CITATION: Amlani v. YYC 473, 2020 ONSC 5090
DIVISIONAL COURT FILE NO.: 0681/20
DATE: 20200828

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Corbett Penny Favreau JJ

BETWEEN:	
Nasiralli Amlani and Nasimbanoo Amlani Applicants/Respondents in Appeal	Rodrigue Escayola for the Applicants/Respondents
– and –	
York Condominium Corporation No. 473 Respondent/Appellant in Appeal	Jonathan Fine and Jennifer Malchuk for the Respondent/Appellant
	HEARD: June 26, 2020

Penny J.

Overview and Issues

[1] Following the appellant's submissions on June 26, 2020, this Court dismissed the appeal with reasons to follow. These are those reasons.

[2] This is an appeal by a condominium corporation from the order of Koehnen J. dated January 13, 2020. In his Order, Koehnen J.:

(a) invalidated a condominium lien registered against the Respondents' condominium unit;

(b) restrained collection/enforcement proceedings, including an attempted sale of the Respondents' unit;

(c) granted damages to the Respondents for oppression; and

(d) awarded costs to the Respondents.

[3] The Corporation advanced numerous grounds of appeal. The Corporation asserted that the application judge erred:

(1) in concluding that the Corporation's lien was invalid;

(2) in concluding that the Corporation's indemnity provision did not allow for the charging of its legal fees;

(3) in finding that the conduct of the Corporation was oppressive (and awarding damages);

(4) in finding that the Corporation refused to negotiate in good faith with the Respondents;

(5) in concluding that the emanation of the odour of cigarette smoke from the Respondents' unit did not constitute a nuisance; and

(6) in awarding costs to the Respondents.

Standard of Review

[4] The standard of review on this appeal is not in dispute. The standard of review on appeal is correctness on questions of law; palpable and overriding error on findings of fact; and palpable and overriding error on mixed questions of fact and law unless it is clear that the judge made an extricable error of law or principle, in which case the standard changes to one of correctness, *Housen v. Nikolaisen*, 2002 SCC 33.

Background

[5] At the conclusion of a two-day hearing, the application judge reached the following conclusions of fact:

- In 2013, the Respondents, Mr. and Mrs. Amlani were looking to purchase a condominium unit. Given that Mr. Amlani had smoked for 56 years, he wanted to ensure that the Corporation had no rules against smoking. After receiving confirmation that there were no rules against smoking, the Amlanis purchased the unit and began living there in December 2013.

- In 2015, some of the Respondent's neighbours complained that the smell of smoke was filtering from the Amlanis' unit into their own apartments. The Corporation hired a contractor to seal certain openings in the applicants' unit to prevent the smell from escaping. The Corporation absorbed the cost of doing so. The work appeared to have been successful and complaints about Mr. Amlani's smoking stopped.

- In March 2017, new complaints arose about the smell of smoke leaving Mr. Amlani's unit. The Corporation wrote Mr. Amlani on April 27, 2017 stating:

"… you are requested to be circumspect with respect to your smoking and/or refrain from smoking in order to protect other residents."

In response, Mr. Amlani restricted his smoking in the unit to an enclosed sunroom which he believed was sealed. He also installed an air filter in the sunroom.

- The next communication from the Corporation to Mr. Amlani was a letter from the Corporation's lawyers, Fine & Deo dated July 6, 2017. After stating that Mr. Amlani's smoking was a danger and a nuisance it concluded:

  "The Board of YCC 473 hereby demands that you immediately cease and desist from smoking in your unit. Please confirm to me, in writing, on or before July 20, 2017 that you are willing to cooperate and comply."

  The letter also warned Mr. Amlani that he would be liable for the Corporation's costs of enforcing his compliance.

