CITATION: Seto v. Peel Condominium Corporation No. 492, 2015 ONSC 6785
COURT FILE NO.: CV-14-508732
DATE: 20151112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
KAREN SETO, PATRICK WONG and PHILIP LAM	)	*Bradley Chaplick*, for the Applicants
	)	
Applicants	)	
	)	
– and –	)	
	)	
PEEL CONDOMINIUM CORPORATION NO. 492	)	*Carol A. Dirks*, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD: October 19, 2015**

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] The respondent Peel Condominium Corporation No. 492 ("PCC 492") is a condominium corporation located at 1550 South Gateway Road, Mississauga, Ontario and known commercially as the Dixie Park Mall ("the Mall"). PCC 492 is responsible for the management and administration of the Mall. The Mall consists of a shopping centre on the first floor, and offices, schools and clinics on the second and third floors.

[2] Within the Mall there is a Food Court area consisting of eight separate units and a seating area for the Food Court patrons to use. The applicants, who are all non-arms' length parties, own and/or operate five of the eight Food Court units. The other three Food Court unit owners are not parties to this proceeding.

[3] The applicants seek a series of declaratory and mandatory orders under the *Condominium Act 1998* S.O. 1990 c.19 ("the *Condominium Act*") together with damages for (i) alleged overpayment of common expenses and (ii) alleged oppressive and unfairly prejudicial conduct.

[4] Although the parties respectively framed the outstanding questions in a slightly different manner, I have been asked to decide the following issues:

Issue #1: Has PCC 492 overcharged the applicants for various common expenses since 2012?

Issue #2: If the applicants have been overcharged for common expenses since 2012, what remedy is available to the applicants?

Issue #3: Has PCC 492 permitted or enabled breaches of its declarations in relation to the Food Court seating area and the sale of alleged similar food services in the Mall?

Issue #4: If PCC 492 has permitted or enabled breaches of its declarations, what is the appropriate remedy to cure those breaches?

Issue #5: Have PCC 492's actions amounted to oppressive conduct as set out in the *Condominium Act*?

Issue #6: If PCC 492 has acted in an oppressive manner, what is the appropriate remedy?

[5] This Court is being asked to dispose of matters advanced by way of an application. The disposition of an application is governed by Rule 38.10 of the *Rules of Civil Procedure* which empowers the presiding judge to:

> (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
>
> (b) order that the whole application or any issue proceed to trial and give such directions as are just.

[6] As held in *Moyle v. Palmerston Police Services Board* (1995), 25 O.R. (3d) 127 (Div. Ct.), when faced with a dispute in the record about a fact(s) material to an issue essential to the resolution of a subject matter of an application, the Court must either direct a trial of an issue in respect of the fact(s) in dispute, or convert the application into an action.

[7] Having reviewed the evidentiary record, I am satisfied that this matter can be disposed of by way of application.

Issue #1: Has PCC 492 overcharged the applicants for various common expenses since 2012?

[8] Most of the applicants' complaints relate to their share of the waste disposal charges incurred and/or budgeted by PCC 492 as common expenses. As with most condominium disputes, the Court will start with a review of PCC 492's declarations.

[9] Section 12(a) of PCC 492's declarations provides as follows:

> "Except as otherwise provided by and subject to the provisions of the Act, this Declaration, the By-laws and Rules of the Corporation, each Owner and his tenants, occupants and invitees may make reasonable use of, occupy and enjoy the whole or any part of the Common Elements, excluding the exclusive use of Common Elements which shall be used only by the Owners of such units to which the exclusive use of Common Elements are allocated and Schedule "F" attached hereto and their tenants, occupants and invitees, save and except for the Food Court Area, which may be used by patrons of the food court business conducted by the owners of Units 23 to 30, inclusive, of Level 1...."

[10] Accordingly, the Food Court seating area is reserved for the exclusive use of the owners, operators and patrons of the Food Court units.

[11] Section 12(c) of PCC 492's declarations provides as follows:

> "The Owners of Units 23 to 30, inclusive, capital Level 1 shall jointly have the right to the exclusive use of the common area A-1, Level 1, which shall be for the purpose of providing a seating area portion of the Food Court Area for which such Units shall be utilized. The Corporation may, by By-law, authorize the leasing or licensing to such Unit owners of such additional portions of the Common Elements abutting exclusive use Common Area A-1 as shall be appropriate to supplement the seating area required for the Food Court of such Units. The Owners of Units 23 to 30, inclusive, Level 1, shall be responsible for all costs of cleaning, furnishing, maintaining, policing and managing the Food Court Area. Specifically allocated to Units 23 to 30, inclusive, Level 1, shall be the separate costs incurred by the Corporation for such purposes, which shall be allocated as a separate item of Common Expenses exclusive to those Units."

