CITATION: *Boily v. Carleton Condominium Corporation 145*, 2012 ONSC 1324
COURT FILE NO.: 11-51640
DATE: 2012/02/24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
DANIELLE BOILY, JUAN ESCUDERO, LISA BACKA-DEMERS, KANTA MARWAH, DOUG CUMMINGS and RICHARD MAUREL	)	Rodrigo Escayola, for the Applicants
Applicants	)	
– and –	)	
CARLETON CONDOMINIUM CORPORATION 145, DAN LITCHINSKY, AVIS MILLER, JEAN-GUY BOURGEOIS and CAROL SMALE	)	Julius Dawn, for the Respondents
Respondents	)	
	)	**HEARD:** By written submissions

DECISION ON COSTS

BEAUDOIN J.

[1] The Applicants seek costs on a full indemnity basis against the Respondents for the following three proceedings in the present matter:

(a) the motion for an interlocutory injunction heard on June 22, 2011;

(b) the motion to enforce a settlement heard on June 29, 2011; and

(c) the application for various reliefs under the *Condominium Act, 1998* (the "*Act")*, scheduled for June 29, 2011. While the Application was not heard as a result of

the Applicants' success in their motion to enforce the settlement, the Applicants seek costs thrown away due to the Respondents' attempt to resile from the settlement that had been reached;

for a total of $48,538.48 on a full indemnity basis.

Background

Applicants' Position

[2] The Applicants are owners of condominium units at Park Square, a condominium complex comprised of 142 units with a landscaped courtyard, which was at the center of this litigation. The crux of this litigation was whether a proposed modification of the courtyard of the condominium complex constituted a "substantial change to the common elements" of the condominium pursuant to s. 97 of the *Act*.

[3] The Applicants were of the view that it did and that the Condominium Board (the "Board") was required to provide notice of this substantial change to the owners and that this question was required to be put to a 66 2/3 percent vote of the owners as provided by s. 97(4) of the *Act*. The Board took the position that the modifications were an ordinary issue of repair and that a simple majority vote on the issue was required.

[4] On May 4, 2011, at a special owners meeting, the Applicants became aware that the Board was proceeding with a plan of altering the courtyard and replacing it with what the Applicants considered to be a significantly different design with less greenery and more parking. The Applicants sought a special owners meeting pursuant to s. 46 of the *Act* to submit their concerns to the Board and they claim that that the Board did everything it could to stifle and silence their opposition.

[5] On May 17, 2011, the Applicants put the Board on notice not to demolish the courtyard until the owners had been provided with proper notice and with sufficient time to hold an owners meeting. Nevertheless there was some demolition of the podium on May 20, 2011.

[6] On May 28, 2011, at the Applicants' insistence, the Board finally distributed a notice to the owners. However, two days later, the Board distributed a notice advising that the question of

the courtyard landscape would be submitted to a simple majority vote at a Special General Meeting, scheduled to proceed on June 22, 2011. On May 31, 2011, the Applicants formally requested an owners meeting by providing the Board with a requisition pursuant to s. 46 of the *Act*. The Applicants sought to have both meetings proceed at the same time and place.

[7] The Board refused to recognize that the Applicants' requisition met the required threshold of 15 percent of units, on the basis that a majority of the owners of each unit (usually married joint tenants) were required to sign the requisition. The Applicants say that the Board's own requisition for a Special Meeting did not meet this requirement and that the Board was using two sets of rules. The Board initially refused to provide the Applicants with the list of registered owners on which it based its refusal of the Applicants' requisition.

[8] On June 21, 2011, the day before the Special Meeting, the Board advised for the first time that it would start removing the vegetation the morning after the Board's owners meeting and that the hard landscaping would be removed within four business days. Since the Board continued to maintain that the question would be submitted to a simple majority vote, the Applicants say they had no choice but to bring an urgent motion seeking the court's intervention.

[9] On June 22, 2011, I granted an interlocutory injunction, stopping the Board from holding its meeting and enjoining the Corporation from making any alteration to the courtyard landscape until further order of the court, subject to an agreement of parties. The balance of the application was adjourned to June 29, 2011.

