of the order. The motion judge also held that MTCC had not met that burden. Again, I agree with her conclusion.

¶ 57 I must also reject the submission made on appeal by counsel for MTCC to the effect that only the validity of the lien and not the amount of the lien claimed by MTCC was in issue on the motion. The notice of motion and the material filed by Skyline in

support of its motion made it clear that Skyline contended that none of the amounts said by MTCC to make up the total amount of the lien claimed were properly added to common expenses under s. 135(4). MTCC had ample notice that all of the amounts it relied on to make up that claim, including those referable to administrative and managerial costs were disputed by Skyline. MTCC had a full opportunity to make its case that those expenses were properly "additional actual costs to the corporation in obtaining the order". It failed to make that case.

IV

(iv) The Appropriate Order

¶ 58 For the reasons set out above, the motion judge erred in declaring that the lien was invalid and ordering it discharged. I would set aside that order and direct a reference pursuant to rule 54.02 to determine first what amount, if any, is properly added to common expenses under s. 134(5) and second, if some amount is properly added, the amount of the lien under s. 85(1) of the Act.

¶ 59 The reference should proceed on the following terms:

- * MTCC cannot reassert its failed claim to amounts described as "other legal costs", "administrative costs" and "managerial services".
- * in deciding what part, if any, of Mr. Arnold's and Mr. Elia's legal fees are properly added to the common expenses of the Skyline units, the referee shall determine the amount, if any, beyond the \$48,000.00 paid by Skyline in costs is properly charged to MTCC by Mr. Arnold and Mr. Elia for legal work done in obtaining the compliance order.
- * in determining whether there are any properly charged additional legal costs, the principles governing an assessment of legal fees as between a lawyer and his or her own client shall govern.
- * if it is determined that an amount was properly added to the common expenses of the Skyline units, and that Skyline has defaulted in payment of that amount, the amount of the lien shall be determined by adding to that amount, all reasonable legal costs and reasonable expenses incurred by MTCC in connection with the collection or attempted collection of the amount owing under s. 134(5).

¶ 60 If the parties cannot agree on the referee, the court will name one.

(v) Costs

¶ 61 MTCC has been successful on the appeal. However, it is clear that the amount of the lien registered by MTCC against the Skyline units is far in excess of the lien MTCC

is entitled to under the Act. Some of the claims made by MTCC are obviously beyond the scope of s. 134(5). By proceeding as it did, MTCC virtually forced Skyline to go to court to challenge the lien. Had the motion judge made the order which I would now make, I think Skyline would still have recovered its costs of the motion on a partial indemnity basis. I would not interfere with the costs order made on the motion.

¶ 62 MTCC is entitled to its costs on the appeal on a partial indemnity basis. I would fix those costs at \$11,000.00 including GST and disbursements. That amount may be set off against the costs awarded in Skyline's favour by the motion judge.

D.H. DOHERTY J.A.

J.I. LASKIN J.A. — I agree.

J.L. MacFARLAND J.A. -- I agree.

cp/e/qlsxk