COURT FILE NO.: 08-CV-347340 PDI
DATE: 20080704

2008 CanLII 32322 (ON S.C.)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ANTHONY ITALIANO, Applicant

TORONTO STANDARD CONDOMINIUM CORPORATION No. 1507, Respondent

BEFORE: MADAM JUSTICE McWATT

COUNSEL: CAROL DIRKS, for the Applicant

JOHNATHAN FINE, for the Respondent

DATE HEARD: April 16, 2008

E N D O R S E M E N T

[1] The Applicant asks for Orders pursuant to s. 45(1) of the Arbitration Act granting leave to appeal to the Ontario Superior Court of Justice from the Arbitral Award of Stephen R. Morrison dated January 3, 2008 and his later Arbitral Costs Award dated February 22, 2008. If leave is granted, the Applicant then asks that the two awards be set aside pursuant to s. 46(1) of the Arbitration Act.

[2] The dispute between these two parties involves the enforcement of two provisions of the Declaration and Rules of the Toronto Standard Condominium Corporation (TSCC 1507) dealing with the creation of noise from Mr. Italiano's unit.

[3] The condominium corporation has brought a Counter-Application to enforce the two arbitral awards and, if necessary, an order validating the registration of a certificate of lien on the title of Mr. Italiano's unit. The corporation asks to be able to enforce the certificate of lien in the same manner as a mortgage, as provided by subsection 85(6) of the *Condominium Act*, 1998.

The Factual Background

[4] The Applicant is the owner of the condominium, suite 426 – 5 Marine Parade Drive, Toronto. He purchased the unit in October, 2006 and moved into it in November, 2006. Prior to moving in, the Applicant got permission from the Respondent corporation, who administers this high rise condominium building, to install laminate hardwood flooring in the home.

[5] Shortly after the Applicant moved into the unit, TSCC 1507 received complaints from owners of units 427 and 326 about noise coming from Mr. Italiano's unit.

[6] TSCC 1507 issued two letters to the Applicant in November, 2006. The letters, however, were left with security and were never delivered to Mr. Italiano.

[7] In January, 2007, TSCC 1507 sent a further letter to the Applicant – on paper and by email. Mr. Italiano and his father, John Italiano, requested a meeting with the property manager as a result. The Applicant's father also asked to be contacted if there were any further complaints. At that time, Mr. Italiano became aware of complaints from his neighbor at unit 427, but was not informed of any complaints from either the unit beneath him at 326 nor any other unit in the building.

[8] From January to April, 2007, security from the building attended at the Applicant's unit several times in response to complaints from unit 427. Two reports confirmed the sound from Mr. Italiano's unit to be "loud".

[9] The property manager did not contact the Applicant or his father, but instead referred the matter to legal counsel for TSCC 1507 in February, 2007. The corporation's lawyer sent Mr. Italiano a letter with a deadline to respond. Mr. Italiano's father, John, requested a sound transmission test, alleging inadequacies in the materials contained in the walls between his son's unit and the unit at 427. TSCC 1507 rejected this request in March, 2007.

[10] The matter was referred for mediation at the end of May, 2007. Mr. Italiano did not attend due to advice given to him by legal counsel at the time. The Applicant believed the mediation would be rescheduled to a new date. However, by July 9, 2007, the Respondent company had submitted the disagreement to arbitration seeking various orders against Mr. Italiano. The hearing date was scheduled for July 30, 2007.

[11] At issue were Article 4.2(d) of the Declaration dealing with noise, odours or offensive action transmitted from one unit to another and Rule 2 of the TSCC 1507 Rules which dealt with noise transmissions from one unit to another. The corporation requested various orders against the Applicant.

[12] On July 30, 2007, the Applicant attended the arbitration unrepresented by counsel. He asked for and was granted an adjournment to hire a lawyer, but, as a result of the adjournment, he was ordered to pay $4,000 in legal costs to the Respondent. Those costs have been paid.

[13] The hearing was rescheduled for August 7, 2007 and commenced that date with the Applicant represented by legal counsel. Counsel for the Applicant requested another adjournment of the arbitration because he had just been retained to act for Mr. Italiano. Counsel also advised the arbitrator that Mr. Italiano was prepared to consent to a compliance order, subject to the common element walls to the unit being tested, at his own expense, to ascertain any deficiencies which might account for excessive noise from his unit. TSCC 1507 rejected this request and insisted that the arbitration proceed.

