

2018 ONSC 5058  
Ontario Superior Court of Justice

Metropolitan Toronto Condominium Corporation No. 596 v. Best View Dining Ltd.

2018 CarswellOnt 14709, 2018 ONSC 5058, 296 A.C.W.S. (3d) 192

**Metropolitan Toronto Condominium Corporation No. 596 (Applicant)  
and Best View Dining Ltd. and 2465031 Ontario Limited (Respondents)**

Perell J.

Heard: August 8, 2018  
Judgment: September 4, 2018  
Docket: CV-17-570473

Counsel: Megan Mackey, for Applicant  
Shawn Pulver, Jackie Bartlett, for Respondent, Best View Dining Ltd.

Subject: Corporate and Commercial; Property

**Related Abridgment Classifications**

Real property

X Condominiums

X.4 Common expenses

**Headnote**

Real property --- Condominiums — Common expenses

Tenant entered into 10-year lease in 2015 with unit owner of mixed-use condominium — Condominium had four commercial units and 76 residential units — Tenant renovated unit to open restaurant — Operation of restaurant disturbed residents of residential units in five floors above restaurant — In response to complaints, condominium corporation took steps to enforce declaration prohibiting unit owner from disturbing other owners by transmitting noise from one unit to another — Corporation obtained order requiring tenant to abate noise disturbing residential unit owners — Noise problems continued and corporation brought motion for contempt — Motion was adjourned and tenant continued to take despite steps to remedy problem — Corporation demanded reimbursement from tenant for legal expenses incurred as result of noise problem\When tenant did not pay, corporation considered legal fees as common expenses arears and advised tenant that lien would be placed on unit if common expenses arrears were not paid — Tenant did not pay and corporation registered lien — Tenant brought motion for directions alleging that charge to common area expenses and lien were illegal and discharge of lien — Motion dismissed — Pursuant to s. 134(5) of Condominium Act, costs incurred by corporation in obtaining compliance order were collectible as common area expenses — Costs expended on legal matters unrelated to obtaining of compliance order did not come within s. 134(5) — Costs of enforcement were recoverable as common expenses under s. 85(1) — Corporation's lien on unit was enforceable.

**Table of Authorities**

**Cases considered by Perell J.:**

*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2004), 2004 CarswellOnt 3330, 31 R.P.R. (4th) 186, [2004] O.T.C. 723, 31 R.P.R. (4th) 187 (Ont. S.C.J.) — referred to  
*Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* (2005), 2005 CarswellOnt 1576, 31 R.P.R. (4th) 169, 253 D.L.R. (4th) 656, 197 O.A.C. 145 (Ont. C.A.) — considered  
*Toronto Standard Condominium Corp. No. 1633 v. Baghai Development Ltd.* (2012), 2012 ONCA 417, 2012 CarswellOnt 7650, 293 O.A.C. 123 (Ont. C.A.) — referred to  
*York Region Standard Condominium Corporation No. 1253 v. Hashemi* (2017), 2017 ONCA 557, 2017 CarswellOnt 10063 (Ont. C.A.) — considered

**Statutes considered:**

*Condominium Act, 1998*, S.O. 1998, c. 19

Generally — referred to

s. 1 — considered

s. 1(1) "common expenses" — considered

s. 17 — considered

s. 17(3) — considered

s. 84 — considered

s. 84(1) — considered

s. 85 — considered

s. 85(1) — considered

s. 85(6) — considered

s. 119 — considered

s. 134 — considered

s. 134(1) — considered

s. 134(2) — considered

s. 134(3) — considered

s. 134(5) — considered

s. 135 — considered

s. 136 — considered

*Mortgages Act*, R.S.O. 1990, c. M.40

s. 12 — considered

s. 12(1) "court" — considered

s. 12(3) — considered

s. 12(4) — considered

s. 12(5) — considered

s. 12(6) — considered

s. 12(7) — considered

s. 12(9) — considered

s. 12(10) — considered

MOTION by tenant of condominium unit for directions with respect to lien for common expenses arrears.

