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Toronto Standard **Condominium Corp**. No. 1633 v. Baghai Development Ltd.

Toronto Standard **Condominium Corporation** No. 1633, Applicant (Respondent/Appellant by way of cross-appeal) and Baghai Development Limited and Rabba Fine Foods Inc., Respondents (Appellants/Respondents by way of cross-appeal)

Ontario Court of Appeal

Janet Simmons J.A., M. Rosenberg J.A., Robert P. Armstrong J.A.

Heard: January 3, 2012
Judgment: June 19, 2012
Docket: CA C52283

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Subject: Property

Real property.

***Robert P. Armstrong J.A.*:**

1 This appeal arises from a relatively simple, fact-specific dispute: can a grocery store in a commercial condominium unit display its merchandise on the adjacent sidewalk? The rules of the **condominium corporation** say no. The terms of grocery store's lease say yes. The parties disagree over which document governs, and brought competing applications in the Superior Court to resolve the issue.

2 Following a protracted legal battle, the application judge held in the **condominium corporation's** favour. She proceeded to award the **condominium corporation** roughly half of what it sought in costs. The grocery store and its landlord appeal on the merits. The **condominium corporation** seeks leave to appeal the costs award.

3 As I will explain, I agree with the application judge that the **condominium corporation's** rules take precedence over the grocery store's lease. I would therefore dismiss the main appeal. On the cross-appeal, it appears that the application judge discounted counsel's hourly rates significantly because she thought the amounts claimed were excessive. But she did not clearly explain how she arrived at the costs award, which makes it impossible for this court to

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assess its reasonableness. I conclude, reluctantly given the already lengthy history of these proceedings, that leave to appeal costs should be granted and the matter should be remitted to the application judge for a reconsideration if the parties cannot resolve it themselves.

Background

The parties

4 Baghai Development Limited ("Baghai") owns a number of commercial units in a mixed-use condominium project in the Yonge-Sheppard area of Toronto. Baghai leases five ground-floor units to Rabba Fine Foods Inc. ("Rabba"), a grocery store. Toronto Standard **Condominium Corporation** No. 1633 ("TSCC") operates the condominium complex.

The dispute

5 From the time the condominium complex opened in 2005, Rabba displayed fruits and vegetables on two carts on the sidewalk in front of its store. Rabba also occasionally displayed merchandise, including flowers and seasonal items such as pumpkins and firewood, directly on the sidewalk next to the produce carts.

6 TSCC objected to this practice at the outset. It argued that Rabba's outdoor displays violated the **condominium corporation's** declaration and rules prohibiting the use of common elements, including sidewalks, for anything other than ingress and egress. Baghai and Rabba maintained that their lease agreement expressly allowed Rabba to display its wares on the sidewalk. The relevant portions on these documents are set out in an appendix at the end of these reasons.

7 In 2005, and again in 2007, the parties agreed that Rabba could continue to use the sidewalk to display merchandise, provided certain conditions were met. But there were still complaints, and in 2009, TSCC brought an application against Baghai and Rabba for compliance with the declaration and rules of the **condominium corporation** pursuant to s. 134 of the *Condominium Act, 1998*, S.O. 1998 c. 19 (the "Act").

8 Baghai and Rabba opposed the application on three bases. First, they argued that the application was barred by the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Second, they argued that the registration of Rabba's lease bound TSCC and all unit holders in the condominium. Third, they argued that a trial was required to determine whether TSCC was bound by the terms of the 2005 and 2007 agreements to allow Rabba to continue using the sidewalk for display.

Proceedings before the Application Judge

9 The hearing before the application judge proceeded in three stages.

(1) The first stage: spring 2010

10 TSCC's application was heard on May 26 and 27, 2010. In an endorsement dated June 10, 2010, the application judge found that Rabba's use of the sidewalk was expressly prohibited by TSCC's declaration and rules.

