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Condominium Boards Beware: Owners May Resort to the Solicitors Act to Reduce Legal Bills Charged to their Common Expenses

When a condominium board decides to initiate a court case to obtain an owner's compliance with the *Condominium Act, 1998* ("the Act"), the board will usually take comfort in the fact that section 134(5) of the Act provides a mechanism for the condominium to recover all of its legal expense.

This section provides that where a condominium obtains an order of the court requiring the owner to comply and an order for costs, the condominium shall add to the owner's common expenses the costs ordered by the court together with any additional costs incurred by the condominium in obtaining the order.

While the "loser pays" principle is a hallmark feature of Ontario's civil justice system, courts infrequently order the losing party to pay all the legal costs incurred by the successful party. Instead, courts commonly order an unsuccessful party in a civil case to pay the successful party's



“partial indemnity costs”. As a general rule of thumb, this means about one half to two thirds of the reasonable legal fees (plus HST) paid by the successful party to its lawyer, along with any reasonable disbursements (i.e. court filing fees, photocopies, fees to serve and file court documents, etc.).

Section 134(5) is intended to “bridge the gap” between a court’s award of partial indemnity costs to a successful condominium litigant and the total amount that the condominium spent to obtain the court’s compliance order. In doing so, the section goes a long way to ensuring that none of the innocent owners in the condominium bear any portion of the costs caused to be incurred by the condominium as a result of the owner’s failure to comply.

This does not mean, however, that the condominium has the proverbial “green light” to spend an excessive or exorbitant amount of legal expense to pursue an owner’s compliance. Notably, there have been a number of cases where courts have strongly cautioned against a “scorched earth” approach by a condominium seeking to enforce compliance by an owner. In fact, in an Ontario Court of Appeal decision issued in 2012, the Court of Appeal commented, “Section 134(5) does not give counsel (for the condominium) license to spend (the condominium’s) money with impunity.”

This important statement by the Court of Appeal resonated in a recent case decided by Madam Justice McArthur of the Ontario Superior Court of Justice in Toronto. The case involved a condominium owner named Jean Temedio and her St. Catharines’ condominium and its legal counsel.

By way of background, Ms. Temedio had been taken to court in the Fall of 2015 by her condominium for failing to ensure that her tenant refrained from causing noise for her neighbours. Ms. Temedio denied that there was any problem but the judge hearing the condo-

minium’s case disagreed. The judge issued a judgment in February 2017 requiring the tenant to comply with the noise rules and requiring Ms. Temedio to ensure that her tenant complied at all times, going forward. The judge also ordered that Ms. Temedio and the tenant be responsible to pay legal costs of \$2,500 to the condominium.

Shortly following this judgment, the condominium, under the authority of section 134(5), added the \$2,500 cost

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award to Ms. Temedio’s common expense account along with a further sum of \$49,500, representing the additional actual costs the condominium incurred in obtaining the judge’s compliance order.

Ms. Temedio failed to appeal the judge’s decision in time, so she made a motion to the Court of Appeal asking for an extension of time to appeal. However, the Court of Appeal rejected the motion, concluding that Ms. Temedio did not form an intention to appeal within the 30-day appeal period and that the proposed appeal appeared to lack merit. The Court of Appeal ordered that Ms. Temedio pay the condominium’s costs of her unsuccessful motion in the amount \$5,000.

Following this decision of the Court of

Appeal, the condominium informed Ms. Temedio that under the authority of section 134(5) it was charging to her unit approximately \$29,000 for the costs incurred in defending her motion, which included the \$5,000 award made by the Court of Appeal.

When Ms. Temedio failed to pay the charge backs described above, the condominium registered a lien against Ms. Temedio’s unit and indicated it would be enforcing the lien through Power of Sale proceedings.

In her case before Madam Justice McArthur in November 2018, Ms. Temedio requested that the legal bills issued by the condominium’s lawyers and charged to her common expense account be referred to an assessment under the *Solicitors Act*.

Under the *Solicitors Act*, a client that receives a bill from a lawyer, or a third party that is liable to pay a bill from a lawyer, may, under certain circumstances, obtain an as-

essment of the legal bill to ensure that it is fair and reasonable in the circumstances. Ms. Temedio also requested that Madam Justice McArthur order that the condominium not enforce the lien pending the outcome of the assessment of the legal bills issued by the condominium’s lawyers.

Madam Justice McArthur noted that since the legal bills relating to the condominium’s case before the judge that made the compliance order had been delivered by the condominium’s lawyers more than 12 months prior to Ms. Temedio’s application to have them assessed, Ms. Temedio was required to prove that there were “special circumstances” to warrant the assessment of the legal bills. To this end, Madam Justice McArthur



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observed that that the legal bills did not appear remarkable especially considering the fact that during the case before the judge that made the compliance order, Ms. Temedio’s counsel acknowledged that the case was not a simple, straightforward case and speculated that the condominium’s legal costs might be approximately \$50,000. On this basis, Madam Justice McArthur noted that there was no reason to believe that the condominium spent money on the compliance case with impunity.

However, Madam Justice McArthur concluded that there appeared to be special circumstances warranting an assessment of the legal bills relating to the Court of Appeal motion given the amount of the bills in relation to the nature of the motion. While Madam Justice McArthur directed an assessment for these bills, she concluded that the condominium was free to enforce its lien pending the conclusion of the assessment since it would be unfair to the condominium and its owners to order otherwise.

Ms. Temedio has appealed Madam Justice McArthur’s decision to the Court of Appeal. As of this writing, the appeal has not yet been heard by the Court of Appeal.

However, the main lesson here is that just because legal bills have been charged to an owner’s common element account under section 134(5) does not necessarily mean those legal bills are beyond the possible review of a court.

If an owner is successful in obtaining an order that the bill or bills be reviewed by an assessment officer of the court, the assessment officer will consider a number of factors in determining whether the bill or bills are reasonable and fair in the circumstances.

The bill or bills will be reviewed from the standpoint of the condominium as the lawyer’s client. Some of the more important factors the assessment officer will consider are: (i) the complexity of the issues; (ii) the importance of the issues; and (iii) the results obtained.

Erik Savas is a partner in the Burlington office of Simpson Wigle Law LLP and since 2002 has mainly practiced in the area of condominium litigation/dispute resolution. 