[10] Immediately following the hearing of the motion, the parties entered into settlement discussions which resulted in a negotiated agreement and in Minutes of Settlement being executed by counsel on behalf of the parties. Pursuant to this agreement, the Board's owners meeting would proceed as scheduled that evening on the condition that one of the Applicants would co-chair the meeting and that the question of the courtyard configuration would be put to a 66 2/3 percent vote of all owners.

[11] The owners meeting did proceed as agreed but the Board did not obtain the 66 2/3 percent support required for its proposed alteration to the courtyard. The Respondents were unhappy with the result and took the position that there was no agreement. They then

advised the court that the matter had not settled and that the Application was proceeding on June 29, 2011.

[12] The Applicants brought a Motion to enforce the Minutes of Settlement to be heard immediately before the application. At the conclusion of the hearing, I dismissed the Respondent's submissions from the Bench and granted the motion seeking to enforce the Minutes of Settlement.

Respondents' Position

[13] The Board says its members fulfilled their statutory duty to act honestly and in good faith and acted with complete transparency. The Board relied all material times upon the professional advice and guidance of their legal counsel, professional engineers, professional property managers, and a landscape architect. The Respondents volunteer their services to carry out the affairs of the Corporation.

[14] In this particular case, the Board had inherited an unenviable position having to undertake significant multimillion dollar structural repairs to the underground garage, garage roof and podium which had not been adequately budgeted for in the reserve funds established by previous boards. It was in this context that this dispute arose between the Board and the Applicants.

[15] The Board says the issue of whether the changes to the podium hard landscaping and podium landscaping were a substantial change, or simply repairs of existing elements, was entirely secondary to a campaign by the Applicants to remove the Board of Directors.

[16] The Board says it held regular meetings every month in fulfillment of its obligations. The Board of Directors posted news bulletins on its billboard in the condominium lobby. The architect landscape design was put on display from early March 2011 until late April 2011. The Board says that the vast majority of unit owners fully supported the landscaping plan and change to stone cladding and less than 15 percent of the owners made any objections to the landscaping plan. Following receipt of the owners' informal feedback, the Board of Directors then held a formal information meeting of all owners to answer any questions pertaining to the Phase II Garage Roof and Podium repair on May 4, 2011.

[17] The Board says that since less than 15 percent of the unit owners were opposed to the proposed landscape reinstatement plan design, it therefore decided to proceed by adopting the plan at their next Board meeting on May 6, 2011 and sent out Minutes of Meeting informing all unit owners, upfront and immediately, that they would be adopting the proposed landscape plan, with some modification taking into account the owners' feedback.

[18] Although there is evidence that they were put on notice as early as May 17, 2011, the Board says it was only three weeks after this decision was announced that the Applicants alleged for the first time that the restoration work was a substantial change that required a 66 2/3 percent of owners approval. The Board says it sought legal advice on the interpretation of s. 97 of the *Act*. That opinion was that the proposed repair and restoration work could be reasonably categorized as repairs and not as a substantial change to the common elements.

[19] In an attempt to compromise and continue to engage all owners in a resolution, the Board agreed to call a formal meeting of owners to put the two alternative landscape designs and cladding materials to a simple majority vote of the owners. As to the demolition that had already begun as alleged by the Applicants, the Board says that the engineer had already reported all brick veneer on the podium had to be removed and was not salvageable. The small areas which were removed on May 20, 2011 and replaced with sample alternate finishes were solely done to better inform the owners of their choices.

[20] Thereafter, the Applicants requisitioned hundreds of documents from the Corporation records including copies of all engineer reports, financial plans, contracts and bids, and copies of Board Minutes going back two years. In an effort to avoid unnecessary legal expenses, the Board proposed a further compromise to the Applicants, namely, that the meeting of owners be allowed to proceed to a vote of owners. It would allow both parties to see what percentage of owners agreed with the landscaping plan. If after the vote the Applicants were still dissatisfied with the outcome of the meeting, they still had an opportunity to bring their application. The Board promised not to act on the landscape plan if the Board did not have 50 percent of the owners approval. More importantly, if the meeting was allowed to proceed and resulted in more than 66 2/3 persons voting in favour of the new landscaping plan then the Applicants' concerns would have been fully addressed without the need of any application. The Board's solicitor confirmed

the Board's undertaking that no destruction of tile planters or brick cladding would be done prior to June 28, 2011.