- Mr. Amlani responded with a letter from his own lawyer which noted that, in the past, Mr. Amlani had cooperated in addressing any inconvenience his smoking caused and sought a dialogue with the Corporation to resolve the issue. On July 20, 2017 Mr. Amlani wrote his own letter to the property manager asking for a meeting with the Corporation's Board of Directors and the residents of the 28th floor to "discuss openly, without prejudice in a transparent manner, to sincerely attempt to resolve the matter at hand." Mr. Amlani also asked the property manager for relevant application forms that may be required to refer the issue to mediation. On August 11, 2017, Mr. Amlani's lawyer indicated that he was prepared to hire an engineering company, at his own cost if necessary, to prepare a report to determine if the problem could be solved. He also indicated that he would be prepared to use any company the Corporation could recommend for this purpose.

- On August 25, 2017, Mr. Deo wrote to Mr. Amlani's lawyer indicating that he had left two messages that week had not heard back from him, asked that Mr. Amlani immediately stop smoking in the unit until the matter could be resolved and asked Mr. Amlani for $2,000 as an interim deposit for the engineering report that the Corporation would be commissioning.

- On September 1, 2017 Mr. Amlani advised Fine & Deo that, on September 7, 2007, he would be moving out until the issue was resolved. In addition, he indicated that he had spoken to three professionals who said that there were simple solutions to the problem but that it would help them to get more details about the specific complaints so that they could design solutions tailored to those complaints. Mr. Amlani therefore asked for redacted copies of the complaint letters to enable the service providers to devise a solution more closely tailored to the circumstances. [They were not provided].

- On September 6, 2017, Mr. Amlani had The BSG Group inspect his apartment to propose solutions. BSG proposed some relatively inexpensive solutions including a perimeter gasket around the entry door to the apartment and better sealing of openings through which smoke smell could migrate such as light fixtures, light switches and water pipes.

- As promised, the Amlanis vacated their unit on September 7, 2017 and rented it to a tenant. They included a no smoking clause in the lease even though the Corporation did not have a rule against smoking.

- On September 14, 2017 the Corporation issued a Compliance Demand Notice addressed to Mr. Amlani demanding a full and immediate cessation of smoking in the unit by September 22, 2017, even though Mr. Amlani had already moved out.

- On November 6, 2017 Mr. Amlani requested mediation. On the same day he sent the Corporation a copy of the BSG report.

- In response to the request for mediation, the Corporation appointed a mediator and set the mediation date, both without consulting Mr. Amlani. Mr. Amlani nevertheless cooperated and participated in the mediation. Part way through the mediation, counsel and the representative Board member indicated that they had another appointment and left.

- The Corporation then sought to impose the entire mediation cost on Mr. Amlani, even though the Corporation's by-laws provide that mediation costs should be shared.

- In April 2018, the Corporation passed a non-smoking rule which prohibited smoking in all units. The rule contained a grandfathering provision that allowed smoking residents to apply to the Board for an exemption while they lived in the unit.

- Mr. Amlani applied under the grandfathering provision. The Corporation rejected his request because Mr. Amlani was no longer living in the unit.

- The Corporation hired its own expert for this proceeding, Mr. Philip Brearton, of Cion Coulter. In his report, Mr. Brearton states:

  "Further effort to seal Suite 2802 is not recommended because this is an unrealistic goal. There is no lower threshold for safe exposure to tobacco smoke consequently, to be "smoke-free", a perfect seal in Suite 2802 must be achieved at all times. Beyond the challenge of managing the opening of the unit's entrance door, achieving a "perfect seal" is not possible with current building materials and construction practices."

- On cross-examination, Mr. Brearton admitted that steps could be taken to decrease the smell of smoke in neighbouring units but his mandate did not include proposing or assessing such steps. He was asked only to opine about whether a "perfect seal" was possible.

- Mr. Brearton admitted on cross-examination that there are "relatively easy techniques" to seal openings through which the smell of smoke can migrate. These include sealing gaps in floors, walls, doors, ductwork or between walls and pipes.

