COURT FILE NOS.: 05-CV-297935PD2 &
06-CV-309268PD1
DATE: 20061205

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: METROPOLITAN TORONTO CONDOMINIUM CORPORATION 551
v. MANI ADAM

BEFORE: Justice Low

COUNSEL: *Carol A. Dirks*, for the applicant

Thomas McRae, for the respondent, counter applicant

Heard October 17 and 18, 2006, costs submissions in writing

C O S T S E N D O R S E M E N T

[1] This application and counter-application was heard at some length over the course of two days but on the second day, counsel arrived at a negotiated result. The parties agreed to a protocol pursuant to which the parties would exercise their rights and fulfill their respective obligations as condominium unit owner and condominium corporation.

[2] There were, however, three additional terms that the parties wanted to be imposed which could not be agreed to and I was asked to make a ruling. The applicant sought an order prohibiting the respondent from communicating with the condominium's directors except by letter; it sought an order prohibiting the respondent from communicating with third parties concerning the condominium; and the respondent sought an order that he be permitted to make copies of condominium documents using his own scanner.

[3] I declined to order the additional terms and gave oral reasons. Regrettably, the court reporter had departed for the day, a fact which escaped my attention until I had almost concluded oral reasons and I have attempted to reproduce them in somewhat edited form below as they have some bearing on my reasons for the costs disposition.

[4] I do not order the additional terms as I would dismiss the application and the counter-application. While the behaviour of Mr. Adam was annoying and at times ill-mannered and while his suggestions to management were in several instances unreasonable, I am not satisfied that his actions were oppressive or prejudicial or unfairly disregarded the interests of the applicant corporation. Likewise, although the behaviour of the corporation as expressed through its manager, Mr. Moshenberg, was at times uncooperative and disdainful and while Mr. Moshenberg did not appear to be fully conversant with the rights and obligations of owners and the condominium corporation, I am also not satisfied that the applicant's actions were oppressive or prejudicial or unfairly disregarded the interests of Mr. Adam in the totality of the circumstances.

[5] The case of the applicant breaks down into four main areas. The first concerns Mr. Adam's requests that there be posted greetings in the common areas in relation to religious holidays apart from those in Judaism. Mr. Adam is entitled to make such requests just as the board of directors is entitled, as an incident of management, to decline to accede to them. Mr. Adam's suggestion that either there be postings in respect of no religious holidays or that there be postings relating to holidays of all religions was not a reasonable one and it was entirely within the powers of the Board to deny the request. That Mr. Adam made additional requests and that he expressed the ill-conceived view that the posting of a greeting of the kind on view in the common elements was contrary to the *Charter* was undoubtedly annoying, but the fact of the requests and the expression of opinion does not, in my view, amount to more than that — an annoyance. In any case, Mr. Adam stopped making the requests when asked to by the applicant's solicitors.

[6] The second area concerns the request for investigation and Mr. Adam's own investigation into the delay in response to a fire alarm. Mr. Adam, as an owner and as a resident, has what should be an obviously legitimate interest in knowing the reason or cause of delay in response to a fire alarm. He was entitled to ask the Board to investigate the issue, and I find that Mr. Moshenberg knowingly withheld from Mr. Adam the material information that the monitor was doing telephone verification with the site before it dispatched emergency services. The

written response on behalf of the condominium corporation to Mr. Adam on the issue was misleading. Mr. Adam was, as it turned out, correct in thinking that there was something "fishy" and the conviction on Mr. Adam's part that there was something being hidden, and I find that there was, was the reason he wanted to see the records of the corporation.

[7] The third area of alleged oppression raised by the applicant is Mr. Adam's repeated requests for inspection of a number of the corporation's records. The statute confers on an owner the right to view the records and to have copies. It does not stipulate where and how, and these matters are left to the common sense and good manners of owners and managers. Regrettably, that was lacking here. Mr. Moshenberg was in error insofar as he demanded that Mr. Adam disclose his motive or purpose in seeking to have inspection of the condominium corporation's records. There is some evidence before me upon which a finding could be made that Mr. Adam was given a runaround as to when and where and in whose presence and what he could and could not inspect but the issue of whether the applicant in fact denied the respondent's rights to inspect the corporation's records is the subject matter of a pending small claims court proceeding, as is the issue of whether s. 77 of the Act was breached. In the small claims court action, Mr. Adam claims that he was wrongfully denied access and he claims the statutory penalty of $500.

[8] The applicant complains that Mr. Adam made repeated requests for the same documents. There is no admissible evidence before me that Mr. Adam was given meaningful inspection of records he requested. I am therefore not prepared to make the finding that his repeated requests were not legitimate. If Mr. Adam was denied access to the records which the statute entitles him to see, then his repeated requests, while annoying, are legitimate. Having said that however, I also decline to make the finding that he was denied access. That is a determination to be made in the Small Claims Court, the forum mandated under the statute for the determination of that issue.

[9] As for contravention of s. 77, Mr. Moshenberg's initial response to Mr. Adam's request for the addresses for service of the board members was neither appropriate nor adequate. While the applicant ultimately made the disclosure required by the statute, it was very slow in doing so. Mr. Adam's reason for seeking the addresses of the board members--to write them a letter--was reasonable. The statute does not, however, require a person to disclose his reasons for requesting the information as a condition of obtaining it.