[12] Pursuant to section 15 of PCC 492's declarations, outside storage of garbage and refuse is not permitted on the Common Elements, and all garbage and refuse must be retained by each owner within his/her unit. It is the responsibility and obligation of each owner to dispose of such garbage and refuse on a timely basis in accordance with the Rules of PCC 492.

[13] Schedule "E" to PCC 492's declarations deals with the specification of common expenses to be shared/allocated between the owners of all the Mall units. In section E(b)(vi), each unit

owner is explicitly responsible for its proportionate share of "waste disposal for Common Elements only". I note that the Food Court seating area is a Common Element, although as stated above, subject to exclusive use by the Food Court unit owners.

[14] Section E(m) states that "all costs of maintaining, repairing, cleaning, policing and managing the Food Court area shall be allocated separately and equally" to the Food Court unit owners. These listed costs are slightly different than those set out in Section 12(c). Both sections refer to the costs of "cleaning, maintaining, policing and managing" the Food Court seating area. Section 12(c) adds the word "furnishing" to those shared listed costs. Section E(m) does not, but adds the word "repairing" to those shared listed costs.

[15] As stated, the bulk of the dispute over common expenses relates to waste disposal costs which the applicants maintain were improperly charged and allocated to them by PCC 492. According to PCC 492, the cost of removing and disposing of garbage is a "major budget item", and the Food Court units generate significantly more garbage than all the other Common Element areas in the Mall.

[16] The fact that PCC 492's declarations permit the creation of a separate budget for the costs associated with the operation and maintenance of the Food Court area seems to confirm that the Food Court area's expenses may be disproportionate to the other units in the Mall. However, this does not in and of itself mean that the waste disposal charges are an expense to be included in the operation and maintenance costs of the Food Court area. As held in *York Condominium Plan No. 164 v. Bank of* Montreal 1998 CarswellOnt 3109 (Gen. Div.), a condominium corporation cannot levy assessments for specific expenses unless explicitly provided for in its declarations. A closer examination of PCC 492's declarations and Schedule E is thus necessary.

[17] PCC 492's declarations and Schedule E project an allocation of higher common expenses to the Food Court units. The listed expenses in Sections 12(c) and E(m) are treated separate and apart from other common expenses incurred by PCC 492, and thus separately charged to the Food Court units alone. Regrettably, those same listed expenses are not specifically defined anywhere in the declarations or Schedules.

[18] Section 15 of the declarations mandates each unit owner (i.e. not just the Food Court unit owners) to be responsible for disposing garbage and refuse from their own individual units at their own cost. In my view, the provisions of Section 15 do not extend to the garbage and refuse created and left in the Food Court seating area. Had the drafters of PCC 492's declarations intended to include such additional garbage and refuse, the terms of Sections 12(c) and E(m) would have been drafted accordingly.

[19] Section E(b)(vi) clearly specifies that waste disposal for Common Elements is a common expense to be shared among all unit owners. The Food Court seating area is a Common Element exclusively used by the Food Court unit owners. Exclusive use of a Common Element does not alter it being a Common Element owned proportionately by all unit owners.

[20] The contents of Sections 12(c), E(m) and E(b)(vi) must be reconciled despite their apparent inconsistency. A plain reading of the terms "maintaining, cleaning and managing" the Food Court seating area does not necessarily include the expenses associated with waste disposal, especially in light of waste disposal being an itemized common expense. In fact, to include waste disposal as a cost of "maintaining, cleaning and managing" the Food Court seating area would arguably render the application of Section E(b)(vi) redundant. In my view, the specific cost of waste disposal from common elements, including the Food Court seating area, is a regular common expense to be shared among all Mall unit owners.

[21] Accordingly, the answer to Issue #1 is "yes", and I find that PCC 492 has overcharged the applicants for various common expenses since 2012.

Issue #2: If the applicants have been overcharged for common expenses since 2012, what remedy is available to the applicants?

[22] Although not strongly pursued by PCC 492, it appears that the applicants did acknowledge that PCC 492 has always issued a separate Food Court area budget which included a separate charge for garbage removal and an associated management fee. PCC 492 did not strenuously advance an argument arising from the applicants' alleged acquiescence over the years, other than to state that the applicants "never complained about the previous Food Court area budgets". In any event, this application was commenced in 2014, and as such the applicants can only seek redress for PCC 492's overcharging of common expenses going back to 2012 (being the two year limitation period set out in the *Limitations Act 2002* S.O. 2002, c.24.

