ONTARIO
SUPERIOR COURT OF JUSTICE
TORONTO SMALL CLAIMS COURT

Court File No.: SC-13-31717-00
SC-14-9565-00
SC-15-10143-00

BETWEEN:

MICHAEL LAHRKAMP

Plaintiff

-and-

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 932

Defendant

J PRATTAS DJ

Released: October 27, 2017

COSTS ENDORSEMENT

[1] **J PRATTAS DJ** – In these three claims brought by the plaintiff and heard together, I ordered the production of certain documents by the defendant while effectively dismissing the remaining requests, as more particularly set out in my written Reasons for Judgment released on June 8, 2017 (the "Judgment").

[2] The parties requested that they make costs submissions after my Judgment. I received their costs submissions by the latter part of August 2017.

The positions of the parties

[3] The defendant is seeking full indemnity costs against the plaintiff on all three claims in the total amount of $158,114.81, consisting of $140,265 in fees and $17,849.81 in disbursements including HST.

[4] In the alternative, the defendant is seeking substantial indemnity costs without having quantified the amount, although it has submitted partial indemnity fees of $84,159 and $17,849.81 in disbursements.

[5] The plaintiff submitted that each party should bear its own costs, or, in the alternative, that the plaintiff pay costs of 15% of $1,500 to the defendant based on the $500 amount claimed for each of the three claims pursuant to section 55(8) of the *Condominium Act, 1998*, S.O. 1998, c. C-19 ("CA");

The defendant's grounds for full indemnity costs

[6] The grounds for the defendant's request for full indemnity costs can be summarized as follows:

(a) on the unreasonable behaviour provisions of Rule 19.06 and section 29 of the *Courts of Justice Act*, R.S.O. 1990 c. c-43 ("CJA");
(b) on what the defendant calls the consumer protection provision being section 134 (5) of the CA;
(c) on the factors of Rule 57.01 (1) of the *Rules of Civil Procedure* ("RCP"); and
(d) on an offer to settle served by the defendant pursuant to Rule 14.

[7] For the reasons that follow, I am unable to find any justification to assess costs on a full indemnity basis for the defendant. In fact, other than for the unreasonable behaviour provisions above, I am unable to find any other grounds on which to award any enhanced costs to the defendant.

Costs overview in our court

[8] Though costs usually follow the event, they are always subject to the discretion of the court as provided in section 131 (1) of the CJA.

[9] In addition to section 131 (1), in our court the law of costs has four other features:

(a) the *prima facie* limit under section 29 of the CJA;
(b) the specific costs rules under our Rules;
(c) the common law, to the extent that common law principles are not ousted by the legislative scheme; and
(d) the unreasonable behaviour language of section 29 of the CJA and Rule 19.06 which permits enhanced costs.

Section 29 of the CJA

[10] Pursuant to section 29 of the CJA costs, apart from disbursements, are generally limited in this court to 15% of the amount claimed, unless the unreasonable behaviour provisions can be invoked. That section reads as follows:

> **29.** An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding. [emphasis added]

[11] By enacting the so-called "15% rule" the legislature was reinforcing the idea of our court being the "People's Court" where access to justice was very important and where it was intended to provide an inexpensive, speedy, and user-friendly forum to accommodate civil disputes.

[12] I think it is important to emphasize that the 15% rule does not mean 15% of the amount claimed for each day of trial. The 15% rule is a limitation on an award of costs without regard to the number of trial days in a particular case.

[13] It is also important to note that section 29 does not set an upper limit on costs where the court considers it necessary in the interests of justice to penalize a party or party's representative for unreasonable behaviour.

Representation fee under Rule 19.05

[14] The general rule regarding entitlement to a representation fee for a successful party is contained in Rule 19.05 which reads as follows:

> **Representation Fee**
> **19.05** If a successful party is represented by a lawyer, student-at-law or paralegal, the court may award a reasonable representation fee at trial or an assessment hearing.

[15] Two things I would note about Rule 19.05. The first is the concept of reasonableness -- that is, the legal fees awarded in favour of the successful party (in this case the defendant) must be "reasonable" in the circumstances. The second is that, as a matter of statutory interpretation, since this rule is subordinate legislation (enacted by regulation) it is subject to the limitation on costs in section 29 of the CJA, which is a statute.

Penalty under Rule 19.06

[16] Rule 19.06 is also relevant in this case. It provides:

> **Penalty**
> **19.06** If the court is satisfied that a party has unduly complicated or prolonged an action or has otherwise acted unreasonably, the court may order the party to pay an amount as compensation to the other party.