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[14] In September, 2007, Mr. Italiano applied to the arbitrator for access to the common elements by way of entry into Units 427 and 326 to have testing performed. The arbitrator instead ordered an independent acoustical expert to report to him about the issue. The expert was paid for by Mr. Italiano in the amount of $2100.00.

[15] Mr. Italiano was not permitted to participate in the process. The TSCC 1507 property manager gave access to the units to the expert and provided instructions as to the areas to be tested.

[16] The acoustics report was delivered to the arbitrator in November, 2007. It concluded that the sound transmission material installed in the building did comply with the minimum Ontario Building Code standard, although, barely.

[17] The remainder of the arbitration hearing was completed over a day and a half ending on December 12, 2007. On January 3, 2008, the arbitrator found the following facts:

1. The respondent's unit had been a frequent source of noise that was annoying, disruptive and constituted a nuisance to other occupants in the building;
2. there was overwhelming evidence that Mr. Italiano's unit was a frequent source of unacceptable noise generated at all hours of the night and day in total and callous disregard for the welfare of others;
3. every reasonable effort was made to encourage and compel Mr. Italiano to comply with the Declaration and Rules regarding noise before resorting to the extreme and expensive measure of insituting the arbitration proceeding;
4. property management did make every reasonable effort to bring the issue to Mr. Italiano's attention and to make useful suggestions as to how it might be resolved.

[18] With respect to the remedy sought by TSCC 1507, the arbitrator found the following:

> Counsel for the condominium corporation set out ten specific requested terms. I have no difficulty with respect to the first and last of those terms in light of my findings. The first is a declaration that the respondent has breached section 4.2(d) of the Declaration and Rules 2(a) and (b). The last is an order that the respondent pay the applicant's costs on a substantial indemnity basis and the full costs of the arbitration, and that such costs be collectible in the same manner as common expenses. I find this request to be completely consistent with the terms of the Declaration, the Rules, the mediation and arbitration bylaw (By-law #3) adopted by the Corporation on July 24, 2006, which, in paragraph 28 thereof, incorporates by reference the provisions of section 134(5) of the Act, and my powers under the Arbitration Act, 1991. Given the clear wording and intent of the condominium corporation's constating documents in this regard, all of which were accepted by the respondent when he purchased his unit, I see

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> no reason for the other unit owners to bear any cost burden whatsoever arising out of the corporation's enforcement efforts.
>
> Even if I were not obliged to make a costs award on this basis by the terms of those governing documents, I would nonetheless be inclined to do so, given the respondent's pattern of behavior with respect to this series of complaints and the resulting proceedings. In my opinion, these proceedings were entirely unnecessary, but for the respondent's indifference and refusal to meaningfully participate in any of the earlier efforts to deal with the problem, including the scheduled mediation. As Mr. Italiano said during his testimony with respect to the towing of his vehicle, "I had to learn the hard way". Regrettably, the imposition of this costs award is one more apparently necessary lesson for Mr. Italiano. Although I do not know the precise amount of the costs incurred by the condominium corporation to date, I rather suspect that, when it is combined with the full costs of the arbitration itself and his own legal costs, this aspect of my award will have a more salutary impact of Mr. Italiano's future behaviour than any other term.

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[19] He then went on to conclude the following:

> Accordingly, my award will be restricted to the following two items:
>
> (a) a declaration that the respondent has breached sections 4(1)(a) and (b) and 4(2)(d) of the Declaration and Rules 2(a) and (b);
>
> (b) an order that the respondent comply with sections 4(1)(a) and (b) and 4(2)(d) of the Declaration and Rules 2(a) and (b);
>
> (c) an order that the respondent pay the applicant's costs on a substantial indemnity basis and the full costs of the arbitration. If such costs are not paid with fifteen days of them being tendered to the respondent through his legal counsel, the condominium corporation shall pay the full costs of the arbitration and those costs, together with it's own costs shall be collectible in the same manner as common expenses.
>
> If the parties are unable to agree on the quantum of the claimant's costs, I will receive written submissions with respect thereto, within 30 days of the release of this award. I also draw counsel's attention to section 44 of the *Arbitration Act, 1991* and invite any appropriate submissions, with the same 30-day period.

