

Case Name:

York Condominium Corp., No. 345 v. Qi

RE: York Condominium Corporation, No. 345, Plaintiff/Moving Party, and Guang Zhu Qi and Sheng Li, Defendants/Respondents

[2013] O.J. No. 3214

2013 ONSC 4592

Court File No. CV-10-408077

Ontario Superior Court of Justice

**M.G.J. Quigley J.
(In Chambers)**

July 8, 2013.

(30 paras.)

Counsel:

Benjamin J. Rutherford, for the Plaintiff/Moving Party.

Ann Frances Rundle, for the Defendants/Respondents.

COSTS ENDORSEMENT

1 M.G.J. QUIGLEY J.:-- On April 12, 2012, I granted York Condominium Corporation No. 345 ("YCC 345") judgment for possession of the defendants' condominium unit on the summary judgment motion it brought against the defendants, Guang Zhu Qi and Sheng Li.

2 That judgment was granted under the *Condominium Act, 1998*, S.O.1998, c.19 and the Declaration and Bylaws of YCC 345 after the defendants defaulted in the payment of common expenses of \$497.51 in January 2006 by issuing an NSF cheque. That default gave rise to a lien on their unit of \$540 when the charge for the NSF and interest were added in. That sum continuously increased due to the addition of fees, accumulations and legal fees, all added on and accumulated as provided in the YCC 345 Condominium Declaration and Bylaws.

3 By the time the summary judgment motion was brought, the arrears had multiplied to about \$33,000. The total sum claimed on the summary judgment motion, including legal fees, was \$46,735. I also ordered that YCC 345 was to have its costs of the motion, but I did not fix those costs at that time. In my endorsement I wrote:

There, the accumulated arrears total some \$46,735 for fees, interest, accumulations and legal fees, with the last component being probably the lions share, and perhaps as much as two thirds. Nevertheless, the Declaration and the Act permits those legal fees to be added to the owners' arrears amount in such circumstances.

...

For these reasons the summary judgment is granted to YCC 345, together with its costs of this action, most of which I note is included in the estimated amount owing of \$46,735.

4 At the time that I granted summary judgment to YCC 345, the defendants were not represented. Subsequently, they came to be represented by Ms. Rundle. I understand that both counsel consented to a formal order being prepared which provided that YCC 345 was to have its costs of the action and both counsel also proceeded on the assumption that the costs could be subject to assessment under rule 58.01 of the *Rules of Civil Procedure*.

5 As it turned out, some misunderstandings remained. First, counsel had different understandings of what they consented to. Defendants' counsel indicates she gave her consent to the order in exchange for an agreement to stay enforcement proceedings pending a motion to extend time to file an appeal and in the belief that "costs" without qualification meant "partial indemnity" costs. YCC 345's counsel did not understand at least the latter point relative to scale to be part of the consent understanding. Second, the registrar did not consider herself to be in a position to sign the order because she was uncertain as to how the costs ought to be dealt with.

6 This was before the defendants brought a motion at the Court of Appeal for an extension of time to file an appeal. In April, they sought an extension of time to appeal my April 2012 order, and a stay of that order pending the appeal. Their motion to extend the time for appealing my order came before Justice Hoy, now Associate Chief Justice, and she granted the defendants request for an extension for the reasons set out in her April 4, 2013 endorsement. In her view, the justice of the case required that an extension be granted. Further, Justice Hoy (as she then was) noted as follows:

Indeed, the parties agree that they contemplated that the legal fees would be assessed, and advised that they plan to approach the motions judge to see if he will order an assessment ...

If the parties are unable to resolve the issue of the legal costs, they shall, by April 12, 2013 take appropriate steps to have costs assessed. *The seemingly high rate of interest charged by the Condo Corp. may be considered in assessing the reasonableness of the legal costs charged.* (my emphasis)

7 Arising out of that endorsement, both counsel have now sent me submissions and requested that I order an assessment of the costs with directions. The principal debate between the parties on which their submissions focus is not whether to order an assessment, but rather the scale of costs that should apply on that assessment. I acknowledge that their submissions were received late in April, but unfortunately, they were misplaced, so I have only now been able to prepare this endorsement.

8 Dealing first with the question of whether to order an assessment, counsel for the defendants submits that an assessment is necessary and that any costs ordered by me can and should be assessed. In *YCC 482 v. Christiansen et al.*, 2003 CanLII 11152, (ONSC) Justice Lane observed at paragraphs 52 and 53, as in this case, that:

[52] There were disputes about the reasonableness of certain costs and expenses ... The court is not equipped on the motion to deal with such matters. In my view, the cost can be incurred even where the work is done by an employee within the organization ... But evidence would be required in support of the reasonableness of the portion of the employee's salary allocated to the task.