Rule 57 of the *Rules of Civil Procedure*

[17] The defendant in its submission refers to Rule 57 of the RCP and certain related caselaw. Rule 57 deals with the awarding and fixing of costs as between parties to litigation in the Superior Court of Justice.

[18] While resort by analogy where our rules are silent may be had to the RCP, I am not persuaded that it is necessary to refer to Rule 57 of the RCP in deciding on an appropriate costs award in this case.

The reasonable expectation approach

[19] There is, however, one principle or approach discussed in the caselaw under Rule 57 which I consider relevant in this case. That is what has been referred to as "the reasonable expectation approach". This was adopted by the Divisional Court in *Anderson v St. Jude*

Medical, Inc. which concluded that "[t]he reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable."

[20] The notions of "fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases". (See for example *Boucher et al. v. Public Accountants Council for the Province of Ontario et al.* (2004), 2004 CanLII 14579, 71 O.R. (3d) 291 (OCA) at para. 38)

[21] Jurisprudence has emphasized that in fixing costs "the overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings, rather than an amount fixed by the actual costs incurred by the successful litigant". (See *Wilfred v. Dare et al.*, 2017 ONSC 2718 (CanLII) and *Boucher*)

[22] Expressed another way, what could an unsuccessful litigant reasonably expect to pay in legal fees incurred by the other party in our court. In my view, applying that approach in this case, the most important factor which should be considered is the 15% rule or limitation in section 29 of the CJA. The maximum cost award which an unsuccessful litigant should expect to pay on a $25,000 claim would be $3,750.

[23] Of course, given my findings of the unreasonable behaviour of the plaintiff in the conduct of these proceedings, and which unreasonable conduct unduly prolonged the trial, the language in section 29 of the CJA which describes the circumstance where a cost award may exceed 15% is triggered.

[24] The defendant submits that I exercise my discretion to award full indemnity costs, consisting of $140,265 in legal fees and $17,849.81 in disbursements. Such award of costs would clearly run afoul of section 29 of the CJA. Likewise, the request for partial indemnity fees of $84,159. I see no need to discuss these matters further.

Defendant has included costs for other proceedings

[25] The Bill of Costs submitted by counsel for the defendant includes costs for other proceedings such as motions before other judges. Unless otherwise reserved to me, costs for each proceeding are usually dealt with at that proceeding. None of these proceedings were before me and no costs were reserved to me. Consequently, I am not prepared to allow any of these costs.

The offer to settle

[26] The defendant made on offer to settle dated September 29, 2015 (the "Offer"), which was not in accordance with Rule 14.07 (2) paragraph 2 which requires that any such offer shall be made "at least seven days before the trial".

[27] As the trial commenced on October 2, 2015, the offer did not strictly comply with the rule being served only three days prior to the commencement of trial.

[28] The Offer provided for the plaintiff to examine redacted copies of the proxies and the meetings of the Board of Directors upon payment of certain costs at the offices of defendant's counsel, but left all the remaining issues to proceed to trial.

[29] In my Judgment I released redacted copies of the proxies and Board meetings to the plaintiff upon payment of certain costs as outlined in the Judgment.

[30] In view of my finding below that the Offer did not provide sufficient incentive for settlement and therefore no triggering of increased costs, it is unnecessary for me to exercise my discretion to shorten the time for service of the Offer.

Did the Offer provide sufficient incentive for settlement?

[31] Offers to settle should present realistic and genuine opportunities to settle and demonstrate a serious attempt at compromise and not be treated or seen as mere capitulations.

[32] There is also no over-arching principle that costs must be doubled any time a party receives a more favourable judgment than the offer, and costs, including any doubling or increase, remain within the discretion of the trial judge.

[33] In my view, when an offer is so close to the relief granted in the eventual Judgment as was the case here, it is debatable whether the plaintiff may have had the requisite "encouragement" or sufficient incentive to settle before the trial.

[34] In exercising my discretion I have considered all the circumstances of this case and I am satisfied that the Offer did not contain an adequate enough incentive for settlement and therefore did not rise to the point of triggering any increased costs.

Unreasonable behaviour provisions of section 29 of the CJA and Rule 19.06

[35] In assessing costs in this case, there are two key questions which must be answered, namely:

(a) To what extent did the plaintiff engage in:

(i) behaviour that "unduly complicated or prolonged" the proceedings in this case and more particularly the trial, or otherwise act unreasonably (Rule 19.06); or

(ii) "unreasonable behaviour in the proceeding" (section 29 of the CJA);

(b) What is the appropriate amount to award as costs – as a penalty, and in excess of the 15% rule – for such unreasonable behaviour?

[36] I think it is fair to say that the behaviour described in Rule 19.06 which triggers additional compensation is covered by the more general language in section 29 of the CJA.