[20] The arbitrator's award with respect of both the scale and the enforceability of the costs (as being collectible in the same manner as common expenses by the registration of a lien on Mr. Italiano's unit) was made without allowing submissions by counsel for Mr. Italiano. The award was also made without giving any consideration to Offers to Settle which were exchanged between the parties in the course of the proceeding.

[21] On January 18, 2007, the Notice of Application in these proceedings was filed. On January 22, 2007, counsel for TSCC 1507 wrote to the arbitrator and sought to make submissions on the issue of costs, including with respect to matters which had already been determined by the arbitrator and which were the subject of the Notice of Application filed with the Superior Court.

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[22] Despite objections from counsel for Mr. Italiano, counsel for TSCC 1507 delivered submissions to the arbitrator on all issues. Counsel for Mr. Italiano took the position that the arbitrator was functus. The arbitrator ruled that he was functus with respect to the award and scale of costs ordered. He ruled that he was not functus in respect of the quantum of costs and requested submissions on that point.

[23] The Applicant's counsel did not make submissions to the arbitrator, maintaining that the arbitrator was functus on all issues relating to costs.

[24] TSCC 1507 claimed costs of the proceeding in the amount of $62,948.43, which included 75 hours of senior legal counsel's time at $450.00 per hour. The total amount of fees claimed was $48,919.98 (less $4,000.00 previously paid by Mr. Italiano).

[25] The total fees charged by the arbitrator was $35,815.19.

[26] On February 22, 2008, the Arbitrator released the Arbitral Costs Award after receiving submissions from the corporation's counsel on the issue of quantum. It provided that:

> In summary, I order the respondent to pay forthwith the following amounts to the claimant condominium corporation:

Balance of Legal fees	$39,000.00
Disbursements	$ 7,049.88
Arbitrator's Fees	$35,815.19
Total	$81,865.07

The Application
Analysis

[27] Under the Arbitration Act, 1991, appeal rights from an arbitral award are limited. Section 45(1) of that Act sets out a three part conjunctive test for obtaining leave to appeal an award:

> 45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
> a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
> b) determination of the question of law at issue will significantly affect the rights of the parties.

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[28] The arbitration agreement in this matter does not deal with appeals on questions of law and does not provide a party the opportunity to appeal an award on a question of law, a question of fact or of mixed law and fact. Therefore, the Applicant needs the leave of this court to appeal the awards.

The Grounds of the Appeal

1. *The Arbitrator Erred In Law in His Interpretation of Article 4.2(d) of the Declaration and Rule 2 of the Rules of TSCC 1507 And In the Application of A Subjective Standard, As Opposed To Objective, In Determining Whether A Noise of Offensive Action Is An Annoyance And/Or Nuisance And / Or Disruptive.*

[29] Section 4.2(d) of the Condominium Corporation's Declaration provides that:

> In the event the Board determines in its sole and absolute discretion that any noise … is being transmitted to another Unit …

Rule 2(a) of the Rules of TSCC 1507 states:

> Owners … shall not create nor permit the creation or continuation of any noise or nuisance which, in the opinion of the Board or Manager, may or does disturb the comfort or quiet enjoyment of the Units or Common Elements ..

Rule 2(b) states:

If the Board determines that any noise is being transmitted to another Unit …

[30] This ground of appeal does not deal with a question of law, but rather with a question of fact or a mixed question of fact and law. In his decision, the arbitrator recognized that the board of directors and the manager had the discretion to determine whether noise was being transmitted from one unit to the other. He also recognized, however, that the discretion must be exercised reasonably by taking all the evidence into consideration.

[31] The arbitrator did not err in law in his interpretation of the noise provisions. First, there is no established principle in law dictating the interpretation of these types of noise provisions in

a condominium's governing documents. Second, when he did interpret the particular noise provisions to the facts of this case, he did so as a question of fact or mixed law and fact.

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[32] The arbitrator did not determine (nor was he asked to do so) a threshold of noise which would qualify as a breach of the declaration and rules of TSCC 1507. He, instead, applied common sense based on reason and the wording of the TSCC 1507's declaration, by-laws and rules to the facts of this case. He did so correctly, in my view.

[33] The arbitrator also found that the condominium corporation and its manager made every reasonable effort to solve the problems they had with Mr. Italiano. That, coupled with the strong evidence that the Applicant had breached the noise provisions of the declaration and rules, leaves me with no other conclusion than that his decision was sound and without error.