**Perell J.:**

### **A. Introduction**

1 This is a motion for directions in this application.

2 The application involves a dispute between a mixed-use condominium corporation, the Applicant, Metropolitan Toronto Condominium Corporation No. 596 ("MTCC No. 596") and a condominium unit owner, the Respondent 2465031 Ontario Ltd., and its commercial tenant, the Respondent Best View Dining Ltd., which is the occupant of Unit 1 of the condominium complex.

3 The question for which a direction from the court is requested is whether and when a condominium corporation is entitled to add legal expenses to common area expenses pursuant to the *Condominium Act, 1998*.<sup>1</sup>

### **B. Statutory Background**

4 The pertinent provisions of the *Condominium Act, 1998* are sections 1, 17, 84, 85, 119, 134, 135, and 136, which are set out below. Under these provisions, the condominium corporation, unit owners, and occupants of a condominium are required to comply with the *Condominium Act, 1998* and the condominium documents. Unit owners are required to take all reasonable steps to ensure that the occupants of their units comply with the Act and the documents.<sup>2</sup> A condominium corporation is required to take all reasonable steps to ensure that the owners and the occupiers of units comply with the Act and the governing documents.<sup>3</sup>

### **DEFINITIONS AND INTERPRETATION**

#### *Definitions and interpretation*

1 (1) In this Act,

[ . . . ]

"common expenses" means the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in this Act, the regulations or in a declaration;

[ . . . ]

....

#### *Objects*

17 (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

#### *Duties*

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

#### *Ensuring compliance*

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

....

## COMMON EXPENSES

### *Contribution of owners*

84 (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

### *Lien upon default*

85 (1) If an owner defaults in the obligation to contribute to the common expenses payable for the owner's unit, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(5) [Repealed]

### *Lien enforcement*

(6) The lien may be enforced in the same manner as a mortgage.

### *Discharge of lien*

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration.

### *Expiration of lien*

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation with that time registers a certificate of lien in a form prescribed by the Minister.

### *Certificate of lien*

(3) A certificate of lien when registered covers,

(a) the amount owing under all of the corporation's lien's against the owner's unit that have not expired at the time of registration of the certificate;

(b) the amount by which the owner defaults in the obligation to contribute to the common expenses payable for the owner's unit after the registration of the certificate; and

(c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it.

### *Notice to owner*

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

....

*Compliance with Act*

119 (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this act, the declaration, the by-laws and the rules.

[ . . . ]

*Responsibility for occupier*

(2) An owner shall take all reasonable steps to ensure that occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

*Enforcing compliance*

(3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require that a person who is required to comply with this Act, the declaration, the by-laws and the rules shall do so.

*Compliance order*

134 (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of,

(a) this Act, the declaration, the by-laws or the rules; or

(b) an agreement that two or more corporations have entered into to share in the provision, use, maintenance, repair, insurance, operation or administration of any land, any part of a property or proposed property, any assets of a corporation or any facilities or services.

*Pre-condition for application*

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

*Contents of order*

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

[ . . . ]

*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.

*Oppression remedy*

135 (1) An owner, a corporation, a declarant or a mortgagee or a unit may make an application to the Superior Court of Justice for an order under this section.

*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.

*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.

*Other remedies*

136 Unless this Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure to perform a duty imposed by this Act.

5 For reasons that will become apparent in the discussion below, it should be noted that section 85 (6) provides that the condominium corporation's lien for common area expenses may be enforced in the same manner as a mortgage, and in this regard s. 12 of the *Mortgages Act*,<sup>4</sup> provides a dispute resolution procedure when the amount required for a discharge is questioned. Section 12 states:

*Payment: miscellaneous provisions*

12 (1) In this section,

[ . . . ]

"court" means the Superior Court of Justice.

[ . . . ]

*Where mortgagee cannot be found*

(3) When a mortgagor or any person entitled to pay off a mortgage desires to do so and the mortgagee, or one of several mortgagees, cannot be found or when a sole mortgagee or the last surviving mortgagee is dead and no probate of his or her will has been granted or letters of administration issued, or where from any other cause a proper discharge cannot be obtained, or cannot be obtained without undue delay, the court may permit payment into court of the amount due upon the mortgage and may make an order discharging the mortgage.