[37] For ease of reference, I have set forth below a considerable number of findings in my Judgment which, in my view, demonstrate "unreasonable behaviour" of the plaintiff within the meaning of section 29 of the CJA, including in particular behaviour at trial which unduly prolonged these proceedings:

(a) he prosecuted several claims that were statute barred; (Judgment paragraphs 109, 123, 128, 129)

(b) he re-litigated the lobby renovation issue which was *res judicata;* (Judgment paragraph 72)

(c) he was either oblivious to the fact that he was wasting other people's time and money, or more likely, he took a certain delight in pestering the Board and others with his demands; (Judgment paragraph 50)

(d) he is a litigious person as I outlined in the Judgment and his battle for access to the records was purely for sport or because of his enjoyment of litigation; (Judgment paragraphs 51 & 58)

(e) he was on a fishing expedition without a focus and without a rational reason as to the documents and why he was seeking them; (Judgment paragraph 55)

(f) he proffered no credible evidence that access to the requested records would enable him to assess whether the corporation was being run in a proper manner; (Judgment paragraph 55)

(g) he had no apparent or discernable reason for his dissatisfaction with the audited financial statements and his pursuit of this issue wasted time and lacked merit; (Judgment paragraph 59)

(h) there was no reasonable justification for the plaintiff's concern about the auditor's materiality standard; (Judgment paragraph 60)

(i) he advanced claims at trial with respect to proxies and minutes while having displayed disinterest, indifference and disregard to pick up proxies and board minutes which had been available since 2012. In this regard, his excuses were unacceptable and he wasted time at trial; (Judgment paragraph 56, 81-82)

(j) the claim to review proxies served no practical purpose; (Judgment paragraph 75)

(k) the claim to review minutes back to 1990 was onerous and burdensome; (Judgment paragraph 96)

(l) he attempted to re-litigate the "third party verification" issue; (Judgment paragraph 76)

(m) knowing Justice Godfrey's previous decision about the Owner's List, the plaintiff's reason to inspect the list continued to be vague and infringed on the privacy of others; (Judgment paragraph 88)

(n) he was on a fishing expedition with respect to the General Ledgers, to the bank statements and the Portfolio Valuation Summary Details and Transaction Summary and provided no credible evidence to support his alleged suspicions of impropriety; (Judgment, paragraph 107)

[38] In short, these proceedings were unnecessary and were wholly without merit and a complete waste of time and money.

[39] In addition, the plaintiff was at times unduly argumentative during the trial -- which unduly prolonged the trial. A typical exchange went along the following lines: I would tell the plaintiff that "I got the point" and that he should move on, only to receive his immediate reply: "No you haven't".

Assessment of costs

[40] The unreasonable behaviour of the plaintiff cries out for a significant cost penalty to the plaintiff – a penalty on the high side of what would be acceptable within the cost framework of our court.

[41] What is the appropriate amount as a penalty for this unreasonable behaviour? It is not an easy question to answer – there are no guidelines, nor was I referred to any cases with similar circumstances of unreasonable behaviour under section 29 of CJA. Nonetheless, in exercising my judgment and discretion in awarding these penalty costs a few things are clear:

(a) The cost framework of our court is an important consideration, and generally speaking it can be said that costs are "low" reflecting that it is the "People's Court" and access to justice is important.

(b) I think it is fair to say that an unsuccessful litigant in our court is not expecting to get hit with a massive legal bill if he/she loses at trial – a situation markedly different from litigation in the Superior Court. (As noted above, the 15% limitation on costs would be a factor in such expectation – notwithstanding that we are dealing with a "penalty" provision which permits costs to be awarded in excess of 15% of the amount claimed.)

(c) The fact the defendant spent in excess of $140,000 in legal fees is not, in my view, of particular importance in assessing the penalty costs.

[42] Taking into account the above comments and all the circumstances of this case including that it was a twelve-day trial, I assess against the plaintiff the total amount of $15,000 as costs plus HST for all three actions to be awarded to the defendant for the plaintiff's unreasonable behavior within the meaning of section 29 of the CJA.

Disbursements

[43] The disbursement claim in the amount of $17,769.81, including HST, is quite large and appears excessive and unreasonable for a small claims court action, again taking into account the

reasonable expectations of the parties and taking into account proportionality given the amount and the issues in dispute.

[44] Under rule 19.01(3) unless there are special circumstances the amount claimed for service cannot exceed $60 a person. I was not made aware of any special circumstances.

[45] Ordering the transcripts in the amount of $9,363.86 is not an ordinary or reasonable disbursement which the Plaintiff could have anticipated paying.