[10] The fourth area of complaint raised by the applicant is essentially a complaint about bad manners on the part of Mr. Adam on several occasions.

[11] I have no doubt that Mr. Adam was an annoyance, in particular to Mr. Moshenberg. I am not prepared to find, however, on the totality of the evidence that his conduct was oppressive or that it was unfairly prejudicial or unfairly disregarded the interests of the corporation. To a significant degree, this dispute arises out of Mr. Adam seeking to exercise his statutory rights as an owner of a unit in the condominium. The management, and in particular, Mr. Moshenberg,

was not as conversant with the obligations of the corporation and the rights of owners as ought to have been the case. And therein lay the source of friction and the need on the part of the applicant for what appears to have been an extraordinary amount of legal advice. That Mr. Adam was perseverant and impatient only fueled the fire.

[12] Mr. Adam's counter-application rests largely on the alleged refusal to permit him to have meaningful or any access to condominium documents. This was the subject matter of his Small Claims Court proceedings but the applicant put the question of access to records in issue in the application in the hopes, it appears, of achieving an end run around the Small Claims Court process. The denial of access is an issue to be decided in Mr. Adam's Small Claims Court application. If he is correct, there is a statutory remedy in the $500 fine and the applicant cannot rely on the requests as evidence of oppression by Mr. Adam. If he is incorrect, he cannot rely on the alleged denial as a basis for arguing oppression.

[13] In any case, Mr. Adam launched a counter-application seeking an order the specifics of which is not supported by the legislation. The legislation is silent as to the manner in which disclosure is to be implemented. In the ordinary course, one would expect that good sense and courtesy would prevail, that unreasonable requests would not be made and reasonable requests would not be denied. Regrettably, good sense and courtesy were in short supply here and it is fortunate for the parties that their respective counsel at trial (who were not their solicitors when the dispute commenced) were able to fashion a protocol that is mutually acceptable, an exercise that ought to have been undertaken many months earlier.

[14] Mr. Adam also claims discrimination arising out of the amounts that he was charged for photocopying. In respect of the latter, the amounts are *de minimus* and the evidence of discrimination was not persuasive.

[15] The applicant does not seek costs and argues that the parties should bear their own costs or, alternatively, if Mr. Adam is to be awarded costs, it should be on a partial indemnity basis and that the costs attributable to the counter-application should be taken out of the costs claimed. Mr. Adam argues that he should be awarded substantial indemnity costs of the proceeding.

[16] On the basis that costs should ordinarily follow the event, both parties would be *prima facie* obligated to pay the costs of the application upon which they were unsuccessful. The result would *prima facie* be a set-off or near complete set-off with the practical result that each party would bear his and its own costs.

[17] The argument made on Mr. Adam's behalf is that his legal expenses were necessitated wholly by the issues raised on the application and that his counter-application added either nothing or only negligibly to his costs. It is argued as well that his very early offer to settle on the basis that he would refrain from doing those things complained of in the application together with

his later formal offer were both reasonable and would suffice to attract substantial indemnity costs in his favour.

[18] I agree that although Mr. Adam asserted a counter-application, he did not greatly magnify the number or complexity of the issues to be litigated. Nevertheless I do not agree that the prosecution of the counter-application entailed no additional effort. It is suggested by counsel for the applicant that the proportion of time attributable to the counter-application is 35% to 40% of the whole. In my view, that estimate is overly high and I would estimate it at about 30%. Accordingly, if Mr. Adam is to be awarded costs of the application, it ought to be on the basis of 70% of his costs.

[19] I would agree with the submission on behalf of the applicant that the applicant has not conducted itself in a vexatious or reprehensible manner in the prosecution of the application. I do not view the offers made by Mr. Adam as warranting the imposition of substantial indemnity costs. I do, however, take into account and give significant weight to the offer made by Mr. Adam upon the launching of the application and before affidavits were filed with their attendant cross-examinations expanding legal costs. The offer is referred to in the November 3, 2005 letter from applicant's solicitor Mr. Natale to solicitor for Mr. Adam. Mr. Adam's offer was to resolve the matter by refraining from conducting himself in the manner objected to as set out in the application. It was a reasonable offer made promptly and ought reasonably to have been accepted. The applicant's counter-offer of resolution, particularly insofar as it demanded monetary compensation of $10,000, was without foundation.

[20] In my view, this litigation ought to have been resolved as early as November 3, 2005, along the lines of Mr. Adam's offer and the parties would have been spared many thousands of dollars in legal expenses.

[21] I am therefore of the view that while substantial indemnity costs are not warranted, Mr. Adam ought to have his partial indemnity costs of the application which I would fix at $32,000 all inclusive. In arriving at this amount, I have used the full substantial indemnity amount claimed, reduced it by the 30% reasonably attributable to the counter-application and used a ratio of 2/3 of the resulting substantial indemnity figure to arrive at the partial indemnity award of costs.

Low J.

DATE: December 5, 2006