11 On the limitations issue, the application judge acknowledged that TSCC had complained to both Rabba and Baghai about the outdoor displays as early as 2005. However, she concluded that TSCC's application was not time-barred. She explained, at para. 5:

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> The undisputed evidence establishes very clearly that the manner in which Rabba has been using the common elements for display purposes is not uniform or constant, and has fluctuated since Rabba's use first came to the applicant's attention and became the subject of the applicant's complaints to Baghai from 2005 to the present time. *As such, Rabba's impugned use of the common elements is not an isolated act but a series of different and separate uses of the sidewalk for the purposes of displaying its merchandise in various ways, each of which constitutes fresh breaches of the rules, thus giving rise to separate causes of action by the* ***condominium corporation.***
>
> [Emphasis added.]

12 The application judge also rejected the related argument that TSCC had waived its right to demand compliance with its declaration, rules and by-laws. In so holding, she relied on s. 33 of the TSCC's declaration, which states:

> The failure to take action to enforce any provision contained in the Act, the Declaration, the by-laws or the Rules of the Corporation, irrespective of the number of violations or breaches which may occur, shall not constitute a waiver of the right to do so thereafter, nor shall same be deemed to abrogate or waive any such provision.

13 The application judge then considered, and rejected, the argument that the registration of the notice to lease was binding on TSCC and all unit-owners in the condominium. She explained, at para. 13:

> The notice to lease expressly provides that Rabba's right to occupy and use the common element sidewalk for the purpose of displaying its merchandise is subject to compliance with all applicable laws, including ... the **condominium corporation's** declaration, by-laws and rules.

14 She concluded, at para. 17: "Having failed to register and disclose Rabba's alleged right under the lease, Baghai cannot impose its private agreement with Rabba on the **condominium corporation** and its unit-owners."

15 Despite this, the application judge was nonetheless persuaded that oral evidence was required to determine what impact, if any, the 2005 and 2007 agreements had on Rabba's right to continue displaying its merchandise on the sidewalk. She directed a trial on two issues:

> (i) Whether TSCC entered into binding agreements with Baghai and/or Rabba to allow Rabba the use of the sidewalk to display its goods, or if TSCC should be estopped by its acts or omissions from prohibiting Rabba the use of the sidewalk; and
>
> (ii) If there was a binding agreement, whether Baghai and/or Rabba breached that agreement by the manner in which Rabba displayed its goods.

(2) The second stage: fall 2010

16 The trial of the issues was scheduled for November 15 and 16, 2010. Five days before the trial was to start, Baghai filed an application for relief from oppression under s. 135 of the Act. In the application, Baghai claimed that TSCC acted oppressively by failing to honour the agreements with Baghai and Rabba to permit the sidewalk displays.

17 The trial of the issues proceeded as scheduled on November 15 and 16 2010. One additional hearing day was required, on December 8, 2010.

18 The application judge delivered her endorsement in respect of the second stage on May 13, 2011. She concluded that neither the 2005 nor the 2007 agreements bound TSCC to permit Rabba to display its merchandise on the sidewalk. She also held that Rabba had breached its obligation not to display merchandise on the sidewalk. Finally, she

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refused Baghai's request to reconsider the limitations issue, and confirmed her earlier decision that the limitation period had not expired.

The effect of the 2005 and 2007 agreements

(a) The 2005 Agreement

19 The 2005 agreement was described by one of TSCC's witnesses as a "gentleman's agreement" and an "informal, good faith gesture" meant to ensure a positive working relationship between the condominium board and Rabba. The application judge accepted this evidence. She found, at para. 40, that the 2005 agreement was a "working arrangement to allow Rabba to put display stands in front of its store in exchange for Rabba giving up its advertising rights on its windows." She characterized the 2005 agreement, at para. 42:

> I agree with [TSCC's] characterization that the agreement represented a compromise to accommodate a valued tenant but that it was clearly an arrangement that was subject to termination if Rabba did not maintain its stands in a neat condition or if Rabba placed anything on the common element sidewalk.

20 The application judge then turned her mind to whether there had been any breaches of the 2005 agreement. She found that over the course of the next two years, there were a number of complaints that Rabba was not holding up its end of the bargain. The complaints were not necessarily related to the stands, but rather with Rabba placing boxes of pumpkins, apples, bread bins, milk cans, charcoal, barbeque starters, fireplace logs and flowers on the sidewalk. TSCC expressed concerns both about the safety of these items blocking the sidewalk, and about their unsightly appearance.