[53] The legal costs charged to the Corporation and passed on to the defaulting owners can always be assessed under the *Solicitors Act* ...

9 Justice Lane made those observations in the context of s. 134(5) of the *Condominium Act* but as counsel for the defendants argued in her written submissions, I can see no reason that those principles would not be equally applicable here and require that legal costs in respect of the collection of common elements and similar expenses under s. 85(1) of the *Act* would not also be required to be demonstrably reasonable and evidence-based: see *Mancuso v. York Condominium Corporation No. 216*, 2008 CanLII 31418 (ONSC); *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CanLII 13778 (ONCA) at paras. 32-33, 45; *Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited*, 2012 ONCA 417 at para 84; *Durham Standard Condominium Corporation No. 187 v. Morton*, 2012 ONSC 5132 at para. 19. The court observed in *TSCC No. 1633 v. Baghai* that section 134(5) does not

give counsel license to spend the client's money with impunity. I agree with counsel for the defendants that no such authority is provided in s. 85(1) either.

10 This is an appropriate case for the legal costs to be referred for assessment. Plainly there is an issue here about the reasonability of the costs. It is not surprising that issue would be in play having regard to the fact that the costs component of the amount claimed by YCC 345 originally started as a defaulted \$500 common expenses payment, but has grown through arrears interest at 12%, and the addition of a \$25 monthly service fee and the addition of accumulated legal fees, to the very sizeable total of \$46,705. Indeed, Ms. Rundle notes that the legal costs almost doubled as a result of the summary judgment motion. They were \$18,503.43 on January 1, 2012, before the motion was brought but had escalated to \$35,767.73 by July 31, 2012 following the motion.

11 I ventured an explanation in my original endorsement of how this happened, when I noted that the defendants Qi and Li missed their \$497.51 common expenses payment in January 2006, and were then allegedly exposed to hurtful and discriminatory conduct by the staff of YCC 345 because they are of Chinese origin:

That happened when the cheque #24 in that amount was returned NSF. The additional charges of the NSF charge of \$30 got added onto interest of \$10, for a total owing of about \$540. However, while subsequent payments were made and then also not made, the original small accrued amount grew. It grew in March of 2006 when YCC 345 placed a lien on the respondent's condominium, because now it got bumped to over \$1,000 owing to legal fees being added in for the registration of the lien. The arrears amount continued to grow and accumulate in this way. It never got back to zero. The respondents offered a settlement in 2009 that, as the correspondence shows, was intended to permit both sides to save face but YCC rejected that proposal, insisting on receiving full payment, thus basically setting the stage for the matter to snowball out of control as it has to this point.

12 So this leads to the question of what scale of costs YCC 345 should be entitled to receive on an assessment against this background. Counsel for YCC 345 is insistent that the costs ought to be assessed on a solicitor-client basis, but counsel for the defendants says that the appropriate scale in this case is for costs to be assessed on a partial-indemnity basis.

13 Both counsel note that s. 85(3) of the *Act* provides that reasonable costs are secured under a condominium lien and counsel for the plaintiff correctly notes that I found that the legal costs were added to the defendants' common expense arrears in respect of their condominium. However, as the defendants appear intent on arguing on appeal, counsel asserts that the amount of costs that may be charged to the owner and secured by a lien on their condominium is only a "reasonable" amount. The section refers to a lien "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).

14 Both counsel referred to the same authority in support of their positions. They referred to *Mancuso*, above, at paragraph 6 where Justice Strathy, (as he then was), observed:

In my view, the statutory provisions referred to above do not deprive the court of its discretion to fix the costs that are appropriate in the circumstances of a particular case. In that regard, I am required to take into account the circumstances contained in rule 57.01 as well as the result of the proceedings and the reasonable expectations of the parties: *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.).

15 YCC 345's counsel argues that "reasonable legal costs" in this case must mean reasonable costs on a solicitor and client scale consistent with Article II(2) of YCC 345's Declaration and Article 11, paragraph 7(b) of YCC 345's Bylaw No. 1. Plainly, that paragraph stipulates that, where a condominium owner is in default with respect to the payment of common expenses for a period of 15 days or more, the Board may bring legal action on behalf of the Corporation to enforce collection of those expenses and, in that event, "there shall be added to any amount found due all costs of such action *including costs as between a solicitor and his own client.*" (my emphasis).

16 The argument made by counsel for this condominium Corporation, as it is consistently made by counsel for all condominium corporations whose declarations and bylaws typically contain similar substantial indemnity legal costs provisions, is that by becoming condominium owners, owners such as these defendants must be taken to have understood and agreed contractually to pay that level of costs in the event that they defaulted in the payment of common elements or

other expenses, because that is what is stipulated in the constating documents and bylaws of the condominium Corporation.

