

CONDOMINIUM AUTHORITY TRIBUNAL

DATE: September 30, 2022

CASE: 2022-00230N

Citation: Durham Condominium Corporation No. 80 v. Occleston, 2022 ONCAT 103

Order under section 1.44 of the *Condominium Act, 1998*.

Member: Patricia McQuaid, Vice-Chair

The Applicant,

Durham Condominium Corporation No. 80

Represented by Victor Yee, Counsel

The Respondent,

Marilyn Occleston

Represented by Kelly Aitchison, Counsel

Hearing: Written Online Hearing – June 15, 2022 to September 8, 2022

REASONS FOR DECISION

A. INTRODUCTION

[1] The Applicant, Durham Condominium Corporation No.80 (DCC80), filed this case with the Tribunal for enforcement of its no smoking rule (the “Rule”) against the Respondent Marilyn Occleston, an owner and resident of a unit in DCC80. The case proceeded through the Tribunal process and in Stage 2 Mediation, the parties agreed to a Consent Order dated June 1, 2022¹. In that order, the Respondent agreed not to allow smoking in her unit, in her exclusive use balcony, or in DCC80’s common elements, whether by herself or anybody else.

[2] Costs were an issue in Stage 2 and there was no resolution. The parties agreed to have the issue of costs adjudicated in Stage 3. They did agree that the substantive issues had been resolved. The parties acknowledged in this hearing that enforcement in relation to the terms of the Consent Order must be pursued through the Ontario Superior Court of Justice. Therefore, the sole issue in this case is whether the Respondent should be required to pay the Applicant’s legal costs, both those incurred prior to the filing of the case on April 5, 2022 in the amount of \$3709.80 and those incurred after, in the amount of \$9014.02. DCC80

¹ 2022 ONCAT59 (CanLII)

is seeking full indemnity of its legal costs.

- [3] For the reasons set out below, I order the Respondent to pay compensation of \$2500 and costs of \$2275 to DCC80 within 30 days of this decision.

B. BACKGROUND

- [4] I will provide some context for this dispute though the issue is a narrow one. Both parties sought to lead evidence and made arguments on issues beyond the parameters of the issue to be decided. For example, DCC80 submitted evidence which it alleged showed that the Respondent was not complying with the Consent Order, on the basis that noncompliance should be a consideration when determining the Respondent's liability for costs. The Respondent, in closing submissions alluded to harassment and stalking of her by the DCC80 board, and in particular by one board member who was the primary complainant about the smoking. What some of the evidence and submissions underscored was a degree of acrimony between at least one of the residents of DCC80 and the Respondent. While unfortunate, these are not issues which the Tribunal can remedy in this matter. I have considered all of the evidence and submissions but will only refer to that which is relevant to my decision.
- [5] In June 2018, the DCC80 board approved a new rule which prohibits smoking on its property including in units and on exclusive use common elements such as balconies. In a letter dated June 8, 2018 to unit owners, the board explained the new rule and gave current unit residents the ability to register, by September 10, 2018, with the management office in order to be "grandfathered" to allow them to continue to smoke.² Attached to the letter was the new rule as well as the form to register for the exemption. The Rule came into effect on July 9, 2018. If a resident did register, the Rule stated that the exemption would exist for up to two years unless revoked earlier pursuant to the terms of the grandfathering agreement. One such term was that the exemption could be revoked if the smoking unreasonably interfered with the use or enjoyment by other residents of the common elements and the other units.
- [6] DCC80, in its evidence, provided through Allan Radbourne, the board president, asserts that the Respondent did not file the registration form for the exemption. The Respondent testified that she does not recall whether she submitted the form or not, but she believed she must have given that the Respondent's daughter lives with her and, at the time, her daughter was a smoker. Though the parties spent some time in evidence and submissions on this aspect of the dispute; that is,

² The Tribunal has in prior decisions indicated that the term 'legacy' is a preferred term to "grandfathering". However, I will use that term as the parties used it and because the Rule itself refers to that term.

whether or not the Respondent's unit was grandfathered and whether or not smoking was unreasonably interfering with the use or enjoyment of other owners, in any event, any exemption expired, by the terms of the Rule, on July 9, 2020, two years after the Rule took effect, or at the latest, September 10, 2020, two years after the date of execution of any grandfathering agreement. I make note of these dates because Respondent's counsel submitted that the letter received by owners in June 2018 did not refer to an expiry date for the grandfather exemption. The Rule, however, did refer to various time periods, as set out above.