- In March 2018, the Corporation served the Amlanis with a Notice of Intention to Enforce Security. It stated that the Amlanis owe the Corporation $25,108.77, that the Corporation has placed a lien on the unit and that the Corporation would enforce the lien by selling the Amlani's apartment. This prompted Mr. and Mrs. Amlani to bring this application to restrain the sale.

- The entire amount of the lien reflects the legal fees of the Corporation's lawyers, Fine & Deo. The last demand for payment of legal fees that the Corporation sent Mr. Amlani before he moved out was sent on August 23, 2017 and was for $863.99. While Fine & Deo docketed an additional $1,500 more before Mr. Amlani actually moved out, it is clear that the vast majority of the legal fees being claimed arose after Mr. Amlani vacated his unit.

Analysis of Issues

[6] The central issue in this case revolves around the interpretation of ss. 85 and 134 of the *Condominium Act*. Ultimately, the central question is whether the Corporation could use a s. 85 lien to collect legal fees incurred in a s. 134 compliance matter without first having obtained a compliance order from the Court.

[7] Secondary questions include whether the indemnity provision in Article XI of the Corporation's Declaration applied to the Corporation's claim for legal costs and whether the conduct of the Corporation in relation to Mr. Almani was oppressive.

[8] Tertiary issues, which are inter-related with the three main issues, include whether the smell of cigarette smoke constituted a nuisance, whether there was evidence to support the application judge's conclusion that the Corporation did not negotiate in good faith and the application judge's award of costs.

Validity of the Corporation's Lien

[9] Section 85 of the Act allows for the automatic registration of a lien in respect of common expenses. Section 134 of the Act provides that expenses in respect of compliance and enforcement can only be the subject of a lien if the Corporation has obtained a compliance order from the Court. The application judge found that the expenses at issue were not common expenses but fell under s. 134 of the Act. Since there was no Court

order authorizing a lien for those expenses, he found that the lien was invalid and must be discharged.

[10] The Appellant argues that the application judge misapprehended the meaning and inter-relationship of these sections and disregarded the definition of "common expense" in the Act, which lead him to the wrong conclusion.

[11] Section 85 of the Act provides:

> 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. [Emphasis added]

[12] Section 134 of the Act provides, in relevant part:

> 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 this Act, the declaration, the by-laws, the rules or an agreement* between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.
>
> (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. [Emphasis added]

[13] "Common expenses" are defined to mean "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".

[14] The essential reasoning of the application judge on this point appears in paras. 34 and 35 of his decision:

> [34] It is one thing to allow the corporation to enforce, by way of lien, common expenses that are applicable to all unit holders and that a majority of unitholders have approved. It is entirely another to allow a condominium corporation the unfettered, unilateral right to impose whatever costs it wants on a unitholder, refer to them as common expenses and thereby acquire the right to sell the unitholder's apartment.

> [35] I am strengthened in this view by other provisions in the Act that specifically allow a condominium corporation to add certain types of costs unique to a single owner to the common expenses of the particular unit holder without a court order. By way of example, sections 92(1) and (4) provide that a corporation can carry out certain repairs if an owner fails to do so and can add the cost of such repairs to the owner's common expenses. In a similar vein, section 105(2) provides that if an owner causes damage, the lesser of the cost of repair or the corporation's insurance deductible may added to the owner's common expenses. Legal fees and enforcement costs do not fall into these categories.

[15] I can find no error in the application judge's interpretation of these provisions of the Act. His interpretation is correct. There are numerous sections allowing condominium corporations to charge back expenses to an owner and to have a lien if the owner defaults, without the requirement of an order. However, as expressly provided, s. 134 is not one of them.

[16] Furthermore, there was ample evidence in the record, cited by the application judge in his reasons, to support his conclusions on the application of these provisions to the facts of this case.

[17] I therefore give no effect to this ground of appeal.

Applicability of the Indemnity Provision

[18] Article XI of the appellant's Declaration provides in relevant part:

> Each owner, shall indemnify and save harmless the Corporation from and against any …cost, …or liability whatsoever which the Corporation may suffer or incur resulting from or caused by an act or omission of such owner, … to or with respect to the common elements and/or all other units … All payments pursuant to this clause are deemed to be additional contributions toward the common expenses and recoverable as such.