[21] After the meeting, the Board took the position that it would proceed within four days to start the changes, which resulted in the application for an injunction.

Costs

Applicants' Position

[22] The Applicants seek costs on a full indemnity basis in light of the Respondents' conduct leading up to and at the hearing. They allege that the Respondents acted with bad faith, in a high-handed, vexatious and oppressive manner, disregarding the *Act* and the interests of the Applicants.

[23] The Applicants submit that the *Act* allows the court to shift the burden of obtaining compliance orders onto the individuals whose conduct necessitated the obtaining of such order.

[24] The *quantum* of costs being requested is broken down as follows:

(d) the interlocutory injunction: $8,594.50 plus $1,117.29 for HST;

(e) the motion to enforce settlement: $14,127.00 plus $1,836.51 for HST;

(f) the Application: $16,697.00 plus $2,170.61 for HST; and

(g) disbursements: $3,571.34 plus $424.23 for HST.

[25] In exercising its discretion to award costs of the proceedings pursuant to s. 131 of the *Courts of Justice Act*, the Applicants refer to the factors found at Rule 57.01. They submit that the starting point in this case should be that they were entirely successful.

57.01(1) (0.a) The principle of indemnity

[26] The Applicants claim that the principle of indemnity is particularly important in the present matter since they are simple owners of condominiums who were forced to take the Board to court to ensure compliance with the *Act* and with the settlement it had entered into and that

they cannot be expected to finance this out of their own pockets. They point out that this is not a case where the victorious party was suing for pecuniary or personal advantage.

[27] Moreover many sections of the *Act* (such as ss. 85, 134(5) and 135(3) provide for a particular regime when dealing with costs, shifting the financial burden of obtaining compliance orders away from the innocent owners onto those whose conduct necessitated the obtaining of the order.

[28] The Applicants cite a number of decisions, namely, *MTCC No.1385 v. Skyline Executive Properties Inc.*, 253 D.L.R. (4th) 656 (Ont. C.A.).; *Muskoka Condominium Corp. No. 39 v. Kreutzweiser*, 2010 ONSC 2463, [2010] O.J. No. 1720; *MTCC No. 985 v. Vanduzer*, 2010 ONSC 900, [2010] O.J. No. 571; and *Chan v. Toronto Standard Condominium Corp. No. 1834*, 2011 ONSC 108, [2011] O.J. No. 90. These were all cases where the costs of legal proceedings to enforce compliance with the *Act* were enforced against an individual owner. The Applicants argue that the corollary is that innocent unit owners should not have to bear the financial burden of obtaining a compliance order as a result of the misconduct of the Board.

[29] They also submit that I should consider the inequity and unfairness which would result if the Applicants were not fully compensated for their legal fees while the Respondents are having their legal bills paid by all owners through condominium fees. While this may very well be a case where Board members should pay the costs award out of their own pockets, at the very least, the successful Applicants claim that they should be entirely compensated for the costs they incurred.

57.01(1)(0.b) The Amount of Costs that an Unsuccessful Party Could Reasonably Expect to Pay

[30] On May 18, 2011, the Board send out to all owners its operating budget 2011/2012, advising, that $55,000.00 had been earmarked to cover the legal costs anticipated as a result of the Applicants' demand letter. This is a good indicator of the Board's expectations as to the fees it would have to expend.

57.01(1)(f) Conduct of the Board which is Improper, Vexatious and Unnecessary

[31] The Applicants say that the Board sought to quash the opposition by trying to derail the Applicants' attempt to have an impromptu meeting with owners by qualifying it as "illegal" and refusing to allow the owners meeting to proceed on the basis of a requirement which it did not apply to its own requisition for a meeting. The Board also refused to provide the Applicants with the list of registered owners.