17 However, counsel for the defendants is of the view that only partial-indemnity costs are called for in this circumstance. She says that the court's discretion to award costs, which is preserved under s. 131(1) of the *Courts of Justice Act*, is not superseded by any condominium declaration, that the *Act* stipulates that charges made to owners must be reasonable, and that only proper charges may be made to unit owners. Indeed, she notes that Justice Strathy distinguished at para. 20 of *Mancuso* between proper expenses which may properly be charged to unit owners and those which may not:

Notwithstanding the importance of common expenses, I do not accept the submissions of counsel for the Corporation that "whenever the condominium Corporation pays, the unit owners pay." The unit owners' obligation is to pay *proper* common expenses. If the corporation enters into a contract that is not authorized by the Act, the declaration or the bylaws, the owner is well within her rights to refuse to pay ...

Nonetheless, counsel for YCC 345 distinguishes this case and argues that the decision in *Mancuso* should only apply to cases where there is no authorization in the condominium Constitution to apply all costs as charges to owners. Respectfully, I disagree.

18 There is an increasing and persistent issue with legal costs that can be noted in a number of the recent cases that have seen condominium owners pitted against a management group, or a group of directors. The *Condominium Act* creates a framework for the governance of condominiums, but at the end of the day, the directors of condominium corporations are counted upon to act with prudence and reasonable good judgment, to represent the interests of all unit owners, and the property interests as well. It is this presumption that would suggest that an award of costs should ensure that the non-defaulting co-owners are not left in a position where they are made to pay for the costs associated with legal remedies being pursued against defaulting co-owners.

19 Nevertheless, as Justice Bielby concluded in *Peel Condominium Corporation No. 452 v. Jaworowski*, 2010 ONSC 4567, in appropriate circumstances, awarding costs on the partial-indemnity scale may be more fair than putting the interests of co-owners first by ordering full-indemnity costs. At paragraph 30 he stated as follows:

I have also had regard to the plaintiff's argument that whatever the defendant does not pay will have to be shared by the other condominium owners. I agree that this is, on its face, an unfairness. However there is an unfairness of the amount of fees claimed. The plaintiff within the lien process is only entitled to reasonable costs and it is for me to determine that amount.

20 Moreover, the case-law shows instances of non-defaulting co-owners being required to shoulder some element of the costs of legal proceedings brought by the directors or management of condominium corporations where it would not be fair to force the defaulting owners to absorb a disproportionate amount of costs, or where the directors or management of the condominium have behaved badly, or failed to try to take advantage of less costly routes to resolution. For example, in *Channa v. Carleton Condominium Corp. No. 429*, 2011 ONSC 7260, at para. 49, Polowin J. exercised her discretion to hold that each party shall bear its own costs in proceedings that included, amongst other things, a claim by the condominium Corporation for arrears of common expenses and associated legal costs: see also *PCC No. 452 v. Jaworowski*, above, and *Toronto Common Element Condominium Corporation No. 1508 v. Stasyna et al.*, 2012 ONSC 1504 at paras. 9 and 92.

21 *Jeffers v. YCC No. 98*, 2010 ONSC 474 is another slightly different instance of this phenomenon. In that case, costs were fixed on a partial indemnity basis. At paragraphs 86 and 87, Low J. stated as follows:

[86] That said, I am not persuaded that this is a case for substantial indemnity costs. The plaintiffs appeared genuinely, although mistakenly, to believe that they have been treated oppressively. On the evidence before the court, however, it is apparent that the plaintiffs have been the authors of their own misfortunes through their failure to appreciate the consequences of and to take responsibility for their actions and inactions, their failure to appreciate that their litigation conduct was increasing the costs which might be awarded against them, and their apparent unwillingness to take legal advice.

[87] The issues in the action were not complex and were almost entirely factual and evidentiary. The law was straightforward. The amounts at stake were modest.

22 In that case, even though the defendants might have been the authors of their own misfortune, a situation that might be regarded as analogous to this case, the court gave weight to the defendants' expectations and to the relative simplicity of the matter.

23 The question is whether full indemnity costs are appropriate where condominium management pursues expensive legal remedies against an owner rather than a less expensive path of potential resolution where all parties may be able to save face and move on. The question also arises in cases where the condominium's conduct seems out of proportion to the gravamen of the defaulting owners' initial breach, as it may here where an original default of about \$500 ultimately leads to a lien for many, many thousands of dollars against the defaulting owners' condo and the condominium management taking steps under its Declaration and Bylaws to sell the unit to pay the accumulated arrears.

