COURT FILE NO.: 15-SC - 134445]
DATE: May 16, 2016

ONTARIO
SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

BETWEEN:

HUI WU	Self - Represented
CARLETON CONDOMINIUM CORPORATION	N. Houle Nelligan, O'Brian Payne LLP

HEARD at Ottawa, Ontario December 2, 2015:

REASONS FOR COST AWARD

Deputy Judge I.G. Whitehall, Q.C.

Background

1. The plaintiff brought this action under section 55 of the Condominium Act, 1988 c.19 (hereafter the "Act") to compel the Corporation to produce documents in addition to the documents already produced in response to the plaintiff's request

2. Section 55 requires the corporation keep and make available to co-owners records.

3. In my decision on the merits, I concluded that the plaintiff was not entitled to relief as in my view the Corporation proceeded reasonably in producing its records and further that electronic addresses are not part of an address of service within the meaning of section 55.

4. In light of the unique nature of the case asked the parties to make submission addressing the question of costs.

The position of the parties

5. The plaintiff submits that each party should bear its costs. The plaintiff's primary points are that success was divided because some documents were disclosed in the course of the trial and but for the trial those documents would not have been produced. Second, the plaintiff says that the defendant should be penalized because of its alleged failure to comply with the Order of McCarthy D.J. She says that the will stay statement of Mr. Khan was not sufficiently detailed. Finally, the plaintiffs argues that the case was one of first impression clarifying whether e mail addresses form Section 47(2) records and therefore the result, clarifying the law benefited both parties.

6. The defendant seeks $21,290.90 costs and disbursements, including HST on a full indemnity basis, chiefly on the grounds on two grounds, the indemnity provision of the Corporations by laws and the alleged unreasonable behavior of the plaintiff in bringing the action. The by-laws provide in part:

> *Each owner shall indemnify and save harmless the Corporation from and against any loss, costs, damage, injury, claim or liability whatsoever which the Corporation may suffer or incur (including all related legal costs incurred by the Corporation) resulting from or caused by a breach of the Act or the Corporation's Declaration, By-laws or Rules (as amended from time to time). or by any act or omission, of such owner, his/her family, guests, servant: agents or occupants of his/her unit.*

7. The defendant points to the decision of my colleague R.H. Gouin D.J. in *Wexler v. Carleton Condominium Corporation #28,* 264 ACWS (3d) 248, 2016 CarswellOnt

6003 for the proposition that absent indemnity the other co-owners bear the cost of the litigation when the condominium corporation was unsuccessfully sued.

8. The defendant also argues that the plaintiff acted unreasonably in bringing this lawsuit and points to the decision *Carleton Condominium Corporation No 396 v. Burdet,* 2015 ONSC 1361 and *McBride Metal Fabricating Corp. v. H & W Sales, 92002*) 59 OR (3d) 97 for the proposition that improper conduct during the action as well as unproven allegations of fraud, bad faith and misconduct are sufficient reasons to award costs on a full indemnity basis.

Discussion

9. As the defendant makes its submission on two alternative bases. I start with discussing the argument that by reason of the indemnity agreement it is entitled to its full legal costs.

10. The leading authority on the point appears to be the decision of. Quigley J. in *Toronto Common Element Condominium Corporation No. 1508 v. William Stasyna,* 2012 ONSC 1504. The case though different on its facts set out the considerations the court should apply in face of a provision such as relied in the present case. At paragraph 82 he stated

> *Moreover, whatever rights the Corporation thinks it may have reserved for itself in the Declaration relative to costs, the fundamental fact is that Article V of TCECC No. 1508's Declaration does not displace this court's discretion to award costs. Our Court of Appeal clearly determined in Bossé v. Mastercraft Group Inc. (1996), 1995 CanLII 931 (ON CA), 123 D.L.R. (4th) 161 (C.A.), leave to appeal to the S.C.C. refused, [1995] S.C.C.A. No. 205, that a contractual right to recover legal fees is subject to judicial discretion. The Court observed at para. 65:*
>
> *The costs of and incidental to a proceeding or a step in a proceeding are, subject to the provisions of a statute or the rules of court, in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid: Courts of Justice Act, R.S.O. 1990 c. C-43, s. 131(1); rule 57.01 of the Rules of Civil Procedure. As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which render the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances. See, generally, Orkin on Costs, 2nd ed. 1993, p.2-111; Collins v. Forest Hill Investment Corporation, 1967 CanLII 291 (ON SC), [1967] 2 O.R. 351 (Cty. Ct.), Ontario Potato Distributing Inc. v. Confederation Life Insurance Co. (1991), 25 A.C.W.S. (3d) 809 (Ont. Ct. Gen. Div.), Cabot Trust v. D'Agostino (1992) 1992 CanLII 7507 (ON SC), 11 O.R. (3d) 144 (Gen. Div.), C.D.I.C. v. Canadian Commercial Bank (1989), 1989 ABCA 150 (CanLII), 68 Alta. L.R. (2d) 194 (C.A.), p. 203-4. [Emphasis Added by Quigley J]*

11. Accordingly, the indemnification agreement is not determinative of the cost issue. In this case I think it is important to note what was at issue. It was a statutory provision for the payment of penalties in the event of non-disclosure of documents. There was no question that the Corporation had a statutory duty to produce documents, the real

question was the scope of that obligation and particularly its right to redact the minutes by reason of privacy concerns and more importantly whether e mail addresses had to be produced. Much of that was a question of first impression, which may well explain why the Corporation spent some $20,000.00 to defend a claim of $1000.00 (each potential penalty being $500.00).