[32] The Applicants rely on the position that the Board took on the motion to enforce settlement. The Board argued that there was no agreement; if there was, the Applicants had breached their obligations by forcing the Board to accept Richard Maurel as co-chair; that the owners meeting was chaotic and out of control, which resulted in confusion as to what was being voted upon; that portions of the Minutes of Settlement violated the *Act* by allowing for other motions to be put only to the owners present at the meeting; and that the terms of the settlement were unclear and unenforceable. I dismissed those arguments.

[33] The Applicants further submit that the Board's oppressive and egregious conduct can be further addressed having regard to the oppression remedy pursuant to s. 135 of the *Act*. It provides:

> **Oppression remedy**
> 135. (1) An owner, a corporation, a declarant or a mortgagee of a unit may make an application to the Superior Court of Justice for an order under this section. 1998, c. 19, s. 135 (1); 2000, c. 26, Sched. B, s. 7 (7).
>
> **Grounds for order**
> (2) On an application, if the court determines that the conduct of an owner, a corporation, a declarant or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, it may make an order to rectify the matter. 1998, c. 19, s. 135 (2).
>
> **Contents of order**
> (3) On an application, the judge may make any order the judge deems proper including,
> (a) an order prohibiting the conduct referred to in the application; and
> (b) an order requiring the payment of compensation. 1998, c. 19, s. 135 (3).

[34] The Courts have used this oppression remedy to impose the equivalent of full indemnity costs in *Waterloo North Condominium, v. Webb*, 2011 ONSC 2365, where an owner disregarded the interest of the rest of the community.

[35] Full indemnity costs against a condominium corporation were awarded to an owner by the Alberta Queen's Bench in *Condominium Corp. No. 0111505 v. Anders*, 2005 ABQB 401, where a condominium board proceeded (with the advice of counsel) with a court application rather than proceed by way of a general meeting pursuant to the by-laws of the corporation. In *Metropolitan Toronto Condominium Corp. 626 v. Bloor/Avenue Road Investment Inc.*, [2009] O.J. No. 4899 (Div. Ct.), the Divisional Court confirmed a substantial indemnity award against a condominium corporation that forced an unnecessary hearing after having breached an undertaking.

The Minutes of Settlement must be considered as a written offer to settle

[36] Finally, the Applicants urge me to consider the language of the Minutes of Settlement of June 22, 2011 as having the same effect as a formal offer to settle as attracting full indemnity costs, at least for the motion seeking to enforce them.

Respondents' Position

[37] The Respondents submit that there be no costs in these proceedings. In the alternative, they argue that the costs be fixed on a partial indemnity basis and be payable by the Respondent Condominium Corporation, not by the Board personally. The Board says the Applicants were not entirely successful and that success was divided. In their motion to enforce the Minutes of Settlement, the Applicants originally sought to enforce the right to have the owners' meeting reconvened to vote on a motion for three new estimates for the restoration work. That relief was abandoned prior to the hearing of the motion. The Respondents emphasize that the legal issue of whether landscaping, repairs and restoration constituted a material change under the *Condominium Act* was never adjudicated.

Principle of Indemnity

[38] The Respondents say that none of the sections of the *Act*, as relied upon by the Applicants, shift the financial burden to them. More importantly, the *Condominium Act* expressly provides under s. 37(3) that Directors shall not be found liable for breach of their duty in acting honestly and in good faith when they have relied upon professional advice. They argue that they acted in good faith and relied upon the report and opinions of legal counsel, engineers, and other persons. The relevant sections are set out below:

