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Condo Alert!

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Cost recovery at the CAT?

An Nguyen

Costs awards at the Condominium Authority Tribunal ("CAT") have been mixed. Recent cases indicated the CAT's willingness to award legal fees in "exceptional circumstances" where offenders deliberately broke the condos' governing rules. In Fall 2021, the CAO asked for the condo community's input on whether legal costs should be awarded in CAT cases. Clarity on the topic came in form of amended CAT Rules of Practice in January 2022.

While the Rules still maintain that the CAT will generally not order one party to reimburse another party's legal fees, the Rules were amended to allow the CAT to order costs against a party if the costs were directly related to a party's behaviour that was unreasonable, undertaken for an improper purpose, or that caused delay or additional expense:

> **Reimbursement of Legal Costs and Disbursements at any stage**
> **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.

The CAT also issued a Practice Direction effective January 1, 2022, outlining a non-exhaustive list of factors the CAT may consider when ordering reimbursement of costs or on the appropriateness of costs:

- Whether a party or representative's conduct was unreasonable, for an improper purpose, or caused a delay or expense;
- Whether the application was filed in bad faith or for an improper purpose;
- The conduct of all parties and representatives, including the party requesting costs;
- The potential impact an order for costs would have on the parties;
- Whether the parties attempted to resolve the issues before the CAT application was filed;
- Whether a party has failed to follow or comply with a previous order or direction of the CAT;
- The condominium corporation's declaration, by-laws and rules;
- Any other factors the CAT considers relevant;
- The nature and complexity of the issues in the case;
- Whether the costs are reasonable and were reasonably incurred.

These amended Rules and the Practice Direction will hopefully clarify parties' expectations and behaviours before and during a CAT proceeding. The amendments address some of the important benefits of the traditional cost recovery regime of the courts, which we blogged about here.

The issue of CAT costs also arose in a recent Divisional Court decision. The court clarified that CAT-ordered costs should not be awarded against a *successful* party unless there was a finding of bad faith or misconduct.

In the underlying CAT case, the condo successfully defended against a unit owner's CAT application to enforce the removal of portable basketball nets. The unit owner's application was dismissed but costs of $200 were awarded against the condo. The reasons given for the cost award were that the unit owner's claim was novel and within a new area of jurisdiction for the CAT (i.e. issues relating to storage on common elements, which was effective October 2020), and that the unit owner was not unreasonable in pursuing the dispute despite being unsuccessful.

The Divisional Court reviewed the CAT Rules of Practice. The court held that novelty and reasonableness of bringing a claim may be relevant factors which would support *no costs* being awarded against the condo, but these factors are not relevant to support an award of costs against a successful party. Unless there was a finding of bad faith or misconduct, it was an error to award costs against the condo, the successful party. The cost order was set aside.

Troublesome tenants…

Tony Bui and Andrea Lusk

Two recent decisions highlight the ability of condos to step in a deal with non-compliant tenants:

MTCC No. 1260 v. Singh

MTCC 1260 brought an urgent court application against two tenants after one of their pitbulls attacked another resident and dog in the building's elevator. Despite this incident and an order from the City of Toronto requiring the dogs be muzzled in public, the tenants continued to let their dogs roam off leash without a muzzle and the dogs continued to lunge at other residents.

The court ordered the tenants permanently remove the dogs pending the determination of whether their lease should be terminated but - as with the order from the City of Toronto - they did not comply with the removal. A Sheriff removed the dogs from the unit but in sheer disregard for the court, the tenants brought the dogs back into the unit while threatening to get two loud German Shepherds and let them loose in the hallways.

Not surprisingly, the court did not take kindly to this: it terminated the tenancy and permitted the Sheriff to evict the tenants (and their dogs) from the unit once and for all. A common misconception is that the Landlord and Tenant Board ("LTB") has exclusive jurisdiction over any matters regarding tenancies and only it can order evictions. That is incorrect as section 134 (4) of the Condo Act allows a court to order terminate a tenancy/order an eviction but only after the tenants breach an existing compliance order.

The Condo Act provides little recourse against tenants (the bulk of its remedies are aimed at owners) but section 134 (4) is an important mechanism for condos to terminate egregiously problematic tenancies without having to go through the LTB's slow and backlogged procedures.

These tenants viewed pet ownership as a right instead of a responsibility – sadly, this is far too common in condominiums. No one wants to have their pet taken away from them but all the tenants had to do was leash and muzzle their dogs on common elements. Instead, they thought they could disregard municipal and court orders with impunity. This case should serve as firm warning not to take compliance orders lightly.