21 TSCC raised these issues with Baghai and Rabba and demanded that all displays be removed. In a memorandum dated May 10, 2007, Shane Baghai, the principal of Baghai Development Limited, conceded that Rabba had failed to comply with the 2005 agreement:

> I visited Rabba's store today and I have to agree that the displays are excessive, poorly displayed, and with inappropriate items such as barbeque starters (hazardous accelerants, charcoal, etc.). Furthermore, the displays had occupied more than 50% of the sidewalk and pedestrian row.
>
> I spoke to Jack Rabba last week, who sounded extremely understanding, who promised to talk to Sam, the store manager. Apparently, Sam has not taken heed.

22 The application judge concluded, at para. 61, that the 2005 agreement was breached by Rabba's "excessive" and "inappropriate" displays.

(b) The 2007 Agreement

23 In the spring of 2007, the parties tried again to resolve the dispute. As a result of a meeting on May 30, 2007, the parties reached an agreement which provided, in part:

- Rabba agreed to specific limits on the location, height, and contents of its sidewalk display stands;
- Rabba agreed not to store any racks, pallets, boxed or shipping-related items on the sidewalk, other than for a two-hour unloading period;
- There would be a 60-day trial period to allow the parties to gauge the level of cooperation and goodwill;

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• The condominium Board had to approve the terms of the agreement, and any resulting permanent agreement was to be approved by the Board, in writing, and signed by all of the parties; and

• In the event that the agreement was "flagrantly violated", TSCC could require the immediate removal of all items outside Rabba's store.

24 Rabba apparently complied with this arrangement during the trial period. However, by the fall of 2008, the evidence suggests that Rabba was in breach of its 2007 agreement for the same kinds of violations as before. The application judge held, at para. 99:

> The evidence establishes that, while not as "flagrant" as before, after May 30, 2007, Rabba's displays continued to be messy and Rabba continued to place and leave items on the common element sidewalk and not on the display stands (other than temporarily for the purpose of receiving deliveries) in breach of its agreement with the applicant and Baghai.

(c) Were the agreements enforceable against TSCC?

25 The application judge concluded that Rabba had breached the 2005 agreement. That agreement was subsequently replaced by the 2007 agreement, which Rabba also breached. The application judge further concluded that, regardless of the latter breach, the 2007 agreement was expressly subject to permanent approval by the TSCC board. Since that approval was never sought or obtained, the agreement was not enforceable.

(d) The oppression application

26 In its oppression application, Baghai sought to require TSCC to enter into an agreement that would permit Rabba to display its merchandise in front of its store. It relied on s. 98 of the Act, which provides in part:

> An owner may make an addition, alteration or improvement to the common elements that is not contrary to this Act or the declaration if,
>
> (a) The board, by resolution, has approved the proposed addition, alteration, or improvement....

27 Baghai relied on the evidence of two Board members who testified that if they had known what needed to be done to enter into a permanent agreement, the Board would have done so. Baghai claimed that the Board's failure to honour its agreements constituted oppressive conduct under s. 135 of the Act.

28 In light of all the circumstances, including the fact that a permanent agreement was never reached, the application judge concluded that TSCC's conduct was not oppressive. Further, she held that there was no agreement to enforce in any event. She explained, at para. 124:

> Although Baghai argues that the applicant should be compelled to "honour its agreement", there is no agreement that this court can enforce. In the circumstances of this case, where there are so many variables to be negotiated and concluded, this court has no jurisdiction to compel the parties to negotiate a permanent and an enforceable agreement or arrangement in accordance with the Act and the applicant's Declaration, By-laws and Rules.

(e) The limitations issue revisited

29 Finally, Baghai submitted that as a result of further evidence provided at the trial of the issues, as well as an intervening decision of the Divisional Court, the application judge should reconsider and change her decision in

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respect of the limitation period. She declined to do so.