> **Standard of care**
> 37. (1) Every director and every officer of a corporation in exercising the powers and discharging the duties of office shall,
> (a) act honestly and in good faith; and
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. 1998, c. 19, s. 37 (1).
>
> **Validity of acts**
> (2) The acts of a director or officer are valid despite any defect that may afterwards be discovered in the person's election, appointment or qualifications. 1998, c. 19, s. 37 (2).
>
> **Liability of directors**
> (3) A director shall not be found liable for a breach of a duty mentioned in subsection (1) if the breach arises as a result of the director's relying in good faith upon,
> (a) financial statements of the corporation that the auditor in a written report, an officer of the corporation or a manager under an agreement for the management of the property represents to the director as presenting fairly the financial position of the corporation in accordance with generally accepted accounting principles; or
> (b) a report or opinion of a lawyer, public accountant, engineer, appraiser or other person whose profession lends credibility to the report or opinion. 1998, c. 19, s. 37 (3); 2004, c. 8, s. 47 (1).
>
> **Indemnification**
> 38. (1) Subject to subsection (2), the by-laws of a corporation may provide that every director and every officer of the corporation and the person's heirs, executors, administrators, estate trustees and other legal personal representatives may from time to time be indemnified and saved harmless by the corporation from and against,
> (a) any liability and all costs, charges and expenses that the director or officer sustains or incurs in respect of any action, suit or proceeding that is proposed or commenced against the person for or in respect of anything that the person has

done, omitted to do or permitted in respect of the execution of the duties of office; and
(b) all other costs, charges and expenses that the person sustains or incurs in respect of the affairs of the corporation. 1998, c. 19, s. 38 (1).

Not for breach of duty
(2) No director or officer of a corporation shall be indemnified by the corporation in respect of any liability, costs, charges or expenses that the person sustains or incurs in or about an action, suit or other proceeding as a result of which the person is adjudged to be in breach of the duty to act honestly and in good faith. 1998, c. 19, s. 38 (2).

[39] The Board notes that the cases cited by the Applicants are distinguishable in that those were cases where the Board was the applicant taking action against an owner for repeated breaches of the *Act*.

Amount of costs the parties could reasonably expect to pay

[40] The Board says its estimate of $55,000.00 was the estimated cost for all parties. The main application did not proceed and the Board says the fees claimed are excessive. I note however that it did not provide a copy of its own costs outline.

Conduct of the Parties

[41] The Board maintains its conduct was reasonable and at all times in good faith. It held monthly meetings and the minutes of those meetings were distributed every month to all owners during the construction phase. The Corporation posted and distributed regular information bulletin updates and the Board consulted the owners at all stages as to their feedback. It displayed the proposed landscape plans for nearly two months. The Board adds that it consulted the necessary professionals to ensure its decisions were in compliance with the *Act*.

[42] The Board is critical of the conduct of the Applicants and maintains that their principal objective was the removal of the Board. It notes that the case was determined solely on the basis of enforcing Minutes of Settlement between the parties. The Board says it is of fundamental importance that both parties were claiming the other to be in breach of the Minutes of Settlement. It was only at the hearing of the enforceability of the Minutes of Settlement that the Applicants withdrew their declared position that no work could proceed until three new quotes were obtained. The fact that the Applicants decided to change their position at the hearing does

not detract from the fact that their declaration to stop all work left the Board with no other alternative but to return to court for further direction. The Board rejects the argument that the Minutes of Settlement should be considered as an offer to settle.

Conclusion

[43] I am satisfied that there was a legitimate debate as to whether the proposed modifications to the courtyard constituted a substantial change within the meaning of the *Act*. While an oppression remedy was claimed and the Applicants did raise the issue of a compliance order, the dispute was resolved by enforcing the Minutes of Settlement reached between the parties. I have no doubt the problem of the multi-million dollars repairs that were the result of the decisions of previous Boards of Directors created a great deal of unhappiness on the part of all the owners of the condominium and this dispute has to be viewed in that context.

[44] I am satisfied that the Board of Directors was, for the most part, acting in good faith. There are nevertheless two areas of concern. The first involves the Board's refusal to recognize the legitimacy of the owner's requisition for a Special Meeting and the requirement that it be brought by a majority of the owners of each unit. The Board seems to acknowledge that it did not have to comply with those rules since it was exercising its authority under the *Act*. Moreover, the Board did not immediately supply a list of registered owners so that the Applicants could correct any alleged deficiencies. Four requests were made. Even if the Board was correct in its interpretation of the requirements of the requisition, its refusal to recognize the legitimacy of the requisition only served to deepen the mistrust and this was a relevant factor precipitating the motion for an interim Injunction.