FCC 6 v. McCauley et. al.

Since 2018, the condo, its manager and its lawyers contacted the unit owner at least 27 times by various means over the conduct of the owner's tenant. The court record filed by the condo in court detailed over 200 complaints and over 60 police visits.

The complaints made against the tenant included her screaming, yelling obscenities, banging on doors, punching walls, threatening physical harm and exposing herself. There was no evidence presented to confirm a diagnosed mental health issue although one was suspected.

The owner brought at least 10 eviction proceedings at the LTB – none resulting in an eviction order.

A condo can bring a motion terminating a tenancy if a compliance order has already been granted in relation to the tenant, and it is not followed. Therefore a compliance proceeding and order is step one in eviction.

The tenant sought a stay of the compliance proceeding on the basis of the many returns of her matter before the LTB – some determined and some waiting to be heard. The owner did not oppose the condo's relief.

The court was satisfied that the behaviour complained of was a breach of the Condo Act and also the governing documents. On the argument about concurrent proceedings in court and the LTB, the court found that the court proceeding and the LTB proceeding were brought by different parties with different interests and responsibilities. The court saw no justification to further delay the condo's relief because of ongoing LTB proceedings.

The tenant was left with two options: comply with the court order (and the LTB matter can still be dealt with if appropriate as between the owner and tenant) or do not comply, and face eviction if the condo must return to court.

In matters involving tenants, mediation and arbitration are not mandatory precursors for a compliance application at Superior Court. The CAT can only evict animals, not tenants. If a tenant's behaviour falls in the "dangerous activities" or "damage to property or person" category, head to Superior Court.

Obligations and limitations

Andrea Lusk

In the recent Court of Appeal decision of *Thermal Exchange Service Inc. v. MTCC 1289* the plaintiff was an HVAC contractor who provided services to a condo. The condo did not dispute that it asked for and received services or that those services were done satisfactorily. However, it did not pay for service and does not dispute this. Its defence for not paying was that the 2 year limitation period had expired. Some of the invoices went back to 2008. The contractor sued for payment and the court found that the action was not barred by the limitation period and ordered the condo to pay the contractor $86K. The condo appealed.

The Ontario Court of Appeal dismissed the condo's appeal. It accepted that the contractor had a running account and payment made by the condo (and payment was occasionally made) was applied to the oldest arrears. More importantly, it analyzed when the contractor knew or ought to have known that a court claim was the appropriate means of collection.

The contractor sent a legal demand letter in 2015. The condo argued this was the latest date the limitation period could run from. However it was only in late 2016 that the condo manager informed the contractor that the condo was not responsible for the invoices (in fact, the individual units were responsible and could be charged back). After doing so, the condo took steps to collect fees from owners and remit those fees to the contractor.

The Court of Appeal confirmed the lower court's findings that it was the 2016 date – when the condo informed the contractor it was not responsible for the invoices and would not pay the contractor until owners paid the condo – that was the pivotal date of discovery that litigation was necessary.

We all suffer adverse treatment - not all is discriminatory

Tony Bui

Two complainants brought a human rights application against a condo alleging they were discriminated against based on their race, colour, ancestry, place of origin, ethnic origin and creed after the condominium demanded they restore their driveway after it was altered without the corporation's permission. The complainants claimed other owners also altered their driveways without permission but the corporation was only going after them requiring restoration. The Human Rights Tribunal accepted that the other owners who altered their driveway were white and that the complainants were not. However, that was not enough for the Tribunal to make a finding of discrimination.

The *Human Rights Code* protects against discrimination on specific grounds such as race, colour and creed. But to succeed on a human rights application, there has to be a connection between the complaints' *Code*-protected ground and the discriminatory act: the discriminatory act has to be "related to" or "directed at" the *Code*-protected ground. It was not enough for the complainants to say they were discriminated against because other offending owners were white and the complaints were not.

The Tribunal noted that

> *…everyone will identify with at least one Code-enumerated ground and, over the course of their lifetime, most people will suffer some form of adverse treatment which may or may not be connected to the Code. Because of this, the Code does not assume that all adverse treatment is discriminatory…the applicant must provide some factual basis to link the respondent's conduct to their Code-enumerated ground. A bald assertion that the adverse treatment they received was owing to their enumerated ground is not enough to provide the required factual basis.*

It is understandable that the complainants felt they were being treated differently and unfairly compared to other owners. But it takes a lot more than just an allegation to prove that they were treated differently and unfairly *because* of their status.

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