(3) The third stage: spring 2011

(a) The parties' submissions

30 The third stage of the proceedings before the application judge concerned costs. TSCC claimed partial indemnity costs of $172,373.01 and full indemnity costs of $199,020.97. TSCC argued that it was entitled to the higher amount by virtue of s. 134(5) of the *Condominium Act, 1998*, which 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....*
>
> [Emphasis added].

31 Baghai and Rabba acknowledged that, as the successful party, TSCC was entitled to an award of costs. However, they disputed TSCC's entitlement to full indemnity costs, and also argued that the amounts claimed were excessive. They suggested an award of $80,000, plus or minus disbursements, was appropriate.

(b) The application judge's June 14, 2011 costs endorsement

32 The application judge began her analysis by reviewing the principles established by this court in *Metropolitan Toronto* ***Condominium Corp****. No. 1385 v. Skyline Executive Properties Inc.* (2005), 197 O.A.C. 144 (C.A.). In that case, Doherty J.A. explained the distinction between an award of costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43, and "additional actual costs" under s. 134(5) of the Act. He wrote, at para. 8:

> "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.
>
> [Emphasis added.]

33 Justice Doherty also drew a distinction between obtaining an order and enforcing an order, and concluded that only costs related to obtaining an order can be added to the losing party's common expenses pursuant to s. 134(5).

34 Applying these principles to the case before her, the application judge held that TSCC's "additional actual costs" excluded any amount spent defending Baghai's oppression application, because those costs did not relate to obtaining the compliance order.

35 The application judge went on to observe that the only "additional actual costs" submitted by TSCC were the fees and disbursements charged by counsel in excess of the partial indemnity costs. She held, at para. 14, that the determination of these "additional actual costs" was subject to the court's discretion under s. 131(1) of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. She explained, at para. 15:

> In other words, section 134(5) of the *Condominium Act, 1998*, does not allow the applicant to expend or authorize

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its counsel to expend any amount and then ask that it be completely indemnified for costs that are otherwise disproportionate and unreasonable. The Court retains its discretion to determine what amount of costs is fair and reasonable and to award no costs where appropriate.

36 The application judge accepted that TSCC was entitled to full indemnity for counsel's appearances at cross-examinations and the various court hearings. However, she concluded that the amounts claimed for preparation and research (over 330 hours in total) were "overkill" given the relative simplicity of the legal issues, on the one hand, and the expertise of TSCC's counsel, on the other. She explained, at para. 22, that TSCC could have avoided much of the expenses claimed if it had tried to negotiate or arbitrate a solution, "instead of embarking on a scorched earth campaign."

37 Ultimately, the application judge fixed TSCC's costs and "additional actual costs" at $95,000, including disbursements and taxes.

(b) The application judge's addendum of June 22, 2011

38 The application judge released her costs endorsement on June 14, 2011, before she had received TSCC's reply submissions. She subsequently reviewed those submissions and released an addendum on June 22, 2011.

39 In the addendum, at para. 5, the application judge reiterated that TSCC was entitled to "full indemnity for its fair and reasonable costs related to obtaining the compliance order." She also held that TSCC was entitled to "fair and reasonable partial indemnity costs" for its successful defence of Baghai's oppression application. The dockets TSCC provided revealed that counsel spent $5,846.00 defending the oppression application. (These dockets do not appear to have been included in the appeal materials.) The application judge added partial indemnity fees of $1,500 on this amount.

40 The application judge also accepted that TSCC spent an additional $3,918.11 on photocopying related to the compliance order. She reimbursed TSCC in full for this amount as part of its "additional added costs".

41 The application judge therefore fixed TSCC's costs at $100,418.11, including taxes and disbursements.

The Appeal and The Cross-Appeal

42 Baghai and Rabba raise three issues on appeal:

(1) Did the application judge err by failing to find that the two-year limitation period had expired?

(2) Did the application judge err by concluding that the waiver provisions in TSCC's declaration trump the *Limitations Act, 2002*?

(3) Did the application judge err by failing to grant the cross-application for relief from oppression?

43 TSCC seeks leave to appeal the costs order. Its principal submission is that that the application judge erred by failing to order full indemnity costs, in accordance with s. 134(5) of the Act as interpreted by this court in *Skyline*.