24 In raising the question of this court's discretion to award only partial-indemnity costs or no costs to a successful party instead requiring each party to bear its own costs, such as occurred in *Channa*, above, I have not forgotten that condominium corporations have an additional statutory means provided to them by s. 134(5) of the *Act* to recover much if not all of the costs of obtaining judgment against the defaulting unit owner. However, appellate jurisprudence shows that the availability of this alternative method of obtaining recompense for costs does not diminish this court's discretion relative to costs: see *MTCC No. 1385 v. Skyline Executive Properties Inc.*, above. It still permits that discretion to be exercised, even if the ultimate outcome may permit most of the costs incurred to be recovered.

25 Counsel for YCC 345 argues that the legal fees in this case are neither unreasonable nor disproportionately high. The costs incurred were necessary to deal with the matter and Mr. Qi was the author of his own misfortune. Instead of paying the arrears at a point in time before legal costs and other charges began to accumulate, it is said that he insisted that they did not exist, but then withheld payment of his regular common expenses. Counsel says that Mr. Qi never tendered or made available a sum that was sufficient to discharge the lien. Moreover, he defended the action and he defended the motion for summary judgment, albeit as a self-represented person. In such a case, counsel says that he must expect consequences in the event that he lost, and the consequences that he must expect are those he agreed to pay by becoming a condominium owner; that is, the costs, interest, and legal expenses stipulated in the condominium Declaration and its bylaws.

26 Notwithstanding those arguments, however, I find that this is a case where the scale of costs applicable on the assessment should be partial indemnity, rather than substantial indemnity or full recovery, and notwithstanding the language that may be found in the Declaration of the condominium Corporation, or its bylaws. I find that five of the six reasons advanced by counsel for the defendants support that conclusion:

- (i) First, the legal expenses charged, totalling \$35,767.73 as of July 31, 2012 are immensely disproportionate to the arrears of common expenses claimed by YCC 345 from the defendants and which were allegedly paid or available to be paid at all material times. The defendants cannot reasonably have been expected to anticipate that they would be asked to pay legal costs of this magnitude given the amount of their original default.
- (ii) In addition to the substantial legal costs claimed, YCC 345 has also been charged interest on arrears at a significant rate of 12% and it imposes a charge of \$25 per month no matter what the state of the arrears.
- (iii) Legal fees of \$18,503.43 were incurred before the summary judgment motion. They almost doubled to \$35,767.73 at July 31, 2012 following the hearing of the motion. The relatively simple collection activity involved in trying to collect the common expense arrears and other amounts from these defendants, including the registration of the lien and preparing letters of demand, calls into question the reasonability of these amounts or whether they are excessive: see *PCC No. 452 v. Jaworowski*, above.
- (iv) YCC 345 could have taken steps to reduce the conflict between the condominium Corporation and the defendants by explaining and/or apologizing to them initially, when it was claimed that hurtful and discriminatory language was used, and when counsel for the defendants claims this was the only request they really made at that time.
- (v) The defendants offered to settle this matter in 2008, only two years after the dispute commenced, but four years before the summary judgment motion was brought, similar to what occurred in *TCECC No. 1508 v. Stasyna*, above. Had reasonable efforts been made at

that time five years ago to find a solution in the offer of settlement that was made, a solution that would have permitted both parties to exit gracefully from the dispute, it appears that the lion's share of the legal expense would never have been incurred.

27 For the foregoing reasons, I find that the appropriate scale of costs that should be applied for the purposes of an assessment of costs in this matter, which I hereby order, is the partial-indemnity scale.

28 Before leaving the matter, I note that this will not be the end of this case since Hoy J.'s endorsement indicates that the justice of the case requires that the defendants be permitted to pursue an appeal on the basis that the amounts claimed by YCC 345 were not reasonable, and thus that summary judgment ought not to have been granted.

29 If that appeal proceeds, it will hopefully permit some appellate clarification to be provided about how summary judgment motions judges are to respond in cases such as this where the conduct of condominium management may be questionable, but where the seemingly clear language in the *Condominium Act* and condominium Declarations and By-laws appear to permit a condominium corporation, such as YCC 345, to claim all of the amounts that it did.

30 Further appellate guidance addressing the costs related legal issues that have emerged since the Court of Appeal's decision *MTCC No. 1385 v. Skyline Executive Properties Inc.* would also be welcome, given that experience suggests¹ costs issues in such cases will also continue to raise issues of fairness and the standard of conduct to be expected of both condominium corporations and their owners in disputes such as these relating to common elements and common expenses.

M.G.J. Quigley J.

cp/e/qlcct/qlrdp

¹ See for example, *TCECC No. 1508 v. Stasyna*, Supplemental Costs Endorsement, 2013 ONSC 2361 at para. 13.