Case Name:

Sharp v. Johnson

RE: Duane Sharp, Applicant, and
Cullen Johnson, Elaine Temins-White and Simcoe
Condominium Corporation #46, Respondents

[2008] O.J. No. 4880

Court File No. 06-CV-312088 PD2

Ontario Superior Court of Justice

D.A. Wilson J.

Heard: December 1, 2008.
Judgment: December 2, 2008.

(14 paras.)

Counsel:

Allan D.J. Dick, for the Applicant.

Harry W. McMurtry, for the Respondents.

ENDORSEMENT
AS TO COSTS

1 **D.A. WILSON J.**:-- This application was commenced by Duane Sharp on May 26, 2006 seeking, *inter alia*, the appointment of an inspector to investigate the financial affairs of the respondent condominium corporation, in particular the actions of the respondents Johnson and Temins-White who were the president and treasurer of the condominium corporation at that time. The applicant holds a 10% interest in one of 4 timeshare units and there are 8 wholly-owned units at the development known as Lagoon City in Brechin, Ontario. The respondents Johnson and Temins-White each own one of the wholly-owned units.

2 After the application was initiated, six consent orders were secured commencing in March of 2007, with the last order being signed June 23, 2008. The final order required the parties to deliver written submissions on the issue of costs and they have done so. The issues for determination by the court today are as follows: what is the appropriate quantum of costs for the successful applicant? Should the timeshare owners be liable for the costs of the investigator, the costs of the applicant and/or the costs of the respondents? Counsel for the respondents did not oppose the request that the timeshare owners not be responsible for payment of the costs of the investigation of Messrs. Brown and Freise or the costs associated with the hiring of security for the annual general meeting of 2006. Further, it was not disputed that the applicant was entitled to its costs on a partial indemnity basis for the application.

3 A review of the material filed in support of the application makes it clear that counsel for the applicant attempted to resolve the issues of concern to the timeshare owners without the necessity of resorting to litigation. Unfortunately, the respondent Johnson's response was to deny there was any validity to the concerns raised by counsel and instead, he invited litigation. Fortunately, once Mr. McMurtry was retained by the respondents in February of 2007, there was co-operation between counsel and the various court orders that were secured were done so on consent.

4 The appointment of an inspector enabled the concerns of the timeshare owners to be dealt with and the initial

report confirmed that the respondent Johnson had improperly transferred funds in 2005 and deposited monies from the timeshare owners into the wrong account, among other things. These improprieties were subsequently remedied but it is clear to me that without the application and the appointment of the inspector, given the attitude of Mr. Johnson, these irregularities would not have been dealt with. Further, as a result of the application, a special meeting of the owners was convened and it was agreed that the respondent Johnson would not stand for re-election as president and a new Board was appointed.

5 Simply put, it is the position of the applicant that the within application and the various court orders were necessitated by the actions of the respondents Johnson and Timens-White and in particular by the aggressive stance adopted by Johnson when questioned about certain of his actions. The conclusions of the inspector confirmed the suspected improprieties, it is argued, and since Johnson refused to concede any irregularities or mistakes, the applicant had no choice but to retain counsel and proceed with the application.

6 Counsel for the respondents argues that the costs claimed are out of proportion to the amount in dispute in the application. Further, in exercising its discretion under Rule 57, the Court must consider what the fair and reasonable expectations of the parties were. In this case, it was argued, the demand of $55,000 for the applicant's fees and disbursements is close to half of the condominium corporation's annual budget.

7 In exercising its discretion with respect to costs, Rule 57.01 sets out the factors that the court may consider in determining an award of costs. I note that the court may examine the "conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding and a party's denial of or refusal to admit anything that should have been admitted."

8 In this case, the applicant wrote to the respondent in his capacity as president of the Board in 2005 with certain question arising out of the financial affairs and budget of the condominium corporation. In response, he received a letter describing the request as "absurd, frivolous and vexatious ... nothing more than a ridiculous waste of money ..." His response to counsel's letter was in a similar vein.

9 It is unfortunate that the requests of the applicant could not have been responded to without the necessity of court proceedings. In my opinion, counsel for the applicant had no other option but to issue the application and I concur that the respondents were aware of the costs that would be incurred through defending the application and the involvement of an inspector. The respondents cannot be heard to say that they did not expect that significant costs would be incurred through the appointment of an inspector and a thorough review of the financial records of the corporation.

10 What is being sought is partial indemnification of the costs incurred by counsel acting on behalf of the applicant. Had the respondents co-operated in the investigation instead of steadfastly denying there was any wrong-doing or errors on their part, the costs would have been less and perhaps there would have been no need for an inspector. The conduct of the respondents, in particular that of Johnson, resulted in the protracted legal proceedings, the outcome of which attested to the validity of the concerns expressed initially by Mr. Sharp.

11 In my view, in determining what constitutes a fair and reasonable award of costs, the court must look at the proceeding in its entirety, not just at the amount at issue between the parties. I am mindful of the comments of the Court of Appeal in *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495 in which the Court noted that costs must be "fair and reasonable" as opposed to the precise amount of the actual costs to a successful litigant. In this case, valid concerns were raised by the applicant on behalf of the timeshare owners and these were not addressed until the application was served. The respondents had to have known that retaining an inspector and forcing counsel for the applicant to proceed with the application would prove to be an expensive proposition. They must bear the consequences of their conduct prior to this application being issued and subsequent to its service.

12 The fees of counsel for the applicant are approximately $75,000 to date. After the institution of the application, the balance of the proceedings went on consent without the necessity of making submissions in court, apart from the attendance before me today. In my view, taking all of the factors enumerated in Rule 57.01 into account, a fair and reasonable amount for the costs of the applicant is $40,000 and I fix the costs in this amount.

13 Therefore, an order shall issue that the respondent condominium corporation shall pay the applicant's costs on a partial indemnity basis fixed in the sum of $40,000 inclusive of fees, GST and disbursements. It is further ordered that the members of the Timeshare Owners Group are not responsible for payment of the applicant's costs, the inspector's costs or the legal fees of the solicitor retained by the respondents on this application and that no special assessment shall be made on the Timeshare Owners Group with respect to these costs. As indicated previously, the Timeshare Owners Group is not responsible for payment of the costs of security at the general meeting in 2006 nor of the investigation of Messrs. Freise and Brown.

14 I would like to thank counsel for their co-operation throughout these proceedings and for the assistance shown to

the Court.

D.A. WILSON J.
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