[34] For the reasons stated, I would not grant leave to appeal, but would also not allow an appeal had leave been granted.

2. *The Arbitrator Erred In Law In Interpreting The Responsibilities of The Board of Directors And Property Management In Respect of the Enforcement of Article 4.2(d) Of The Declaration and Rule 2 Of The Rules of TSCC 1507.*

[35] This is ground of appeal relates to a question of mixed fact and law. It deals with the Arbitrator's findings of fact about the noise emanating from the Applicants' unit, the reasonableness of the actions of the board of directors and property manager, the suggestions as to noise abatement techniques in the letters sent to the Applicant by the corporation and the finding by the arbitrator that the Applicant did not do enough to abate the noise.

[36] Leave to appeal is denied.

[37] In any event, this ground of appeal has no merit. Pursuant to the *Condominium Act*, 1998 and the TSCC 1507's declaration and rules, the obligation to comply and do whatever is necessary to prevent disturbing noises was Mr. Italiano's. As the Respondent has pointed out in its submissions, it was not up to the condominium corporation to show Mr. Italiano how to do this.

3. *The Arbitrator Erred In Law In Failing to Consider Evidence of Efforts Made By The Applicant to Abate Any Noise From The Unit.*

[38] This issue does not relate to any error in law. The Arbitrator considered the Applicant's evidence on this issue and found that whatever the Applicant did was insufficient to prevent annoying and disruptive noise from being transmitted from his unit.

4. *The Arbitrator Erred In Law In making an Order Requiring Italiano To Pay The Substantial Indemnity Costs of TSCC 1507 And Full Costs Of The Arbitraiton, And In The Absence of Allowing Italiano to Make Proper Submissions In Respect of That Issue.*

[39] The Applicant alleges a denial of natural justice in the arbitrator's award of costs on a substantial indemnity basis and without hearing submissions on the issue by the Applicant. This procedural irregularity is reviewable as a matter of law. Pursuant to section 45(1)(a) of the *Arbitration Act*, 1991, this issue is an important one regarding the matters at stake in the arbitration and justifies that leave be granted to appeal because of the substantial amount of costs awarded against the Applicant. Leave is granted, but the ground of appeal should be dismissed for the following reasons.

[40] The Arbitrator has the power to award costs pursuant to the *Arbitration Act*, 199. Section 54 (1) and (2) set out:

> 54.(1) An arbitral tribunal may award the costs of an arbitration.
>
> (2) The costs of arbitration consist of parties' legal expenses, fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

[41] The Arbitrator is given discretion pursuant to this section to decide who must pay costs to whom. That discretion must be exercised judicially and not irrationally or whimsically (*AWS Engineers & Planners Corp. v. Deep River (Town)* 2006 Carswell Ont. 3320, par. 11).

[42] In the AWS case, the court paralleled the powers of an arbitrator under section 54 to those of an arbitration board, not limited by factors under Rule 57.01 of the Rules of Civil Procedure for a court's exercise of discretion. AWS further described the board's discretion as follows:

> The statute establishing and empowering the board gave it complete discretion to order costs of and incidental to proceedings before it. Chief Justice Furlong [in Newfoundland] went on to add;
>
> "the discretion of the Board is unlimited so long as that discretion is properly exercised in law and we are in no position to interfere with it."

[43] It is within an arbitrator's discretion to order full indemnity if it is justified after looking at the prior conduct of a party when making such an award (*Rosenfeld v. Iamgold International African Mining Gold Corp.* 1997 CarswellOnt 3676).

[44] In this case, the arbitrator acted in accordance with s. 134(5) of the *Condominium Act*, 1998 when he ordered costs payable by the Applicant on a substantial indemnity basis and added them to the common expenses to be collectible as such (*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2005) 253 O.L.R. (4th) 656 (Ont.C.A.) at par. 160).

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[45] There was no denial of natural justice to the Applicant in this case. While not taking submissions from the Applicant before deciding the issues of scale and quantum of costs of the arbitration and enforcing the collection of costs by allowing them to be collected as common expenses, the arbitrator later gave the applicant opportunites (except in relation to the scale of costs) to make submissions.

[46] Section 44 of the Arbitration Act, 1991 permits an arbitrator, on his own initiative or at a party's request, to amend the award so as to correct an injustice caused by an oversight by an arbitrator.