44 I will address each issue in turn.

Analysis: the Main Appeal

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(1) Did the application judge err by failing to find that the two-year limitation period had expired?

45 Baghai submits that the application judge erred by finding that the various breaches of the condominium's declaration, by-laws and rules were not uniform or constant, thereby constituting fresh breaches giving rise to separate causes of action. Rather, Baghai submits, the limitations clock started running in 2005 when TSCC first raised objections to Rabba's use of the sidewalk.

46 In the alternative, Baghai submits that even if the evidence established that there were a series of separate breaches giving rise to distinct causes of action, TSCC was only entitled to pursue those breaches that occurred within the applicable two-year limitation period. Since TSCC's application was filed on September 2, 2009, only those alleged breaches that occurred after September 2, 2007, were actionable.

47 TSCC responds that the *Limitations Act, 2002*, does not apply because the basis of its application does not amount to a "claim" within the meaning of that statute. The application judge does not appear to have addressed this question.

48 In the alternative, TSCC submits that if a limitation period applies here, it is the ten-year limit for adverse possession claims set out in the *Real Property Limitations Act*, R.S.O. 1990, Chapter L. 15.

49 In the further alternative, TSCC submits that Baghai and Rabba were in a continuing state of breach, and that there is no time limit for compliance with the terms of the *Condominium Act, 1998*.

50 Finally, TSCC submits that in August 2009, Rabba moved a display table on the sidewalk and affixed it with a lock. This constituted a new and actionable breach, to which TSCC responded the following month by bringing its application.

51 Assuming that the *Limitations Act, 2002*, does apply and that the relief sought falls within the basic two-year period, Baghai's appeal on this ground still fails. There was evidence before the application judge to support her finding that the limitation period had not expired because of the repeated, and varied, nature of Rabba's misconduct. Even if only those breaches that occurred after September 2, 2007 were actionable, those incidents alone were more than sufficient to entitle TSCC to the relief requested.

(2) Did the application judge err by finding that the waiver provisions in TSCC's declaration trump the Limitations Act, 2002?

52 Baghai submits that the application judge erred by essentially concluding that the general waiver clause in s. 33 of the condominium declaration trumps the limitation periods mandated in the *Limitations Act, 2002*. In support of this submission, Baghai points to s. 22(1) of the *Limitations Act, 2002*, which provides: "A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6)." None of the exceptions apply in this case.

53 TSCC responds that there is no conflict between s. 33 of its declaration and s. 22 of the *Limitations Act, 2002*, because the latter does not apply to compliance proceedings brought under the *Condominium Act*.

54 As I have already explained, I am satisfied that the conduct complained of here falls within the statutory two-year limitation period. Accordingly, it is unnecessary for me to decide this issue.

(3) Did the application judge err by failing to grant the cross-application for an oppression remedy?

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55 In support of its oppression claim, Baghai submits that both it and Rabba had a reasonable expectation that the 2005 agreement was valid and binding. Baghai further argues that the application judge's distinction between "permanent" and "temporary" agreements is meaningless, because all the parties clearly thought the agreement was valid. Baghai submits that if the agreements were unenforceable, it is only because TSCC failed to make them enforceable — i.e. by seeking Board approval to make them permanent. This, Baghai argues, is oppressive behaviour.

56 Baghai also argues that the application judge erred by failing to differentiate between Rabba's permitted and non-permitted uses of the sidewalk. Baghai submits that the 2005 and 2007 agreements allowed Rabba to display its merchandise on stands in front of the store. The agreements did not allow Rabba to store all manner of items (e.g. bread skids and shipping pallets) outside. In fact, Baghai argues, it did not countenance the latter actions.

57 In my view, there was ample evidence to support the application judge's conclusion that TSCC did not act oppressively against Baghai and Rabba. I also accept that the evidence supported the application judge's finding in respect of the lack of a permanent agreement and therefore her conclusion that there was no agreement to enforce. Finally, she was entitled to conclude that the use of the display stands and of the adjacent sidewalk space were not separate issues and that both kinds of display were prohibited under the declaration, by-laws and rules of the **condominium corporation**.