[46] The costs claimed for photocopying in the amount of almost $4,000 are quite high and is not an ordinary disbursement which the plaintiff could have anticipated paying. I appreciate there were voluminous exhibits filed in court by both parties.

[47] The expert lawyer report at $1,364.42 and other fees to him of $2,135.66 totalling $3,500.08 are quite high under the circumstances of this case that the plaintiff could not have anticipated paying.

[48] Taking into account the above comments and all the circumstances of this case, I assess against the plaintiff the amount of $4,000 for disbursements plus HST to be paid to the defendant.

Section 134 (5) of the CA

[49] Counsel for the defendant submitted that section 134 (5) of the CA would allow this court to award full indemnity on the idea that the condominium corporation should not be saddled with the costs in these actions.

[50] Section 134 (5) of the CA reads as follows:

> **Addition to common expenses**
> (5) If a corporation obtains an award of damages or costs in an order made 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.

[51] While this section may provide a mechanism for greater indemnification to a condominium corporation for legal fees incurred in a lawsuit where it is successful, there are two reasons why this section is not applicable to these actions.

[52] First, from the caselaw provided by the defendant it is apparent that this section is only applicable on an application brought by the condominium corporation to enforce compliance on a unit owner. It is not applicable where the unit owner is seeking to have the condominium corporation comply with the production provisions of the CA.

[53] Second, in this case any such purported full indemnification would clearly run afoul of section 29 of the CJA, as I have discussed above.

[54] Consequently, section 134(5) of the CA need not be considered in awarding costs in this case.

Summary

[55] In summary therefore, costs to be paid by the plaintiff to the defendant are fixed at $15,000 plus HST and disbursements are fixed at $4,000 plus HST.

[56] In all other respects my Judgment is confirmed.

Authorities submitted

[57] The parties submitted the following authorities which I have reviewed and considered for this Costs Endorsement:

(a) **By the defendant:**

1. *Courts of Justice Act,* R.S.O. 1990,c.C.4J,ss.29and 131(1)
2. *Rules of Small Claims Court,* O Reg 258/98, Rules 19.01(1), 19.02, and 19.06
3. *Condominium Act, 1998.* S.O.1998,c.19,ss.17(1), 17(2), 23(6),60-71, 84-87,and 134(5)
4. *Rules of Civil Procedure,* R.R.O. 1990, Reg 194, Rules 57.01(1), 57.01(0.b), 57.01(d)-(f), 57.01(i)
5. *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291, (OCA)
6. *Carleton Condominium Colporation No. 347 v. Trendseller Developments Ltd.,* [1992] O.J. No.1767, (OCA)
7. *Winfair Holdings (Lagoon City) Ltd. v. Simcoe Condominium Corporat ion No. 46,*[1998], 115 O.A.C. 332, (OCA)
8. *Carlton Condominium Corporation No. 279 and Rochon,* [1987] O.J. No. 417, (OCA)
9. *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd.,* [1982], 138 D.L.R. (3d) 414, (OHCJ)
10. *York Condominium Corp. No. 46 v. Medhurst, Hogg & Associates Ltd.,* [1983], 147 D.L.R. (3d) 768, (OCA)
11. *Metropolitan Toronto Condominium C01p. No. 1385 v. Skyline Executive*

Properties Inc., [2005) O.J. No. 1604, (OCA)

12. *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.,* 2014 ONCA 696

13. *Terracorp. v. Becky,* 263 A.C.W.S. (3O) 649, (ONSC)

14. *Wexler v. Carleton Condominium Corp. No. 28,* [2016], 265 A.C. W.S. (3d) 583, (ONSC)

15. *Wexler v. Carleton Condominium Corp. No. 28,* [2016], 269 A.C.W.S (3d) 183, (ONSC)

(b) By the plaintiff:

1. *MTCC #932 v. Lahrkamp,* Court File No. 07-CV-343730 PD378 (OSCJ)
2. *Royal Bank of Canada v. MTCC #1226*, Court file No. 12-35966 (OSCJ)
3. *Peel Condo Corp #231 v. Grygorchak et al,* Court File No. CV-06-CV310261 (OSCJ)
4. *TSCC No. 1633 v. Baghai Development Limited*, 2012 ONCA 417
5. *Pearson (Litigation Guardian of) v. Carlton Condominium Corp No. 178* (OSCJ)

(c) Other

1. *Wexler v. Carlton Condominium Corporation No. 28,* 2017 ONSC 5697, where the Divisional Court overturned the *Wexler* case cited by the defendant in numbers 14 and 15 above, released September 27, 2017.
2. *Wilfred v. Dare et al.*, 2017 ONSC 2718

J PRATTAS DJ