[45] The main area of concern involves the Board's attempts to resile from the Minutes of Settlement and avoid the results of the meeting when it failed to obtain the necessary level of support. While the Board now says it was required to bring the matter back to court because of the insistence by the Applicants that they obtain three new quotes before proceeding with the work, its main argument was that the Applicants had breached the Minutes of Settlement on many other grounds and that these Minutes of Settlement were not enforceable. More importantly, the Board took the position that the paragraph of the Minutes of Settlement that

would have allowed anyone at the meeting to bring any motion were in violation of the provisions of the *Act*. Their own solicitor negotiated those terms and he was not present at the meeting to advise them. In any event, the meeting was adjourned before any such motion could be voted on. I conclude that the Board acted in bad faith in attempting to resile from the agreement their own solicitor had negotiated on its behalf.

[46] What is more, the Respondents' solicitor allowed the applicants' solicitor to deliver the executed Minutes of Settlement to the meeting; he himself did not attend. This fact alone triggered a great deal of the chaos that the Respondents later complained of.

[47] The Respondents did not address the scale of costs in its submissions but simply says the costs should be shared by all the condominium owners. In this case, the Respondents have not provided their own costs outline and as noted in *United States of America v. Yemec* (2007), 85 O.R. (3d) 751 (Div. Ct.) at para. 54: the court can "rightly make the inference that the [unsuccessful party] devoted as much ... time ... in an attempt to contest the motion." In this case, I find that Board's estimate of $55,000.00 for legal fees to be informative. With all the disparaging comments it has made about the Applicants, I find it hard to believe that the Board was consciously thinking of paying the Applicants' costs when it arrived at that estimate.

[48] As noted, the Board's legal fees will be paid in full. I have already determined that there was legitimate dispute as to whether the alterations and repairs to the courtyard constituted a substantial change within the meaning of the *Act*. The dispute is yet one more facet of the problems inherited when previous boards of directors postponed repairs and failed to set aside sufficient reserves. For this reason, the Applicants' costs should be paid by the Condominium Corporation with the exception of the fees incurred to enforce the settlement. None of the fees to enforce the settlement can be allocated to the Applicants and these are to be paid by the Board. The Minutes of Settlement should not be treated as an offer to settle, but the Applicants should not have to bear any portion of the costs of enforcing them. Notwithstanding the Respondent's arguments to the contrary, the Applicants were the successful parties on that motion.

[49] The hourly rates claimed by the Applicants' solicitor are reasonable, however I recognize that there is an element of duplication between the motion for the interim injunction and the

application and I have discounted that amount by one half. I note that there were also costs thrown away as the Applicants had to prepare for the hearing of the application since the Respondents took the position there was no settlement. I therefore allow costs as follows:

(a) the interlocutory injunction: $8,594.50 plus $1,117.29 for HST;

(b) the motion to enforce settlement: $12,000.00 plus $1,560.00 for HST;

(c) the application: $8,350.00 plus 1085.50 for HST;

(d) disbursements: $3,571.34 plus $424.23 for HST.

[50] These costs are to be paid by the Condominium Corporation equally with the exception of the amount allocated in paragraph 49(b) for the motion to enforce the settlement. That sum is to be paid by the Board and none of it can be re-allocated to the Applicants.

Mr. Justice Robert N. Beaudoin

Released: February 24, 2012

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COURT FILE NO.: 11-51640
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIELLE BOILY, JUAN ESCUDERO, LISA BACKA-DEMERS, KANTA MARWAH, DOUG CUMMINGS and RICHARD MAUREL

Applicants

– and –

CARLETON CONDOMINIUM CORPORATION 145, DAN LITCHINSKY, AVIS MILLER, JEAN-GUY BOURGEOIS and CAROL SMALE

Respondents

DECISION ON COSTS

Beaudoin J.

Released: February 24, 2012