Analysis: the Cross Appeal

58 Counsel for TSCC raised a number of issues on the costs appeal. However, I find it necessary to deal with only two of the issues to dispose of the costs appeal:

(1) Did the application judge err by failing to award full indemnity costs in respect of the oppression application?

(2) Did the application judge err in her approach to "additional actual costs" under s. 134(5) of the Act?

(1) Did the application judge err by failing to award full indemnity costs in respect of the oppression application?

59 TSCC submits that the oppression application was no more than a defence to the compliance application, and its costs beyond partial indemnity rates in responding to the oppression application should therefore be characterized as "additional actual costs" to which full indemnity rates apply.

60 I agree with the application judge's analysis on this point. While there is obviously some overlap in respect of the two applications, the oppression application was a separate and independent application that stood on its own pursuant to s. 135 of the Act. The dismissal of the oppression application does not attract an order for "additional actual costs" under s. 134(5) of the Act.

(2) Did the application judge err in her approach to "additional actual costs" under s. 134(5) of the Act?

61 To repeat, s. 134(5) of 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.]

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62 As explained above, this court's decision in *Skyline* established that "additional actual costs" under s. 134(5) include the legal costs properly owed by the **condominium corporation** to its own lawyers in obtaining a compliance order, above and beyond the amounts awarded by the court or an assessment officer.

63 TSCC submits that the application judge confused an award of costs with "additional actual costs" and treated them as if they were the same. According to TSCC, if the application judge had applied *Skyline*, she would have simply made a partial indemnity costs award in respect of the proceedings before her. TSCC would then be free to charge the difference between the application judge's costs award and TSCC's costs of its own lawyer (full indemnity costs) to the Baghai units.

64 However, counsel concedes that he did not request or suggest that the application judge adopt that procedure. Rather, he simply submitted a costs outline listing both partial and full indemnity rates, and asked the application judge to award TSCC's costs on a full indemnity basis throughout. It is difficult, after the fact, to say that the application judge should have done something that she was not asked to do.

65 That said, I conclude that the application judge erred in principle by failing to explain how she arrived at the quantum of costs on the compliance application.

66 As explained above, TSCC calculated its costs on a partial indemnity scale at $172,373.01 and on a full indemnity scale at $199,020.97. Both amounts included disbursements of $11,313.01. The only difference between the partial indemnity costs and the full indemnity costs was counsel's hourly rates.

67 The application judge explained her approach to costs on the compliance application at paras. 13-15 of her costs endorsement:

> [13] ...I must assess the applicant's partial indemnity costs and determine whether the applicant has any "additional actual costs" related to the obtaining of the compliance order against Baghai and Rabba. In the present case, the only "additional actual costs" submitted are the legal fees and disbursements of Fine & Deo, the applicant's counsel.
>
> [14] As the Court must determine the applicant's "additional actual costs", *the applicant's entitlement to any "additional actual costs" under section 134(5) of the Condominium Act, 1998 is necessarily subject to the Court's exercise of its discretion under section 131(1) of the Courts of Justice Act and to the application of the appropriate costs principles and factors set out under Rule 57.01 of the Rules of Civil Procedure and in the relevant jurisprudence.*
>
> [15] In other words, as noted by [counsel for Baghai] ..., section 134(5) of the *Condominium Act, 1998* does not allow the applicant to expend or authorize its counsel to expend any amount and then ask that it be completely indemnified for costs that are otherwise disproportionate and unreasonable. The Court retains its discretion to determine what amount of costs is fair and reasonable and to award no costs where appropriate.
>
> [Emphasis added.]

68 The application judge went on to hold that the amount TSCC spent on the compliance order was excessive given that the legal issues were relatively straightforward, and its counsel, Mr. Fine, is an expert in condominium law.

69 For example, she described the time counsel spent preparing the application materials (some 196 hours in total) as "overkill". Similarly, she found that the nearly 36 hours counsel spent on legal research was not warranted.

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70 The application judge presumably reduced the costs order in light of these assessments, but she did not indicate what the deduction was, nor did she indicate whether she applied full indemnity rates before factoring in that deduction.