- [7] The DCC80 board began receiving complaints about smoking in the Respondent's unit impacting a neighbour in October 2021. Between October 2021 and April 2022 one neighbour recorded dozens of occasions on which they smelled smoke, allegedly from the Respondent's unit. DCC80 sent letters to the Respondent on October 13 and October 20, 2021, advising the Respondent that they had received an increasing number of complaints from other unit owners. The Respondent's counsel responded to the correspondence by letter dated October 20, 2021. The Respondent did not deny that smoking was occurring in the unit (though not on her balcony) but stated that mitigating steps had been taken and that it was unlikely that smoke was interfering with any other unit.
- [8] Following this letter from Respondent's counsel, DCC80 engaged legal counsel to respond with what was the first legal enforcement letter. This was followed by an email from DCC80's counsel on January 10, 2022, advising of continuing complaints and the violation of the Rule by the Respondent. More complaints were received after this date with the result that DCC80 filed this case with the Tribunal on April 5, 2022.
- [9] The Respondent's counsel reiterated in this hearing that the Respondent has admitted to the smoking violations, hence the reason for her consent to the order in Stage 2. I note that in evidence and through counsel's submissions, DCC80 raised the issue as to whether someone else is living in the Respondent's unit who was smoking or continues to smoke. However, who may have been smoking in the unit is not relevant given that, as the parties agreed, the Respondent is ultimately responsible for any loss, costs or damages arising from a breach of the Rule by 'the Owner, Resident and/or their family, tenant, guest, visitor...'
- [10] Mr. Radbourne in his evidence referenced emails from the neighbour who has complained of the smoke in the past in which the neighbour has recorded numerous dates subsequent to the Consent Order on which they allege smoking has been detected in their unit. The Respondent denies that this has occurred.

C. ISSUE & ANALYSIS

Is the Applicant entitled to full indemnification for the costs incurred to secure compliance with the Rule?

[11] Both DCC80's by-laws and the Rule contain indemnification provisions as follows.

Article X (1) of By-law 12 states:

"Each Owner shall indemnify and save the Corporation harmless from and against any loss, costs, damage ... including ... legal costs on a solicitor and client basis, which the Corporation may suffer or incur resulting from or caused by any act or omission of such Owner, or any contravention by the Owner with any provision contained in the Act, or the Corporation's Declaration, By-laws and Rules. All amounts paid by the Owner pursuant to this section shall be deemed to be common expenses payable by such owner and shall be recoverable in the same manner and upon such terms as common expenses.

Section 6 of the Rule states:

Any and all losses, costs or damages incurred by the Corporation by reason of a breach of this Rule by an Owner, Resident and/or their family, tenant, guest, visitor, servant and/or agent, shall be paid for by an Owner of the Unit(s) and may be recovered by the Corporation against the Owner in the same manner as common expenses.

a. Pre-CAT costs

[12] Based on the legal invoices included with Mr. Radbourne's testimony, DCC80 incurred legal costs of \$3709.80 between November 29, 2021 and April 4, 2022 - its "pre-CAT costs". Also based on the evidence, it appears that within that time frame, DCC80's counsel sent one letter to counsel for the Respondent, on December 15, 2021, and one or two emails on January 10, 2022. There may well have been communications between DCC80 counsel and the DCC80 board within that period related to this matter.

[13] Previous Tribunal's decisions, as noted by DCC80 counsel in submissions, have considered the issue of indemnification of pre-CAT costs, and, in several cases, awarded these, based on the wording of the specific wording of the governing documents. The concept that all owners of a condominium should not be required to pay for the cost incurred to secure compliance of one of them, is accepted by the Tribunal, as is the principle that such costs must have been incurred reasonably and proportionate to the issues in dispute before it. In one of the decisions cited by DCC80, *York Condominium Corporation No.229 v. Rockson*³ (Rockson), the Tribunal, in awarding pre-CAT costs of \$547.49 to the corporation, noted that Mr. Rockson received multiple notices in a two-year period advising him of the corporation's noise rules and requesting his compliance and cooperation,

³ 2022 ONCAT 48 (CanLII)

including four letters from legal counsel. Only the costs related to the fourth letter were considered by the Tribunal at the hearing. The legal costs that had been incurred by the corporation for the first three letters of approximately \$1600 had already been billed to Mr. Rockson.