[19] The Appellant argues that the application judge committed a palpable and overriding error in concluding that the appellant's indemnity provision did not apply because the alleged breach to the rules did not constitute an act to or with respect to the common elements.

[20] The appellant's argument is three-pronged. First, it argues that the application judge held that "there was no act of Mr. Amlani to the common elements ignoring the key words in Article XI 'or with respect to the common elements'". It then goes on to argue that Mr. Amlani's smoking in his unit constituted an act "with respect to the common elements". Finally, it argues that the appellant's interpretation of the indemnity provision was reasonable.

[21] The application judge started his analysis on this point by quoting the indemnity provision, including the words "to *or with respect to* the common elements" (emphasis added). He did not, therefore, "ignore" any words of the Declaration. The application judge made no error in concluding that the indemnity applies only with respect to costs the Corporation incurs arising out of acts by owners 'to or with respect to the common elements and/or all other units'.

[22] There was ample evidence to support the conclusion that there was no act of Mr. Amlani to or with respect to the common elements. The Appellant argues that the *Smoke Free Ontario Act* prohibits smoking in the hallways and that smoking in the common element hallways or smoking in a unit "so that it fills the hallway with cigarette smoke and/or cigarette smell" is an act with respect to the common elements.

[23] No one smoked in the hallway and there was no evidence that any smoking in the unit "filled the hallway with cigarette smoke and/or cigarette smell".

[24] In any event, I agree with counsel for the respondent when he submits that the air space in the hallway does not form part of the common elements and is not meant to be captured by the language of the indemnity clause. The Act defines "common elements" as the property except the units. "Property" is defined as the "land, including the building on it …". An act to or with respect to common elements therefore is a reference to the physical component of the common elements. There is no allegation of harm or damage to the land or the building.

[25] Further, the application judges' conclusion, that the costs the Corporation incurred after Mr. Amlani left his unit could not possibly arise out of acts by Mr. Amlani to the common elements because he was out of the building and was not engaging in any acts with respect to the common elements or otherwise, was entirely consistent with the evidence.

[26] The appellant argues that its indemnity provision allows it to simply charge back any and all costs incurred in its attempt to secure compliance, without the requirement to first obtain a compliance order.

[27] Section 7(5) of the Act provides that a declaration cannot be inconsistent with the Act. The application judge found, the interpretation of Article XI advanced by the Corporation contravenes s. 134 (5) of the Act because the costs it claimed related to compliance and enforcement costs and were not embodied in a court order. An interpretation that contravenes a statutory provision, he found, is, by definition, unreasonable. The legal accounts for which the corporation claimed indemnity described the services as relating to the "enforcement of the Corporation's Declaration and Rules" and not as relating to the protection of any common elements.

[28] In the circumstances, there are no palpable and overriding errors to justify overturning the finding that the appellant could not rely upon its indemnity provision to charge Mr. Almani with the legal fees it was seeking.

The Finding of Oppression

[29] The application judge correctly stated the legal test for oppression under s. 135(2) of the Act and applied the leading case, *BCE Inc., Re*, 2008 SCC 560, as well as several recent condominium oppression cases. The application of the oppression remedy is based on findings of fact and the exercise of discretion by the Court.

[30] After enunciating the test and evaluating the evidence before him, the application judge concluded that "The Corporation's attempt to sell the Amlani's unit contrary to the provisions of the Act is oppressive, unfairly prejudicial to and unfairly disregards the interests of the Amlanis." In so concluding, the application judge made the following findings of fact and mixed fact and law:

(a) the Corporation did not behave in accordance with its constating documents by refusing to negotiate in good faith;

(b) the Corporation did not try and achieve "the greatest good for the greatest number." The Corporation did not even ask whether it was possible to accommodate both Mr. Amlani and his neighbours;

(c) it was evident that a simple, practical solution had worked in the past, and the duty to negotiate required the Corporation to explore, in good faith, whether there continued to be a practical solution. It refused to do so; and

(d) Mr. Amlani's reasonable expectations were defeated by the Corporation breaching its own constating documents (i.e. the duty to negotiate).