[47] After having asked for submissions from counsel on the outstanding issues on costs, the arbitrator's release of his award prior to considering those submissions was an oversight. This is clear because, after having been notified by the condominium corporation's lawyer of the irregularity, the arbitrator asked the Applicant on two occasions to present those costs submissions to him. The Applicant declined to do so, taking the position that the arbitrator was functus.

[48] In fact, the arbitrator had agreed that he was functus on the issue of the scale of costs to be awarded, but was open to reconsider his award on the issues of quantum of costs and their enforcement by way of payment as common expenses. I agree with him that he was not functus on those issues (*Finlay Forest Industries v. I.W.A. Local 1-424* 1975 CarswellBC 155).

[49] The Applicant's counsel had an opportunity to present submissions on costs and chose not to do so. The arbitrator's decision to proceed to a final decision without the Applicant's participation, once he chose not to deliver the invited submissions, was not inappropriate (*Environment Export International of Canada Inc. v. Success International Inc.*, 1995 CarswellOnt 2485).

[50] The arbitrator was also not incorrect for not inviting costs submissions on the issue of the scale of costs. I have previously outlined the basis for his discretion to award substantial indemnity costs from the Applicant, but would add that pursuant to s. 134(5) of the *Condominium Act*, 1998, TSCC 1507's declaration, mediation/arbitration By-law No. 3 and rules, and the Ontario Court of Appeal's decision in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline (supra),* he was bound to order such costs. An award for substantial indemnity costs would have been ordered even had the Applicant had made submissions – especially in light of the particular facts of this case.

[51] The Applicant complains that the arbitral costs award was made without any consideration, by the arbitrator, of offers to settle made by the parties. At the same time, the Applicant failed to respond to the arbitrator's request for submissions on costs. The arbitrator can hardly be faulted for not considering any offers to settle made by the parties if he was not made award of them.

[52] This ground of appeal is dismissed.

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5. *The Arbitrator Erred In Law In Making An Order That The Cost Award Payable By The Applicant Is To Be A Common Expense and Enforceable As Such By Registration Of A Certificate of Lien On the Applicant's Unit Pursuant to Section 134(5) of The Condominium Act, 1998, By Law No. 3 And The Declaration of TSCC 1507, And In The Absence of Allowing Italiano To Make Submissions In Respect of That Issue.*

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[53] I have already ruled that the Applicant has no valid complaint about the arbitral costs award in the face of his refusal to provide submissions to the arbitrator. That ruling also applies to this issue.

[54] In addition, I have found that the arbitrator made no reviewable error in awarding substantial indemnity costs in this case after considering the legislation, governing documents of the Respondent corporation and the Applicants' behavior.

[55] The arbitrator's decision to make the costs ordered collectible as common expenses and enforce the collection of costs by allowing the condominium to register a certificate of lien on the unit pursuant to s. 134(5) of the *Condominium Act*, 1998 and the condominium's declaration and rules is an issue of law and reviewable by this court.

[56] Leave to appeal is granted pursuant to subsection 45(1)(a) and (b) of the *Arbitration Act*, 1991. Not only is the issue important to the parties, but Mr. Italiano's rights relating to his ownership of the condominium are significantly affected by this issue.

[57] Regretfully, this ground of the appeal must fail.

[58] Any order as to costs are collectible as common expenses pursuant to s. 134(5) of *The Condominium Act*, 1998. The case of *Skyline (supra)* affirms the notion that the financial burden associated with obtaining a compliance order should shift from the "innocent" condominium corporation and owners to the "guilty" unit owner who necessitated the obtaining of the compliance order.

[59] The case of *York Condominium Corp. No. 482 v. Christiansen*, 2003 CarswellOnt 6533, advanced the notion that the unit owners' contributions to the common expenses were the life blood of the condominium corporation and, as such, the legislature has provided means whereby these corporations are assured of collecting such contributions, along with interest and reasonable legal and other costs incurred in such collection.

[60] The parties disagree about whether s. 134(5) of the *Condominium Act*, 1998 applied to the arbitrator's cost award. The arbitrator did not explicitly state that section 134(5) applied to the costs award. He simply stated that s. 134(5) was incorporated into paragraph 28 of By-law #3 of the corporation. Both parties agree that this provision applies to the arbitrator's fees. The Applicant submits that the subsection does not apply to costs in favour of a party.