[14] In contrast, DCC80 is seeking indemnification of \$3709 in this case, almost five times the legal costs claimed in Rockson. Here, counsel was involved for a six-month period and only one letter was sent to the Respondent. I do appreciate that discussions with the client were likely required both in advance of and subsequent to that one letter. However, in weighing the reasonableness of costs claimed, the wording of the by-law and after careful review of the legal invoices submitted in evidence, I award to DCC80 compensation for its pre-CAT costs in the amount of \$2500. This sum represents substantial and reasonable indemnity for the pre-CAT fees incurred, I also note that the legal invoices reveal that approximately \$2500 in legal fees were incurred between November 29, 2021 and January 18, 2022, the period during which, based on the evidence, there was some interaction between parties' counsel in respect of enforcement of the Rule.

[15] In making this award, I note that the Respondent's counsel's letter to DCC80, dated October 20, 2021, reflects a misunderstanding of the Rule which precipitated the letter of December 15, 2021 from DCC80's legal counsel, and as a result, consequent legal costs for DCC80 as it pursued compliance with the Rule. This misunderstanding may have arisen from information provided to counsel by the Respondent, but a close reading of the Rule ought to have provided clarity regarding the effect, and expiry, of any exemption. This may have brought the dispute to an early end.

b. In – CAT costs

[16] The Applicant is also seeking its "in-CAT costs" on a full indemnity basis, of \$9014.72. The Stage 2 Summary and Order states that the parties did not agree on the costs issue. At that time, June 1, 2022, based on the DCC80's counsel's invoices in evidence before me, approximately \$3300 in legal costs had been incurred. This means that approximately \$5800 has been incurred to pursue costs of \$3300, which seems, on its face, to raise some questions about reasonableness and proportionality. And, as stated by Respondent's counsel, one reason for the Respondent consenting to an order was to expedite resolution and save costs.

[17] Regarding the legal costs related to this proceeding, the Tribunal's authority to make orders is set out in section 1.44 of the *Condominium Act, 1998* (the "Act"). Section 1.44 (2) of the Act states that an order for costs "shall be determined...in accordance with the rules of the Tribunal." The cost related rules of the Tribunal's Rules of Practice relevant to this case are:

48.1 If a Case is not resolved by Settlement Agreement or Consent Order and a CAT Member makes a final Decision, the unsuccessful Party will be required to pay the successful Party's CAT fees unless the CAT member decides otherwise.

48.2 The CAT generally will not order one Party to reimburse another Party for legal fees or disbursements ("costs") incurred in the course of the proceeding. However, where appropriate, the CAT may order a Party to pay to another Party all or part of their costs, including costs that were directly related to a Party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused a delay or additional expense.

[18] The Tribunal's Practice Direction: Approach to Ordering Costs, issued January 1, 2022, provides guidance regarding the awarding of costs. Among the factors to be considered are whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense; whether the case was filed in bad faith or for an improper purpose; the conduct of all parties and representatives; the potential impact an order for costs would have on the parties; whether the parties attempted to resolve the issue in dispute before the CAT case was filed; and whether a party has failed to follow or comply with a previous order or direction of the CAT. The Tribunal may also consider the provisions of the corporation's governing documents and whether the parties would have had a clear understanding of the potential consequences of a contravention of the declaration and rules.

[19] In accordance with Rule 48.1, I will order that the Respondent reimburse the \$75 Tribunal fee, as requested by DCC80 in its closing submissions (the \$25 filing fee and the \$50 fee for Stage 2 - Mediation). In assessing the legal costs incurred, I note that by reaching an agreement, as set out in the Consent Order, the parties acted reasonably, bringing the substantive issue to a close, which was expeditious and ought to have reduced costs. In considering the potential impact of an order of costs, \$9000 requested is not an insignificant amount and based on the Respondent's submissions could result in hardship. The impact of a \$9000 cost award is likely to be substantial.