[23] It is the applicants' position that on the heels of significant PCC 492 Board member turnover in the spring of 2012, PCC 492's new Board of Directors undertook a series of steps geared towards making the Food Court unit owners responsible for approximately 70% of PCC 492's waste disposal expenses.

[24] I have reviewed the Common Expense budgets and Food Court area budgets prepared by PCC 492 for the 2012-2016 years inclusive. Based upon my resolution of Issue #1, PCC 492's charging for waste disposal and any monthly "garbage recovery fees" ought not to have been incurred by the applicants.

[25] In addition to being overcharged for their disproportionate share of the above expenses, the applicants also take issue with the following additional charges in the Food Court area budgets:

(a) Plumbing and sewage expenses

[26] PCC 492 charged the applicants $1,500.00 for "plumbing and sewage" in the 2012-2013 Food Court seating area budget. PCC 492 confirmed that this expense item "would be removed from the Food Court budget going forward in 2013-2014".

[27] To the extent that a credit was never given for this $1,500.00 charge, the applicants would be entitled to the sum of $937.50 being 5/8 of this expense. I leave it to the parties to determine whether this amount was in fact addressed prior to the hearing of this application.

(b) Pest control

[28] There is no doubt that PCC 492 is entitled to charge an expense item for pest control (and any other expenses associated with that purpose). Section 20(b) of PCC 492's declarations mandate that the Food Court unit owners are to comply with all applicable health and sanitation requirements of all applicable governmental authorities regulating food handling and preparation, including taking all measures necessary to eliminate pests attracted by food preparation.

[29] In my view, the pest control expenses are costs properly charged to the applicants. There is evidence that PCC 492 attempted to involve the applicants in the securing of the pest control contracts, and even permitted the applicants to retain their own pest control contractors provided that the applicants sign an agreement taking full responsibility for those pest control services.

[30] I see no reason to exclude the pest control charges from the applicants' share of "cleaning, maintaining and managing" the Food Court seating area.

(c) Administration fees

[31] The applicants take issue with an administration fee charged in the 2012-2013 budget totaling $4,200.00, as they submit that PCC 492 did not incur a separate administrative cost or management service allocated to the Food Court seating area itself. In fact, PCC 492 stopped charging an administration fee the following year.

[32] PCC 492 takes the position that the "administration fee" relates to services performed by the janitors and superintendents related to the Food Court units, such as oil tank, maintenance and clean up. As these charges are necessary to assist with, *inter alia*, cleaning and moving tables, chairs and the floor in the Food Court seating area, I find this sum to have been properly charged to the applicants.

[33] In summary, I find that the applicants were overcharged the following sums (being a 5/8 interest in the actual overcharges):

Year	**Amount (inclusive of HST)**
2012-2013	$14,125.00
2013-2014	$13,762.49

2014-2015	$12,916.10
2015-2016	$13,913.13[1]

[34] Accordingly, the total amount of overcharged expenses (inclusive of HST) is $54,716.72. The applicants request that I award that sum as damages against PCC 492, while PCC 492 request that any sum be awarded as a credit towards present or future Common Expense and/or Food Court area budgets.

[35] Pursuant to Section 134(3) of the *Condominium Act*, on an application to seek compliance with any provision of the *Condominium Act*, the Court may:

> (a) grant the order applied for,
>
> (b) require the persons named in the order to pay,
>
> (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
> (ii) the costs incurred by the applicant in obtaining the order, or
>
> (c) grant such other relief as is fair and equitable in the circumstances.

[36] As stated by Justice Stinson in *Davis v. Peel Condominium Corporation No. 22* 2013 ONSC 3367 (S.C.J.), section 134(3)(c) provides the Court with a "broad ameliorative authority to grant relief".

[37] In my view, the provisions of section 134(3) presume that the appropriate redress for acts of non-compliance is a damages award. There would need to be a substantive reason for not ordering a person named in the order to pay damages incurred as a result of non-compliance.

[38] On the record before me, I see no compelling reason why a damages award would not be appropriate in the circumstances. I therefore order PCC 492 to pay the applicant the sum of $54,716.72 as damages for non-compliance with the *Condominium Act*. Whether the parties choose to treat that sum as a credit towards sums owing under present or future Common Expenses and/or Food Court area budgets is a matter for their determination.