*Payment out of money paid into court*

(4) The money paid into court shall be paid out of court with any accrued interest to the mortgagee or mortgagees or to the executor or administrator of the mortgagee or as the court by order for payment into court or any subsequent order may direct.

*Notice to mortgagee*

(5) The court may require notice to be given by advertisement or as may be considered proper to the mortgagee or those claiming under the mortgagee either before or after making the order.

*When amount offered questioned*

(6) When the amount admitted to be due upon the mortgage appears to be open to question the court may as a condition of making the order require payment into court of a sum in excess of the amount admitted to be due and in such case the additional sum is subject to the further order of the court.

*Provision for subsequent interest and costs*

(7) The court may require payment into court of an additional sum to answer any claim by the mortgagee for subsequent interest and costs.

*Registration of order discharging*

(9) Upon the registration of an order discharging a mortgage it has the same effect as the registration of a certificate of discharge signed by the mortgagee would have under the *Registry Act*. R.S.O. 1990, c. M.40, s. 12 (9).

*Appeal*

(10) An appeal lies to the Divisional Court from any order made under this section.

**C. Facts**

6 The factual background relevant to this motion for direction begins in the summer of 2015 when Best View entered into a ten-year commercial lease with the Respondent 2465031 Ontario, a unit owner in the mixed-use condominium at 81 Church Street in downtown Toronto. There are four commercial units and 76 residential units in the condominium.

7 Best View undertook a major renovation of the premises for its restaurant (Gyu-Kaku) and spent hundreds of thousands of dollars. Unfortunately, after the restaurant opened, the operation of the restaurant and the use of its equipment disturbed the residents of the residential units in the five floors above the restaurant.

8 In response to the vociferous complaints of the owners of the residential units about the noise emanating from Best View's restaurant, MTCC No. 596 took steps to enforce the provisions of the condominium declaration and the rules of the condominium corporation. The declaration of the condominium and the condominium rules prohibit a unit owner from disturbing other owners by transmitting noise from one unit to another.

9 Article III, s. (1)(g) of MTCC No. 596's Declaration states:

III, s. (1)(g) - No noise shall be permitted to be transmitted from one unit to another. In the event the Board of Directors of the Corporation determines that any noise is being transmitted to another unit and that such noise is an annoyance and/or a nuisance and/or disruptive, then the owner of such unit shall at his own expense, take such steps as shall be necessary to abate such noise to the satisfaction of the Board of Directors of the Corporation. In the event the owner of such unit fails to abate the noise, the Board of Directors shall take such steps as shall be

necessary to abate the noise and the unit owner shall be liable to the Corporation for all expenses incurred by the Corporation in abating the noise, which expenses are to include reasonable solicitor's fees.

10 The relevant provisions of MTCC No. 596's Rules are set out below:

Rule 1.1 — Any and all losses, costs or damages, including, but not limited to, all legal fees, disbursements, incurred by the Corporation by reason of a breach of any provision in the Corporation's Governing Documents in force from time to time, by an Owner and/or Resident, or any person, thing or animal for whom or for which the Owner and/or Resident is responsible, shall be borne and/or paid for by the Owner and/or Resident and may be fully recovered by the Corporation against the Owner in the same manner as common expenses or as may be provided in compliance as provided for in the Act.) Notwithstanding the foregoing, each Owner is ultimately liable to cover all costs incurred by the Corporation for any Resident and/or those persons or things for which the Owner is responsible.

Rule 2.5 - Article III (l)(g) of the Declaration states that no noise shall be permitted to be transmitted from one unit or another.

Residents and their Guests must not make noise or create a nuisance that disturbs the comfort or quiet enjoyment of other Residents. Examples of unreasonable noises include, but are not limited to:

- Playing entertainment systems loudly (televisions, radios, stereos, video games)
- Playing musical instruments loudly
- Walking with heavy-soled or high-heeled shoes on hard-surface floors
- Moving heavy pieces of furniture
- Yelling and screaming
- Pounding and banging

Residents may resolve minor disturbances directly with other Residents if they are comfortable to do so. On-going and chronic noise disturbances should be reported to the Concierge or to the Property Manager so that the incident(s) may be documented and the resolution escalated as necessary.