[20] DCC80, both in evidence and submissions, asked that I consider the "credible circumstantial evidence" of Mr. Radbourne that they allege demonstrates that the Respondent has continued to violate the Rule after the consent order of June 1, 2022. They ask this, not because they are asking the Tribunal to enforce the smoking violations after the Consent Order as that is a matter for the Superior Court to enforce, but rather because they assert that this is evidence that the Respondent has "failed to follow or comply with a previous order or direction of the CAT" as per the Practice Direction on Costs. That reasoning raises some inherent logical inconsistency. To find that the Respondent has not followed the Consent Order (and therefore should bear liability for costs) would require me to make a

finding of fact that based on evidence before me, on the balance of probabilities, the Respondent has breached the Consent Order. That is the very issue that the Superior Court would be called to decide in an enforcement action and I cannot usurp the court's authority. By seeking the significant costs that it is, based on this submission, DCC80 is, in effect, asking that the alleged violation be determined, and penalized through a costs order from the Tribunal.

[21] I have also considered the cases referred to by DCC80 in submissions. Some of these did indeed award 100% indemnity for costs to the condominium corporation. An important distinction is that in those cases, legal costs were considered after a full hearing on the substantive issues⁴. Cases in which full indemnity for legal costs are awarded, either before the courts or tribunals are rare, often arising in instances where the respondent's actions are prolonged over many years and have been harassing in intent and blatant in their disregard of their community.⁵

[22] Proportionality is an important consideration when determining the appropriateness of a costs order. In this case, legal costs as of the date of the Consent Order were approximately \$3300. DCC80 made a decision, as it was entitled to do, to incur more costs to pursue reimbursement of those legal fees. This does not mean that the Respondent should be called upon to bear the full cost of that decision. However, it is appropriate that some costs be awarded in light of the indemnification provisions of the Rule, and to minimize the burden on other owners, given that the Respondent has acknowledged that smoking had occurred in violation of the Rule. In closing submissions, DCC80 argued, in the alternative that at least 50% of its "in-CAT" costs should be indemnified by the Respondent.

[23] I am not convinced that the costs incurred in this case, and in particular, during this hearing, are proportional to the nature of the issue in dispute and what should have been narrowly focussed evidence and submissions in this hearing. The sole issue was costs - a straightforward issue and as a result, an uncomplicated hearing. An award of costs is discretionary and the jurisprudence is clear - condominium corporations must act reasonably and judiciously when incurring legal costs. Therefore, weighing the facts of this case, I award costs in the amount of \$2200 to DCC80, pursuant to Rule 48.2. This amount is approximately 75% of the costs incurred as of June 1, 2022, or, alternatively, approximately 25% of DCC80's total CAT legal costs.

[24] Finally, I note that Respondent's counsel in submissions, suggested that the

⁴ In Peel Condominium Corporation No.96 v. Psofimis 2021 ONCAT48 (CanLII) for example, where legal costs were \$3926.75

⁵ See for example, Ottawa Carleton Standard v. Friend 2019ONSC3899 (CanLII) cited by DCC80.

Tribunal award costs of \$4000 to the Respondent because of the maliciousness in which this matter has been pursued by DCC80. I decline to do so. While I have noted above that there appears to be acrimony between some of the owners, I can not conclude that there is malicious intent, nor is there basis for me to award costs to the Respondent pursuant to Rule 48.2 based on the evidence before me.

D. CONCLUSION

[25] In summary, I have concluded that the Respondent must indemnify DCC80, in accordance with s. 1.44 (1) 3 of the Act, the amount of \$2500 in legal fees. Pursuant to s. 1.44 (1) 4 and Rule 48 of the Tribunal's Rules of Practice the Respondent shall reimburse DCC80 for the \$75 paid for Tribunal fees and legal costs of \$2200.

E. ORDER

[26] The Tribunal Orders that:

1. Pursuant to s. 1.44 (1) 3 of the Act, within 30 days of this Order, the Respondent shall pay DCC80 compensation in the amount of \$2500 in respect of legal fees and expenses it incurred.
2. Within 30 days of this Order, in accordance with s. 1.44 (1) 4 of the Act and Rule 48 of the Tribunal's Rules of Practice, the Respondent shall pay \$2275 to DCC80 for its costs in this matter.

Patricia McQuaid
Vice-Chair, Condominium Authority Tribunal

Released on: September 30, 2022