

Case Name:

Durham Condominium Corp. No. 90 v. Moore

Between

**Durham Condominium Corporation No. 90, Applicant, and
Carol Moore and Keith Wallace, Respondents**

And between

**Carol Moore and Keith Wallace, Applicants, and
Durham Condominium Corporation No. 90, Respondents**

[2010] O.J. No. 4463

2010 ONSC 5301

Durham Court File Nos. 63256/09, 64230/09

Ontario Superior Court of Justice

P. Lauwers J.

Heard: September 24, 2010.

Judgment: October 20, 2010.

(11 paras.)

Counsel:

Paul Chornobay, for the Applicant.

Christine Galea, for the Respondents.

ENDORSEMENT

1 P. LAUWERS J.:-- There were two applications before me, one brought by Durham Condominium Corporation No. 90 ("D.C.C. 90") and the other brought by the respondents Moore and Wallace. See [2010] O.J. No. 4138. D.C.C. 90 was completely successful and as a result, I made the following costs award:

[19] The applicant has been successful in its application and is therefore entitled to costs. Given the factual uncertainties in the respondents' application, subject to any offers to settle, I would not be inclined to award costs on the respondents' application. If costs cannot be agreed between the parties, I will accept costs submissions on a seven-day turnaround commencing with D.C.C. 90.

2 D.C.C. 90 submits a costs outline structured around a settlement offer made by it to the respondents on May 11, 2010. There is no doubt that D.C.C. 90 obtained a better result on the hearing than was contemplated by the Offer to Settle, so that the ordinary costs consequences under Rule 49 should apply. In any event, a reasonable offer to settle must be taken into account Rule 57.01.

3 D.C.C. 90's Costs Outline sets fees on a partial indemnity basis for the period up to May 11, 2010 as \$8,789.60 on a partial indemnity basis, or \$13,184.41 on a substantial indemnity basis, reaching \$14,649.34 inclusive of HST. Dis-

bursements including HST are set at \$815.33. Fees post May 11, 2010 are set at \$4,335.35 on a partial indemnity basis, \$6,503.03 on a substantial indemnity basis, and \$7,225.59 inclusive of HST. The disbursements for that period are set as \$993.09 inclusive of HST.

4 Despite the order for costs, no effort was made by D.C.C. 90 to distinguish between costs relating to the application brought by D.C.C. 90, and the application brought by the respondents. On the basis of the material and the argument, I find that the relative proportion is two-thirds and one-third.

5 In this case, D.C.C. 90 is obliged under section 17(3) of the *Condominium Act* to enforce the corporation's bylaws. Section 134(5) provides that:

134(5) If a corporation obtains an award of damages or costs in an order against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

The concept, as explained by Wood J. in *Muskoka Condominium Corporation No. 39 v. Kreuzweiser*, 2010 ONSC 2463 is that:

No part of these costs should be borne by the respondent's neighbours who are blameless in this matter. The corporation declaration provides that any owner is bound to indemnify the corporation for any loss occasioned by his or her action. For these reasons, it is appropriate that the corporation's costs be on a full recovery basis.

6 The purport of section 134(5) of the Act was explained at length by the Court of Appeal in *Metropolitan Toronto Condominium Corporation No. 1385 v. Skyline Executive Properties Inc.*, (2005), 253 D.L.R. (4th) 656. The court held that "any additional actual costs" means costs that go beyond the normal award of costs. But this is only in relation to "obtaining the order". The enforcement of the order is not covered by section 134(5): see para. 51.

7 The respondents argue that Rule 49 only entitled D.C.C. No. 90 to partial indemnity costs up until the date that the offer is made. They offer, however, no argument in response to D.C.C. 90's reference to the *Condominium Act*. In my view section 134(5) is the more specific authority and supersedes Rule 49.

8 The respondents also argue that Rule 57.01 applies and that the costs claimed are excessive; that is they are disproportionate in light of the issues in dispute, the hourly rates are too high and too many hours were charged. As a comparative, counsel for the respondents notes that fees for the respondents on a partial indemnity basis up until May 11, 2010 were \$5,556.99 while fees for D.C.C. No. 90 were \$9,604.93. I note, however, that the substantial indemnity costs for the period after May 11, 2010 were roughly the same at about \$7,400.00.

9 The fee differential in the first phases does not strike me as being unusual since it was up to D.C.C. No. 90 to launch the application and to incur the additional costs in structuring it.

10 In the circumstances, given the statutory responsibility of the Condominium Corporation, I find that the legal fees charged on a substantial indemnity basis are reasonable and should not be reduced to account for the factors raised under Rule 57.01.

11 Accordingly, D.C.C. No. 90 is entitled to be paid two-thirds of substantial indemnity costs both pre and post May 11, 2010 plus full disbursements as set out in its Costs Outline. The amount is payable within 30 days of the date of this order subject to any other arrangement that the parties may choose to make.

P. LAUWERS J.

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