71 The only references in the application judge's endorsement to the assessment of quantum on a full indemnity scale are in paras. 19(iv) and (v):

> The 34.4 hours for the attendance at the 7 cross-examinations and 1.5 hours at triage court hearing are all related to obtaining the compliance order. The time spent is not excessive but fair and proportionate. I have included this time on a full indemnity basis.
>
> The applicant is entitled to full indemnity for its counsel's court attendances on November 13, 2009, May 26, 27, November 15, 16 and December 8, 2010, which amount to about 40 hours. The hours of preparation claimed for those attendances in excess of 100 hours ... are excessive for a senior practitioner like Mr. Fine who is an expert in condominium law.

72 Unfortunately, it is not possible to discern from the above paragraphs what deduction was applied for the "excessive" hours of hearing preparation.

73 Ultimately, the application judge ordered Baghai and Rabba to pay costs of $95,000. This was subsequently increased to $100,418.11 when additional photocopying costs and partial indemnity costs of defending the oppression application were included. This was roughly half of what TSCC spent on the application.

74 In arriving at this figure, it appears that the application judge essentially came up with what she thought was a reasonable amount for TSCC to have paid its lawyers to obtain the compliance order. There is no arithmetic to support the amount of $95,000. This may have been a reasonable number, but the calculation of it is not apparent from the application judge's endorsement.

75 It is trite law that a trial judge has wide discretion to award costs. An appellate court will not interfere unless the trial judge considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

76 Ordinarily, an appellate court will defer to a trial judge's decision to reduce a bill of costs because the successful party overspent on the litigation. This holds true even when the trial judge does not "show her work" — that is, when the final number is not accompanied by a detailed breakdown of how it was arrived at. Rather, where the record discloses a proper basis for the judge's exercise of discretion, the absence of reasons, on its own, does not justify appellate intervention: *McPhee v. Canadian Union of Public Employees*, 2008 NSCA 104, (2008), 270 N.S.R. (2d) 265 (C.A.), leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 546.

77 The difficulty in this case is the application judge was not simply tasked with making an award of costs pursuant to s. 131 of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure*. She was also asked and acceded to the request to make an order for "additional actual costs" under s. 134(5) of the *Condominium Act, 1998*. Both types of costs orders must be reasonable, but the measure of reasonableness differs with each. In my view, this is where the application judge fell into error.

78 Justice Doherty explained the distinction in *Skyline*, at para. 45:

> 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

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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.

79 In the above reference, Mr. Orkin says the following:

> There is a clear distinction between a judge fixing the costs of a successful litigant and an assessment officer assessing the fees of the successful litigant's counsel. A judge fixing costs must determine what is reasonable for the losing party to pay. *By contrast, an assessment officer conducting a solicitor-client assessment must determine what is reasonable for the client to pay in light of the circumstances between the solicitor and the client.* These analyses, it has been held, can lead to different results, especially where the judge fixes fees based, in part, on docketed time and the assessment officer assesses fees by applying *quantum meruit*.
>
> [Emphasis added.]

80 At para. 14 of her costs endorsement, the application judge held that TSCC's entitlement to "additional actual costs" was "necessarily" subject to the court's exercise of discretion under s. 131(1) of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure*. In the addendum to her costs endorsement, at para. 5, the application judge noted that TSCC was entitled to "full indemnity *for its fair and reasonable costs* related to obtaining the compliance order" (emphasis added). But she does not explain in either passage whether the costs ordered were "fair and reasonable" for Baghai and Rabba to pay TSCC (as with an award of costs), or whether they were "fair and reasonable" for TSCC to pay its own lawyers (as with an award under s. 134(5)). Only the latter assessment was relevant.

81 If the application judge assessed the reasonableness of the "additional actual costs" by reference to what Baghai and Rabba could be expected to pay the winning party, TSCC, this was an error in principle. If the application judge assessed the reasonableness of the "additional actual costs" by reference to what TSCC could be expected to pay its own counsel, she failed to explain how she arrived at what she thought was the right amount. This, too, was an error in principle.