Issue #3: Has PCC 492 permitted or enabled breaches of its declarations in relation to the Food Court seating area and the sale of alleged similar food services in the Mall?

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[1] This sum represents the total overcharged expenses for the entire year, some of which have yet to be incurred. The applicants have and will overpay $1,059.43 per month.

[39] The applicants complain that patrons of several competing food service units (located in the vicinity of the Food Court units) have been regularly using the Food Court seating area, and as a result dumping their garbage in the Common Element garbage bins located near the Food Court seating area. These competing food service units comprise Domino's Pizza, Short Stop Bubble Tea, Rose Bakery (recently closed and replaced with another food and beverage service unit) and Phoenix Bubble Tea.

[40] In or around the fall of 2012, the applicants carried out a "self-help remedy" by creating and posting signage around the Food Court seating area. The contents of that signage stated as follows:

> "No consumption of Bubble Tea/food/beverage from other vendors. Dining area is provided for Food Court purchase only. It is staffed and maintained by the 8 Food Court members."

[41] Pursuant to section 12(d) of PCC 492's declarations, the applicants were not permitted to change or make any alteration to the Common Elements without PCC 492's prior written approval. The applicants never sought any approval or authorization from PCC 492's Board of Directors (or property manager) prior to posting the signs, which were also erected on walls and free-standing stands in the Mall walkways.

[42] The evidence discloses that PCC 492 is not opposed to "more tasteful" signage being employed to address the applicants' concerns. Indeed, PCC 492 circulated a notice to all owners with regards to the proper use of the Food Court, reminding owners to advise their customers that the Food Court seating area is for the exclusive use and enjoyment of the Food Court unit owners.

[43] While PCC 491 initially removed the signage, they were not provided with any alternative wording proposed by the applicants. In the fall of 2014 the applicants resorted to the same self-help remedy by erecting and installing the same signage in the Food Court seating area. Curiously, the applicants' signage remains in the Food Court seating area until this day.

[44] As I have resolved Issue #1 in favour of the applicants, I query whether their concerns about patrons from the competing food service units leaving their garbage behind in the Food Court seating area are still warranted. However, and in any event, I do not find that PCC 492 has breached the provisions of the *Condominium Act* by "allowing patrons of the competing food service units to use the Food Court seating area."

[45] To begin, there is nothing which PCC 492 could have done to stop the owners of these adjacent units from opening competing food businesses (as the units are presumably licensed for commercial use). By circulating the notice among all owners, and permitting the applicants to maintain their self-help remedy, I find that PCC 492 has taken reasonable steps to enforce the

terms of the declarations. At one point, PCC 492 suggested erecting barriers to limit access to the Food Court seating area from the adjacent competing food units. The applicants rejected that suggestion. Although that rejection is likely understandable given the practical problems created by the erection of such barriers, I do not find that PCC 492 treated the applicants unfairly with respect to PCC 492's duty to enforce the applicants' exclusive use of the Food Court seating area.

[46] The applicants raise a further issue with respect to an alleged breach of the declarations providing for a specific "designated use" for the unit owned by the applicant Karen Seto ("Seto"). Since August 31, 2006, the declarations have provided Seto's unit with a designated use for serving dim sum to the exclusion of other Mall units. According to Seto, after this application was commenced, one of the food service units adjacent to the Food Court seating area expanded its business and began selling dim sum as an additional menu item.

[47] PCC 492 points to Section 16(f)(ii) of the declarations which states that any owner may be considered a defaulting owner, if, for any period totaling more than 180 days in any calendar year, that owner does not conduct the business for which the unit has been designated. That section further provides that upon an owner becoming a defaulting owner, the owner's unit shall automatically lose its entitlement to the designated use established for the unit.

[48] The onus of proving that Seto lost her designated use with respect to serving dim sum clearly lies upon PCC 492. I note that in maintaining that Seto has lost her designated use, PCC 492 took the position on cross-examination that it had provided notice to Seto of same. Despite undertaking to produce a copy of this notice, no such document was produced.

[49] Seto's evidence is that she has never ceased serving dim sum and that she is thus still entitled to the designated use. On the record before me, I find that PCC 492 has not provided sufficient evidence to prove that Seto lost her designated use. According, with respect to the competing food service unit currently selling dim sum items, PCC 492 has permitted a breach of its declarations.

Issue #4: If PCC 492 has permitted or enabled breaches of its declarations, what is the appropriate remedy to cure those breaches?