[31] The application judge also exercised his discretion when crafting the remedy under s.135(3): "the court may make any order it deems proper including an order requiring payment of compensation." Courts have held that s. 135(3) should be given a broad and flexible interpretation that will give effect to the remedy it created. Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal.

[32] There is no basis to interfere with the application judge's finding of oppression.

Negotiation in Good Faith

[33] The appellant's by-laws impose on the Corporation and its owners the obligation to "use their best efforts to resolve any disputes which may arise between them, through good faith negotiations… and shall resort to mediation, arbitration or legal proceedings only after attempts fail to clarify, resolve and minimize the scope of any issues in dispute". After quoting this provision of the by-laws, the application judge concluded, on the evidence, that "the Corporation did not behave in accordance with this by-law. Instead of abiding by its by-laws, the Corporation refused to meet with Mr. Amlani despite his request to do so."

This is the clearest of findings of fact and is deserving of deference.

[34] The evidence shows that as early as July 20, 2017, Mr. Amlani asked for a meeting with the Board of Directors and his neighbours. The evidence shows that the Appellant refused to even meet with the Respondents until the aborted mediation.

[35] The appellant now suggests on appeal that "the parties carried on discussion and negotiations, primarily through their legal representatives" who "agreed that the mutual goal was to … render the Respondent's Unit *airtight*" There are two fundamental problems with this theory.

[36] First, it is not supported by any evidence. Despite the July 20 request to meet, the appellant refused to negotiate, refused to meet, and refused to consider low-cost solutions as they had in 2015. On this, the application judge concluded:

> [71] Instead of meeting with Mr. Amlani to discuss solutions, however, the Corporation got its lawyers involved and demanded that Mr. Amlani stop smoking immediately and warned him of enforcement costs. Its position became intractable. For whatever reason, it appears to have become rigid and motivated by an animus towards Mr. Amlani that blinded the Corporation to simple, practical solutions.

[37] Second, this new theory is, in fact, the exact opposite of the position pleaded at first instance. On this very question, the application judge summarized the appellant's oral argument as follows:

> [78] In my view, it was the Corporation that was the intractable one. Its attitude was best summarized by Mr. Fine in oral argument when, at various points he justified the Corporation's refusal to meet by saying:
>
> - "What really was there to talk about if Mr. Amlani was not going to quit smoking. There was really nothing to talk about."
>
> - "What is there to talk about. His smoking is a health and safety danger. I really doubt his neighbours want to talk about ways he can continue smoking."
>
> - "No one is interested in talking because he is still smoking. He shows absolutely no contrition."

[38] The conclusion that the appellant refused to negotiate or discuss the matter is well grounded in the evidentiary record and in counsel's own submissions. There is no basis to interfere with these findings of the application judge.

Nuisance

[39] The appellant argues that the application judge erred when he concluded that "Mr. Amlani's smoking was not a nuisance because the appellant 'refused to discuss

solutions'". This characterization is an unfair simplification of a long and thoughtful analysis of the evidence and the cited legal authorities contained in the decision of the application judge.

[40] The application judge found that neighbours were only "exposed to the smell of smoke between April and September 2017, when Mr. Amlani moved out." He then reviewed the many volumes of evidence of the alleged nuisance filed by the appellant, and made findings of mixed fact and law that what existed during the relevant timeframe did not amount to nuisance either at common law or under a reasonable interpretation of the appellant's Rules.

[41] The application judge disagreed with the appellant's suggestion that there was a "prima facie" nuisance. He wrote, "although Mr. Amlani's smoking could rise to the level of nuisance if it continued unabated, it did not rise to the level of nuisance in the circumstances as they stood before he moved out."