82 I conclude reluctantly, given the already drawn-out nature of the litigation, that the matter of costs should be remitted to the application judge for reconsideration. While the appropriate scale of costs for the application judge to consider would ordinarily be restricted to the partial indemnity scale, counsel, as I have already observed, requested the judge to make an award that includes "additional actual costs". While this should not be taken as the normal course, I would make such an order in the circumstances of this case in order to avoid further prolonged litigation.

83 The reconsideration should start from the premise that TSCC is entitled to be fully indemnified for having obtained the compliance order. The application judge must then explain what amounts, if any, should be deducted based on the principle of *quantum meruit*.

84 In remitting the matter back to the application judge, I emphasize that while s. 134(5) of the Act may entitle TSCC to more than it would get in an ordinary award of costs, the provision for "additional actual costs" does not automatically lead to whatever amount is claimed. Section 134(5) does not give counsel licence to spend the client's money with impunity.

85 As I have just explained, there is a difference between the quantum of costs a losing party is reasonably expected to pay to the successful party, and the quantum of costs the successful party is reasonably expected to pay its own lawyer. But reasonableness remains the touchstone of both analyses.

Disposition

86 I would dismiss the appeal on the merits in respect of the compliance application and the oppression applica-

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tion. I would grant leave to appeal the costs award and allow the costs appeal. I would refer the costs back to the application judge for reassessment. In light of the already protracted history of this dispute I would urge the parties to sit down and attempt to settle the costs, and, failing which, to seek an expedited date for this matter.

Costs of the main appeal

87 In accordance with Skyline, TSCC is entitled to partial indemnity costs for the costs of responding to the appeal of the compliance order, plus additional actual costs in accordance with s. 134(5) of the Act. In respect of the oppression application appeal, TSCC is entitled to partial indemnity costs.

88 If the parties cannot agree on what these costs should be, then counsel for TSCC should submit a new bill of costs and costs submissions limited to seven pages, double-spaced, within 15 days of the release of these reasons. Counsel for Baghai and Rabba can then file a response within ten days, limited to seven pages, double-spaced.

Costs of the cross-appeal

89 To a great extent TSCC was responsible for the problems associated with the costs order made by the application judge. In these circumstances I would make no costs award in respect of the cross-appeal.

M. Rosenberg J.A.:

I agree

Janet Simmons J.A.:

I agree

Appendix

TSCC No. 1633 Declaration

Section 12(a): Each owner may make reasonable use of and has the right to occupy and enjoy the whole or any part of the common elements, and each owner has the right to make reasonable use of, and has the right to enjoy and exclusive use common element area which has been designated to his Unit in Schedule "F", subject to any conditions and restrictions set out in the Act, the Declaration, the Corporation's by-laws, and the Rules and easement and rights registered against the property. However, no condition shall be permitted to exist and no activity shall be carried out in the common elements that is likely to damage the property or that will unreasonably interfere with the use or enjoyment by other Owners of the common elements and the other Units....

Section 12(b): No Owner shall make any installation or any change or alteration to an installation upon the common elements, or maintain, decorate, alter or repair any part of the common elements, except for maintaining those parts of the common elements which he has a duty to maintain, without obtaining the written approval of the Corporation in accordance with the Act, unless otherwise provided for in this Declaration.

Section 18(c)(4): Notwithstanding any provision in this Declaration or in any by-laws or Rules hereafter passed or enacted to the contrary, an owner of a retail Unit, its tenant and their designated agents and/or employees shall not be permitted access to any portion of the common elements save and except to gain access to and egress from his retail Unit....

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Schedule "A" of By-Law No. 1

Section 9: The sidewalks, entry, passageways, walkways and driveways used in common by the owners shall not be obstructed by any of the owners or used by them for any purpose other than for ingress and egress to and from their respective units.

Offer to lease

Section 8: ...[T]he landlord specifically grants to the Tenant an exclusive and irrevocable licence to use the area outlined in yellow on Schedule "A" attached hereto, at no extra charge to the Tenant, for the purpose of the seasonal display of fresh produce, fresh flowers, live plants and other temporary sales kiosks in such a manner as not to impede the safe flow of pedestrian traffic around the area, and subject to compliance with all applicable laws.

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