[50] In *Muskoka Condominium Corporation No. 39 v. Kreutzweiser* 2010 ONSC 2463 (S.C.J.), Justice Hood held that section 17(3) of the *Condominium Act* "requires a condominium corporation to enforce the declaration and rules...these provisions are crucial to the orderly operation of condominiums and for the protection of condominiums unit owners and occupiers."

[51] In order to rectify the breach of Seto's designated use, PCC 492 must take positive steps to enforce its declarations and ensure that any competing food service units cease selling dim sum as a menu item to patrons. I therefore order PCC 492 to prepare and circulate an appropriate notice (much like PCC 492 did when dealing with the patrons of the competing food

service units occupying the Food Court seating area) to be distributed among all unit owners, including the competing food service unit owners. The notice shall re-state Seto's designated use and direct all unit owners to cease selling any dim sum products (i.e. products which compete with Seto's specific designated use).

[52] To the extent that any unit owner(s) continue to sell dim sum products in competition with Seto's specific designated use, PCC 492 shall be at liberty to bring an application before me, or another judge of this Court if I am unavailable, seeking a further enforcement order.

Issue #5: Have PCC 492's actions amounted to oppressive conduct as set out in the *Condominium Act*?

[53] The applicants move under section 135 of the *Condominium Act* for an order declaring the conduct of PCC 492 to be oppressive or unfairly prejudicial to their interests, together with an order rectifying any such oppressive or unfairly prejudicial conduct.

[54] As held in *Niedermeier v. York Condominium Corporation No. 50* 2006 CanLII 21788 (Ont. S.C.J.), the principles of oppression developed in the corporate law jurisprudence are apposite in determining what constitutes oppressive or unfairly prejudicial conduct in a condominium context. In the corporate law jurisprudence, the oppression remedy is designed to protect the reasonable expectation of the complaining party. In order to determine those reasonable expectations, the court must examine the conduct complained of, the nature of the relationship between the parties, the extent to which the subject conduct was foreseeable, and the detriment to the interests of the unit owners.

[55] There is little doubt that the applicants' reasonable expectations are primarily based upon PCC 492's declarations. However, as previously stated sections 12(c), 15, E(b)(iv) and E(m) were not easily reconcilable and, in my view, open to different interpretations.

[56] I do not agree with the applicants' submission find that PCC 492 "unilaterally implemented ostensible policies" which amounted to a breach of the applicants' reasonable expectations. In my view, it was not unreasonable for PCC 492 to have included the waste disposal charges in the Food Court area budget when such actions were mostly based upon poorly drafted declarations.

[57] I do not find PCC 492 to have unjustly ignored or treated the applicants' interests as being of no importance. PCC 492 is charged with taking the interests of all unit owners into consideration. As the applicants had remitted payment towards expenses charged under prior separate Food Court area budgets for years, there was no "change of (course of) conduct in management" which dramatically altered the relationship between the applicants and PCC 492.

[58] Accordingly, I am not satisfied that PCC 492 conducted itself in a manner that would be considered oppressive or unfairly prejudicial to the interests of the applicants. The answer to Issue #5 is therefore "no".

Issue #6: If PCC 492 has acted in an oppressive manner, what is the appropriate remedy?

[59] As I have found that PCC 492's actions did not amount to oppressive conduct, Issue #6 is thus moot.

Costs

[60] At the conclusion of the hearing, counsel for the parties jointly submitted that costs of this application ought to be awarded to the successful party in the all-inclusive amount of $25,000.00. Given my findings, it is arguable that success was divided.

[61] As such, I am permitting the parties to exchange and file written submissions to address the disposition of the costs of this application. Those submissions shall be filed in the course of the following timetable:

(a) The applicants shall serve and file their written costs submissions totaling no more than 2 pages (including a costs outline) within 10 business days of the release of these reasons; and

(b) The respondent shall thereafter serve and file its responding costs submissions, also totaling no more than 2 pages (including a costs outline) within 10 business days of the receipt of the applicants' costs submissions.

Diamond J.

Released: November 12, 2015

CITATION: Seto v. Peel Condominium Corporation No. 492, 2015 ONSC 6785
COURT FILE NO.: CV-14-508732
DATE: 20151112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KAREN SETO, PATRICK WONG and
PHILIP LAM

Applicants

– and –

PEEL CONDOMINIUM CORPORATION NO. 492

Respondent

REASONS FOR DECISION

Diamond J.