12. In my view the Corporation defended because it did not wish to live with a precedent which an agreement to produce the documents sought would have entailed. In that sense it was its "act or omission" which caused it to incur $20,000.00 costs, be it that the claim was initiated by the plaintiff. In my decision on the merits I referred to the decision of Mr. Justice Cavarzan in *McKay v. Waterloo North Condominium Corp* 11 O.R. (3d) 341 for the proposition that the purpose the Condominium Act is provide owners and open book to the affairs of the corporation.

13. In my view in this case the indemnity clause which is at best is ambiguous does not stand for the proposition that whenever an owner seeks to assert its rights under the Act, if unsuccessful it must pay for the Corporation's legal expenses on a full indemnity basis. To ensure that the obligation in s. 55 is met, the section provides a penalty in the event of non-compliance. If co-owners were faced with thousands of dollars in costs in the event they are unsuccessful in seeking to enforce their statutory rights the purpose of the legislation would be frustrated. I say that in particular where there is no evidence of bad faith or unreasonable conduct on the part of the co-owner seeking the production of documents.

14. In this case the demands of the plaintiff were onerous and I measured the reasonableness of the defendant Corporation's response in light of that, but I cannot say that the plaintiff acted in anything but an honest belief that she was entitled to the documents she was seeking. While she was insistent in her quest for documents vigorous litigation in asserting one's claim is no ground to penalize a party by awarding more than ordinary costs. Even if the actions of the owner were unreasonable or unduly complicated the proceedings section 29 of the Courts of Justice Act provides sufficient latitude to penalize such owner for any additional costs caused by his or her conduct of the litigation. I would not base my decision on the indemnity clause in the by-laws.

15. The alternative basis for seeking costs is based on the *Wexler v. Carleton Condominium Corporation #28*, 264 ACWS (3d) 248, 2016 CarswellOnt 6003 where Gouin D.J. awarded costs on the basis that costs in excess of the 15% provided in s. 29 of the Courts of Justice act are available. As he stated at paragraph 11

> *….if the condominium corporation is not awarded full indemnity as to costs when defending an action successfully, the costs of defending that action is actually to the detriment of all other unit owners. That is where an injustice lies if the condominium corporation cannot obtain full indemnity for the costs of successfully defending an action*.

16. Gouin D.J relied on *Carleton Condominium Corp No. 396 v. Burdet* 2015 ONSC

1361. Both *CCC #28* and *CCC #396* were entirely different from the case at bar. The rationale of Kane J. decision can be found in s. 131 of the Courts of Justice Act which states 'Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid'. (Emphasis added) which makes s. 131 of the CJA subject to the provision of Act (other than the CJA) more particularly s. 85 of the Condominium Act. I find no similar provision in s. 29 of the CJA which governs cost awards in the Small Claims Branch of the Superior Court. Therefore, for the defendant to succeed on its cost motion it must rely on the words in section 29 "unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding".

17. The cases that govern the Corporation's claim for full indemnity are fully canvassed in *Harvey v. Elgin Condominium Corporation* No. 3, 2013 ONSC. It was decided in the context of s. 131 of the Court of Justice Act and stands for the proposition that even though successful unless the Corporation can bring itself within the provisions of section 134 of the Condominium Act, the Corporation is not entitled to the costs of its successful defense of the litigation on a full indemnity basis. The normal approach to awarding costs to a successful party will apply. This case of course not one of those "rare and most exceptional" cases where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties' see: Opfermann v. Taylor, 2014 ONSC 4434 quoting *Harvey v Elgin Condominium Corp. No. 3,* 2013 ONSC 1866 (CanLII); *Foulis v Robinson (1978),* 1978 CanLII 1307 (ON CA), 92 D.L.R. (3rd) 134 (ON CA); *Mackay v MTCC* 2014 ONSC 3681 (CanLII).

18. I also note that in the *Harvey* case the plaintiff argued that "the claim was reasonable, as it was the 'only way to get [the Defendant] to listen to his concerns and resolve the issues'. He relies on his "firm belief that he had a legitimate cause of action" [see paragraph 6(a)]. The court decided that that was not sufficient to deprive the successful party of its costs. As similar argument is advanced in this case, and it must be also rejected both as a matter of principle and on the particular facts of this case, having held in the action that throughout the Corporation acted reasonably.

19. I conclude that this case is continues to be governed by section 29 of the Courts of Justice Act and the principle of proportionality [see *May v. Smith*, 2014 ONCA 524]. The amount in issue was $1000.00. Accordingly, the Corporation should receive the sum of $150.00 in costs plus disbursement which I would fix at $340.00 including HST for a total of $490.00.

I.G. Whitehall, Q.C
Deputy Judge

Released: May 24, 2016