In emergency situations, Residents are advised to file noise complaints directly with the police department.

Any costs incurred by the Corporation as a result of an owner's/resident's failure to comply with this provision, including, but not limited to, legal fees and disbursements, shall be recoverable in accordance with Rule 1.1.

11 The by-laws of MTCC No. 596 provide that owners must hold the condominium corporation harmless against all costs, including legal costs and disbursements, incurred to enforce the Declaration and the Rules. By-law No. 9 states:

10.4 (c) each owner shall indemnify and save the Corporation harmless from and against any and all damages, loss and/or costs, which the Corporation may suffer or incur resulting from, or caused by an owner, or any person, thing or animal for whom or for which the owner is responsible including, but not limited to:

- (i) all legal costs and disbursements; and
- (ii) all costs incurred by the Corporation:
  - (A) to redress, rectify and/or obtain relief from any injury or damage;



(B) by reason of breach of the Act, declaration, by-laws and/or any rules of the Corporation in force from time to time; and/or

(C) in relation to the enforcement of any rights or duties pursuant to the Act, the declaration, the by-laws and/or the rules of the Corporation;

10.4 (d) all amounts for which the unit owner is responsible pursuant to this by-law shall form part of the contributions to the common expenses payable for the particular unit.

12 Schedule "E" of the Declaration provides that common expenses include the expense of legal services. The Declaration states:

(e) all sums of money paid or payable by the Corporation to or for the benefit of any and all persons, firms, or corporations engaged or retained by the Corporation, the Board of Directors, its duly authorized agents . . . for the purpose of performing any or all of the duties of the Corporation, including without limitation, legal services.

13 In September 22, 2017, pursuant to the *Condominium Act, 1998*, MTCC No. 596 brought proceedings to enforce compliance with the condominium declaration. It obtained an Order from Justice Akbarali requiring Best View to abate the noise that was disturbing the residential unit owners of the condominium.

14 Best View and 2465031 Ontario consented to Justice Akbarali's order, save for the matter of costs, which Justice Akbarali fixed at \$87,810.09 in a detailed costs endorsement. The endorsement dealt with the costs incurred up until September 22, 2017.

15 After Justice Akbarali's Order, MTCC No. 596 alleges that the noise problem continued, and in December 2017, MTCC No. 596 brought a contempt motion. It alleged that the Respondents, who had paid the costs of the endorsement, were breaching the substantive provisions of the Consent Order.

16 On April 24, 2018, the contempt motion came on before me. I became seized of the matter, but I adjourned the contempt motion *sine die*. I, however, made an interim order requiring more remedial steps to be taken to address the noise problem. I reserved the matter of costs for the return of the contempt motion.

17 After the adjournment of the contempt motion, Best View continued in its efforts to address the noise problem, and although there is progress, it remains to be seen whether the problems will be solved.

18 Meanwhile, MTCC No. 596 alleges that from October 17, 2017 to May 3, 2017, it had incurred \$38,786.85 in engineering and legal costs that were not dealt with in Justice Akbarali's endorsement and which I did not deal with when I adjourned the contempt motion, *sine die*.

19 By letter dated May 3, 2018, MTCC No. 596 demanded that Best View reimburse it for its legal costs for legal work associated with the noise problem between November 2017 and April 2018 failing which the expense would be added to 2465031 Ontario's common area expenses. Best View, in turn, is responsible to indemnify 2465031 Ontario for the common area expenses.

20 On July 18, 2018, MTCC No. 596's lawyers wrote the Respondent's lawyers to advise that, if Best View did not advance \$40,175 for common expenses arrears by July 23, 2018, a lien would be registered against the condominium unit for unpaid common expenses.

21 Best View did not pay, and on July 24, 2018, MTCC No. 596 registered the lien (Instrument No. AT4917241).

22 Best View then brought this motion for directions alleging that the charge to the common area expenses and the lien were illegal and therefore the lien should be discharged. Best View's argument is that it was premature until the

resolution of the contempt motion for MTCC No. 596 to make charges and to register a lien. By this motion, Best View seeks an order from the court discharging the lien.