Released: November 12, 2015

CITATION: Seto v. Peel Condominium Corporation No. 492, 2016 ONSC 477
COURT FILE NO.: CV-14-508732
DATE: 20160120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KAREN SETO, PATRICK WONG and PHILIP LAM	*Bradley Chaplick*, for the Applicants
Applicants	
– and –	
PEEL CONDOMINIUM CORPORATION NO. 492	*Carol A. Dirks*, for the Respondent
Respondent	
	HEARD: WRITTEN SUBMISSIONS

COSTS ENDORSEMENT

DIAMOND J.:

[1] On November 12, 2015, I released my Reasons for Decision which allowed this application in part. I then invited counsel for the parties to serve and file written costs submissions pursuant to a fixed schedule.

[2] In response to the respondent's subsequent motion brought pursuant to Rule 59.06 of the *Rules of Civil Procedure*, I released an Endorsement on December 15, 2015 dismissing that motion, and renewed my request for written costs submissions from the parties pursuant to an amended schedule.

[3] I have now received and reviewed the costs submissions of both parties.

[4] Dealing first with the respondent's unsuccessful Rule 59.06 motion, I see no reason why costs should not follow the event. I do not find the presence of any of the traditional pre-requisites for awarding costs on a substantial indemnity basis. I have reviewed the applicants' costs outline and am satisfied with the rates and hours charged therein. I therefore award costs of

the respondent's Rule 59.06 motion fixed in the amount of $2,500.00 (inclusive of HST and disbursements) and payable to the applicants forthwith by the respondent.

[5] With respect to the costs of the application, at the conclusion of the original hearing, counsel for the parties jointly submitted that costs ought to be awarded to the successful party in the all-inclusive amount of $25,000.00. I advised counsel that given the partial relief granted in my Reasons for Decision, it was arguable that success was divided. This was the reason I permitted counsel to serve and file costs submissions and address my initial observation.

[6] The applicants submit that the most significant issue in dispute was the proper allocation of common element garbage expenses, and on that issue I found in their favour. The applicants further submit that notwithstanding my finding that the respondent's actions did not amount to oppressive conduct as set out in the *Condominium Act*, it was "normal and rather common" to request such addition relief which, according to the applicants, tends to "overlap" with the primary relief. In other words, their request for a finding of oppressive conduct was not unreasonable.

[7] The respondent submits that my initial observation was accurate, and as success was divided between the parties it would be appropriate to grant no costs in favour of either party. The respondent submits that this application was commenced without any prior notification from counsel for the applicants and on the heels of extensive efforts to negotiate a resolution to the underline dispute(s). The respondent further submits that in addition to the issue of the allocation of common element garbage expenses, the applicants unilaterally chose to add and pursue a number of other issues which served to complicate and lengthen the proceeding. As the applicants were mostly unsuccessful in pursuing those additional issues, the respondent submits that success was truly divided between the parties.

[8] Overall, the Court is required to consider what is "fair and reasonable" in fixing costs with a view to balancing compensation of a successful party with a goal of fostering access of justice: *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.).

[9] Pursuant to Rule 57.01 of the *Rules of Civil Procedure*, the Court may consider the following factors when exercising its discretion to award costs:

> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

[10] In my view, there is some merit to the applicants' submission that the issue of allocation of common element garbage expenses was the "driving issue" on this application. While the added issues did not ultimately result in much substantive relief, most of them did overlap with the primary request for relief associated with the garbage disposal expenses.

[11] That said, I also agree with the respondent that the focus of its responding materials had to shift in order to address the applicants' allegations that it acted in an unfair an oppressive manner. Although bad faith is obviously not a pre-requisite to a finding of oppression, I do not hesitate in concluding that the respondent was justified in securing the necessary evidence to respond to and defend the allegations of oppressive conduct.

[12] In the circumstances of this case, I believe that the applicants' costs ought to be reduced to reflect a just and fair result given the unproven allegations of oppressive conduct. I am not implementing a distributive costs award in the sense of proportioning costs to each of the individual issues raised in this application. I am merely awarding what I consider to be fair and reasonable in the circumstances.

[13] I therefore award the applicants costs of this application payable by the respondent in the all-inclusive amount of $13,000.00.

Diamond J.

Released: January 20, 2016

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COURT FILE NO.: CV-14-508732
DATE: 20160120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KAREN SETO, PATRICK WONG and
PHILIP LAM

Applicants

– and –

PEEL CONDOMINIUM CORPORATION NO. 492

Respondent

COSTS ENDORSEMENT

Diamond J.

Released: January 20, 2016