[61] I would tend to agree with the Applicant that s. 134(5), in and of itself, only applies to costs associated with compliance orders granted by courts and not arbitral tribunals. This

principle was recognized in *Metropolitan Toronto Corp. No. 1385 v. Skyline*, *(supra)* at par. 35. Justice Doherty makes it clear, in that case, that

> "section 134(5), the section in issue here, applies only to condominium corporations and only where the condominium corporation has obtained an award of damages or costs under s. 134(3)".

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[62] Section 134(3) does refer to an application to "the court". Justice Doherty's reasoning in Skyline supports the proposition that subsection 134(5) cannot be interpreted separately from the other subsections of section 134 and that the section created a procedure for obtaining compliance orders from the Superior Court of Justice.

[63] This view is also endorsed by the authors of the book *Condominiums in Ontario: A Practical Analysis of the New Legislation* [Harry Herskowitz & Mark F. Freeman. Toronto: LSUC & OBA 2001] at 466-67.

[64] Nonetheless, I conclude that the arbitrator was correct in his finding that the TSCC 1507 was authorized to have the mediation and arbitration costs collected in the same manner as common expenses. Section 4.2(d) of the condominium's declaration provides that

> In the event that the Owner of such Residential Unit fails to abate the noise, the Board shall take such steps as shall be necessary to abate the noise … and the Owner shall be liable to the corporation for all expenses incurred by the Corporation in abating the noise, which expenses are to include reasonable solicitor's fees on a solicitor and his or her own client basis and shall be deemed to be additional contributions to Common Expenses and recoverable as such.

[65] Mr. Italiano, pursuant to section 119(1) of the *Condominium Act*, 1998, is statutorily bound to abide by his condominium's declaration.

[66] Common expenses are defined in s. 1(1) of the *Condominium Act* as "the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act or in a declaration." Therefore, common expenses can be created in three ways:

1. they are specified in the *Condominium Act*
2. they are specified in the condominium's declaration or
3. they are related to the performance of the objects and duties of a corporation.

[67] Costs obtained in arbitral proceedings are not specified as common expenses in the *Act.* However, it is clear from s. 1(1) that a corporation is allowed to designate what common expenses it can charge to unit owners in its declaration. Is this power to designate common expenses restricted? Section 72(d) of the *Act* states that a declaration must contain "a statement

of the proportions, expressed in percentages allocated to the units, in which the owners are to contribute to the common expenses." However, the condominium corporation is also empowered to collect common expenses that are not specified as percentages pursuant to s. 7(4)(a) which states that a declaration may contain "a statement specifying the common expenses of the corporation." The only restriction to the corporation's power to collect certain costs as common expenses seems to be section 7(5) which sets out that "If any provision in a declaration is inconsistent with the provisions of this Act, the provisions of this Act prevail and the declaration shall be deemed to be amended accordingly." I do not believe that the Articles 4.2(d) or 6.1 are inconsistent with the *Condominium Act*. Therefore, it seems to me that a corporation can collect an arbitral costs award in the same manner as common expenses if they are so specified in the declaration. This would allow it to register a lien, pursuant to s. 85(1), for unpaid common expenses.

[68] Pursuant to that provision, the owner is liable to the corporation "for all expenses incurred in abating the noise," including its legal fees on a solicitor and his or her own client basis (which is usually held to mean full indemnity) and presumably its costs of arbitration. These expenses would be deemed to be additional contributions to common expenses and recoverable as such.

[69] The arbitrator did not err when he found that the corporation's declaration authorized the collection of the Respondent's costs and the costs of the arbitration were collectible in the same manner as common expenses.

[70] In authorizing the collection of the respondent's costs in the same manner as common expenses, the arbitrator also relied on paragraph 28 of By-law #3. It states:

> "The arbitrator's fees for assisting the parties with the disagreement, and other associated costs, such as but not limited to court reporters' fees, shall be split equally between the parties, unless otherwise agreed, as between the parties or ordered by the arbitrator, but the Corporation shall be primarily responsible for paying the arbitrator's account. The other party or parties, regardless of whether an owner or a tenant, shall reimburse the Corporation within seven days of a written request for reimbursement, failing which, the default in payment shall be deemed to be an award of costs pursuant to section 134(5) of the Act."