#### D. Discussion

23 The declaration, the rules and the by-laws of MTCC No. 596 prohibited occupants from making noise that disturbed the other occupants of the condominium and required unit owners to hold the corporation harmless from any damages, loss, or costs from enforcing compliance with the Act, the declaration, and the rules of the condominium corporation. Pursuant to s. 17 (3) of the *Condominium Act, 1998*, MTCC No. 596 had a duty to take all reasonable steps to ensure that Best View complied with the Act, the condominium declaration and the rules of the condominium corporation. Pursuant to s. 134 (1) of the Act, MTCC No. 596 had the right to make an application to the Superior Court for an order enforcing compliance with the Act, the condominium declaration and the rules of the condominium corporation.

24 Pursuant to s. 134 (5) of the Act, the "costs" and the "additional actual costs" incurred by MTCC No. 596 in obtaining the compliance order were collectible as common area expenses.<sup>5</sup> In the immediate case, the costs and additional costs of obtaining the compliance order have been paid and, as I shall explain below, s. 134(5) does not include enforcement costs. However, enforcement costs are relevant to determining the amount of the lien under s. 85 of the Act.<sup>6</sup>

25 Best View's failure to comply with the rules of the condominium corporation including the legal fees and disbursements for obtaining the compliance order, which costs were paid, and the legal fees and disbursements incurred in enforcing the compliance order, which were claimed but not paid, were recoverable against 2465031 Ontario's as common expenses under s. 85 of the Act.

26 The issue of whether the legal costs of obtaining and enforcing a compliance order arising from a breach of the *Condominium Act, 1998* or the declaration, by-laws, and rules of a condominium court was considered by the Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*<sup>7</sup>

27 In this case, Skyline Executive Properties, an owner of multiple units in the condominium was renting out its units on a short-term basis and operating a hotel business in contravention of declaration and the rules of the condominium. In compliance proceedings, the condominium corporation obtained a judgment that Skyline had breached the declaration and the rules. The condominium corporation then registered a lien for about \$205,000 pursuant to s. 85 of the *Condominium Act, 1998*. Skyline then brought a motion, similar to the motion in the case at bar, for a declaration that the lien was invalid and for an order requiring the condominium corporation to discharge the lien. Skyline submitted that it had paid the costs of the compliance proceeding and that none of the amounts liened by the condominium corporation were common expenses under section 134 (5) of the Act. Justice Lax granted Skyline's application,<sup>8</sup> and the condominium corporation appealed to the Court of Appeal.

28 The Court of Appeal reversed Justice Lax's decision and ordered a reference for an assessment of the condominium corporation's "additional actual costs". In granting the appeal, Justice Doherty (Justices Laskin and MacFarland concurring) agreed in part and disagreed in part with Justice Lax's interpretation of s.134 (5) of the *Condominium Act, 1998*.

29 Justice Doherty held that the condominium corporation's costs in obtaining the compliance order were common expenses for the unit. In the condominium corporation's compliance application these costs had been assessed on a partial indemnity basis (and had been paid by Skyline), but disagreeing with Justice Lax, Justice Doherty held that the additional actual costs (the difference between the partial and substantial or full indemnity costs) were also common expenses within the ambit of s. 134 (5) of the *Condominium Act, 1998*.

30 Disagreeing with Justice Lax, Justice Doherty held that the costs incurred by the condominium corporation in responding to the unsuccessful appeal of the compliance order were part of the costs of obtaining the compliance order and were common expenses for the units.

31 Justice Doherty held that administrative and managerial costs might be recoverable as additional costs in obtaining the order, but he held that the condominium corporation had failed to demonstrate that it had incurred these additional costs.

32 Further, agreeing with Justice Lax, Justice Doherty held that costs expended on legal matters unrelated to the obtaining of the compliance order did not come within s. 134 (5).