[42] This is a finding of mixed fact and law, subject to the palpable and overriding error standard of review.

[43] The application judge applied *Antrim Truck Centre Ltd. V. Ontario (Transportation)*, 2013 SCC 13, the seminal case on nuisance, to the facts, and concluded that there was no substantial and unreasonable interference with the owners' use or enjoyment of their property.

[44] In so doing, the application judge assessed 1) the evidence of the act and its effects; 2) the duration of that act; and 3) the unreasonableness of the Corporation's conduct in prolonging the situation: "the duration of the exposure would have been substantially less had the Corporation sat down with Mr. Amlani in April 2017 to see if a practical solution could be found."

[45] The Amlanis lived in unit 2802. During the relevant months of April to August 2017, there were no complaints from units 2801, 2803, 2804, 2806, 2807, or 2902, being the units on the same floor as, and above, the Amlanis' unit. During those same months, there were only two units that made complaints: unit 2808 and 2805, who both had a history of unfounded complaints.

[46] Further, the Corporation submitted no evidence that the dissipated smoke alleged to be travelling from the Amlanis' unit was causing a health and safety risk to any of the other residents. Accordingly, the application judge found:

> In essence, the Corporation submits that even if there were no smell dissipating into neighbouring units, there would still be a health hazard because a perfect seal is never achievable and there is no safe level of dissipated smoke. While I do not dismiss that possibility, I am not prepared, without medical evidence, to find that a diminution in the dissipation of smoke to the point that it is no longer noticeable, amounts to a health hazard.

[47] There was, by definition, no nuisance created by the Amlanis after September 7, 2017 as they had completely vacated their unit. And yet, the Corporation charged over $25,000 in legal fees to seek "compliance" after September 7.

[48] The application judge evaluated the evidence before him, and concluded:

> While I am sensitive to the right of other unitholders to be free from the smell of smoke, to characterize the matter as one of life and death as Mr. Fine suggests, belies the Corporation's own the behaviour. Recall that in 2015, the Corporation seemed to have fixed the problem by taking minor remedial steps. In April 2017, when new complaints arose, the Corporation merely suggested that Mr. Amlani be "circumspect" while smoking in his apartment. In addition, even after the Corporation passed a non-smoking rule, it grandfathered a number of owners and permitted them to continue smoking in their units.

[49] I can find no basis upon which to interfere with this conclusion.

Costs

[50] Given that the substance of the appeal has been dismissed, leave is required to appeal the issue of costs separately. I would not grant leave but, even if leave was granted, I see no merit to the cost appeal.

[51] This Court does not disturb discretionary awards of costs absent an error in principle. The test is not whether an appellate court would have made the same costs order, but whether the application judge committed an error in principle or whether he was clearly wrong.

[52] The application judge concluded that elevated costs were appropriate as the appellant had engaged in conduct that is "worthy of sanction", as discussed throughout his reasons. After making adjustments to the costs sought, the application judge determined, in his discretion, that substantial indemnity on an elevated scale was appropriate, given the pre-litigation conduct, the three settlement offers made by the Amlanis (all of which were beaten), and the other relevant factors under Rule 57:

> "in a nutshell, the entire proceeding could have been avoided had the [appellant] acted reasonably" and that
> "Parties who ignore cost-effective solutions in favour of litigation must pay the price if they fail in litigation".

[53] This conclusion was, again, amply supported by the evidence. There is no basis upon which to interfere with the exercise of the application judge's discretion on the question of costs.

Conclusion

[54] The decision of the application judge is lengthy, thoughtful and carefully reasoned. His decision is amply supported by the evidence. There is no basis upon which to interfere with the result that he reached. The appeal is dismissed with costs payable by the appellant to the respondents in the agreed amount of $30,000.

_____
Penny J.

I agree _____
Corbett J.

I agree _____
Favreau J.

Released: August 28, 2020

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REASONS FOR JUDGMENT

Released: August 28, 2020