[71] Because of my earlier conclusion that s. 134(5) of the Act only applies to court orders, I do not think the arbitrator is correct in relying on para. 28 in awarding costs. However due to the fact that this paragraph only deals with the costs of the arbitration and the arbitrator did not rely solely on this paragraph in awarding his costs to be collectible as common expenses, this error is of no consequence.

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6. The Arbitrator Erred in Law In Making An Order For The Amount Of Substantial Indemnity Costs Which He Did, Which Cost Award Fails to Bear Reasonable Connection to The Amount Reasonably Contemplated.

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[72] This issue does not raise a question of law. In any event, the Applicant intended to mount a full defence to the condominium corporation's case. He was represented by counsel in that regard. He was ordered to pay costs of $4,000 on July 30, 2007 for not being prepared to proceed. The arbitration itself took four days along with a motion with cross-examinations. There were concerns raised at the arbitration by TSCC regarding the mounting costs for continuing the hearing. The Applicant lost the arbitration and should bear the costs of proceeding with it, - especially in light of the fact that he could have kept the noise down in his unit and avoided what has taken place in this matter.

7. The Arbitrator Erred In Law In Awarding Costs To TSCC 1507 Which Precede The Arbitration Proceedings

[73] I agree with the Applicant that what constitutes arbitral costs is set out in section 54 of the *Arbitration Act*, 1991 c. 17 as the following:

> 54.(1) An Arbitral tribunal may award costs of an arbitration.
> (2) the costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

[74] I also agree with the applicant that the arbitrator erred in law by ordering costs to TSCC 1507 which preceded the delivery of the Notice of Arbitration by TSCC 1507 in accordance with its By-law No. 3.

[75] Although the arbitrator found that the mediation was a condition precedent to the commencement of the arbitration and the mediation was "related to the arbitration" pursuant to section 132 of the Condominium Act, 1998, he had no jurisdiction to order the Applicant to pay the $4,102.50 mediation costs as costs of the arbitration.

[76] First, Section 132(6)(b) of the *Condominium Act*, 1998 specifies that

> 132(6) Each party shall pay the share of the mediator's fees and expenses that
> (b) the mediator specifies in the notice stating that the mediation has failed, if the mediation fails.

[77] The mediation did not continue after it was adjourned due to the Applicant's failure to attend. There was no "failure" of the mediation pursuant to s. 132(6)(b) of the Act.

[78] Second, paragraph 10 of the corporation's By-Law no. 3 (Mediation and Arbitration Agreement) states that the mediator's fees for assisting the parties shall be borne equally by the parties unless the mediator specifies otherwise.

[79] In *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2004), 2004 CarswellOnt 3330 (S.C.J.) at par. 31 reversed on other grounds (2005), 253 O.L.R. (4TH) 656 (Ont. C.A.)], Justice Lax held:

> "it [the legislature] left the determination of the payment of the mediator's fees and expenses to the mediator under section 132(6), who specifies the amount each party will pay. Where mediation fails to obtain a settlement, the parties are required to arbitrate under the Arbitration Act, 1991. Presumably, the arbitrator will determine how the parties will share in payment of these fees and whether to award costs of the arbitration to either party".

[80] Leave to appeal is granted and the application granted on this ground. The $4,102.50 will be deducted from the total of the costs awarded by the arbitrator. The award then becomes $77,762.57.

[81] On all other grounds except the seventh and last ground, the Application is dismissed.

Counter-Application

[82] In the circumstances, the counter-application is granted. The Costs Award, dated February 22, 2008 ordered the Applicant to pay $81,865.07 to TSCC 1507. Any amount which remained unpaid 30 days from the date of the Arbitral Costs Award were to be recovered by TSCC 1507 as common expenses. No payments have been made by the Applicant pursuant to the Arbitration Award.

[83] On March 25, 2008, 32 days after the date of the award, a Notice of Lien was sent to the Applicant pursuant to section 85(4) of the *Condominium Act*, 1998 advising him that a certificate of lien would be registered on title if payment for the total amount owing plus interest was not received by April 7, 2008. No payments were made by the Applicant.

[84] A Certificate of Lien was registered on title to the Applicant's Unit pursuant to s. 85 of the *Condominium Act*, 1998. The total amount of the lien will be $77,762.57.

[85] Submissions on Costs of the Application shall be made in writing to me within the next 14 days. Those submissions shall be no longer than 3 pages in length excluding any Bill of Costs.

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McWatt J.

DATE: July 4, 2008

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