33 In the point that is most pertinent to the immediate case, Justice Doherty agreed with Justice Lax that the costs expended on the enforcement of the compliance order were not costs associated with obtaining the order; however, he held that the costs of enforcement could come into play in determining the proper amount of a s. 85(1) lien. For the common expense lien, the condominium corporation could claim the amount of the unpaid common expenses plus all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

34 Before returning to the immediate case, it should be noted that in *Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited*,<sup>9</sup> the Court of Appeal applied *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, and the Court added that while "costs" and "additional actual costs" were different types of costs under s. 134(5) of the *Condominium Act, 1998*, both types of costs must be reasonable although the measure of reasonableness differed. "Costs" under s. 134 (5) are governed by the costs principles between parties (formerly described as party and party costs) and "actual legal costs" are those costs that are properly claimable by a lawyer against his or her own client (formerly described as costs as between a solicitor and his or her client).<sup>10</sup> In *Baghai Development*, Justice Armstrong stated for the Court:<sup>11</sup>

**84. In remitting the matter back to the application judge, I emphasize that while s. 134 (5) may entitle [the condominium corporation] to more than it would get in an ordinary award of costs, the provision for "additional actual costs" does not automatically lead to whatever amount is claimed. Section 134 (5) does not give counsel licence to spent the client's money with impunity.**<sup>12</sup>

35 Returning to the case at bar, MTCC No. 596's \$40,175 lien for common expenses appears largely to be legal costs associated with enforcing compliance with the Consent Order. Following the authority of *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, the common expenses of the \$40,175 are not common expenses pursuant to s. 134 (5) of the *Condominium Act, 1998*, but these costs are recoverable as common expenses pursuant to s.85(1) of the Act.

36 Thus, MTCC's \$40,175 lien for common expenses is a proper lien, but in any event, Best View's motion was unnecessary. It conceded during argument that it may be obliged to pay additional actual costs and legal expenses incurred by MTCC No. 596 after the Consent Order made by Justice Akbarali. Its real objection was that it objected to MTCC No. 596 presumptuously writing itself a blank cheque without the court reviewing the claim for costs.

37 MTCC No. 596, however, did nothing wrong in making a charge to 2465031 Ontario's common area expenses, and if there was an overcharge, then that issue would have been resolved upon the return of the contempt motion that followed the compliance procedures brought by MTCC No. 596. Pending the return of the motion, the common area expenses should have been paid.

38 If the contempt motion was never brought back on for a hearing because Best View had resolved the noise problem to the parties' satisfaction, then if the amount of the lien was still questioned, then that dispute could be resolved pursuant to s. 12 of the *Mortgages Act*, which is set out above. The court could also possibly resolve the dispute pursuant to the oppression remedy provisions of the *Condominium Act, 1998*. Thus, there was no prospect of MTCC No. 596 writing itself a blank cheque for common area expenses and Best View's concerns in the immediate case were unfounded.

## E. Conclusion

39 For the above reasons, Best View's motion is dismissed. The lien should not be vacated unless paid by Best View, subject to future adjustment, if any, to 2465031 Ontario's common area expenses.

40 If the parties cannot agree about the costs of this motion, they may make submissions in writing beginning with MTCC No. 596's submissions within twenty days from the release of these Reasons for Decision, followed by Best View's submissions within a further twenty days.

*Motion dismissed.*

## Footnotes

- 1 S.O. 1998, c. 19.
- 2 *Condominium Act, 1998*, S.O. 1998, c. 19, s. 119.
- 3 *Condominium Act, 1998*, S.O. 1998, c. 19, s. 17 (3).
- 4 R.S.O. 1990, c. M.40
- 5 *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] O.J. No. 1604 (Ont. C.A.) .
- 6 *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] O.J. No. 1604 (Ont. C.A.) at paras. 52-53 .
- 7 [2005] O.J. No. 1604 (Ont. C.A.).
- 8 *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2004] O.J. No. 3360 (Ont. C.A.) , rev'd [2005] O.J. No. 1604 (Ont. C.A.).
- 9 2012 ONCA 417 (Ont. C.A.).
- 10 *Toronto Standard Condominium Corp. No. 1633 v. Baghai Development Ltd.*, 2012 ONCA 417 (Ont. C.A.) paras. 77-81; *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] O.J. No. 1604 (Ont. C.A.) at para. 45.
- 11 2012 ONCA 417 (Ont. C.A.) at para. 84.
- 12 This passage was adopted by the Court of Appeal in *York Region Standard Condominium Corporation No. 1253 v. Hashemi*, 2017 ONCA 557 (Ont. C.A.) at para. 17.