Court of Queen's Bench of Alberta

Citation: The Owners: Condominium Plan No. 802 2845 v Haymour, 2014 ABQB 758

Date: 20141210
Docket: 1303 03371
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 802 2845

Plaintiff

- and -

Anis Najib Haymour

Defendant

And Between:

Breezy Bay Holdings Inc.

Applicant (Appellant)

- and -

Anis Najib Haymour

Respondent (On Appeal)

Memorandum of Decision
of the
Honourable Madam Justice J.M. Ross

A. Introduction

[1] This is an Appeal of a Master's Order which was obtained by the Respondent Anis Haymour ("Haymour"), the former registered owner of a condominium unit, reinstating a caveat that he had filed against the condominium unit title now registered in the name of the Appellant Breezy Bay Holdings Inc. ("Breezy Bay"). The issue is essentially whether Haymour has already had or should yet have an opportunity to take proceedings to prove the interest in land asserted in his caveat. While the Appeal itself is relatively simple, the legal proceedings that preceded it between Haymour and Condominium Corporation No. 802 2845 (the "Condominium Corporation"), pursuant to which the condominium unit was sold, are more complicated. Those proceedings are relevant to Haymour's claimed interest. The Master's Order under appeal, in addition to reinstating the caveat, consolidated an action between the Condominium Corporation and Haymour, with a separate action between Breezy Bay and Haymour. That consolidation order is not appealed. Because of the connection, I heard from counsel for the Condominium Corporation as well as the parties to the Appeal, and I have reviewed the proceedings between the Condominium Corporation and Haymour, as well as proceedings between Breezy Bay and Haymour.

[2] While I intend to refer in some detail to proceedings between the Condominium Corporation and Haymour, there is no application before me in relation to those proceedings. Breezy Bay's Appeal first came before me in morning Chambers on August 20, 2014. I adjourned it to October 15, 2014. At the same time, on Haymour's representation that the Appeal should be heard with an application he wished to bring against the Condominium Corporation, I ordered that, if any such application was to be heard concurrently with the Appeal, Haymour must comply with a filing deadline. He did not do so, and sought an extension of time from me. I declined to grant the extension, and ordered that the hearing of the Appeal proceed without his concurrent application. Haymour continued to object to the hearing of the Appeal without his concurrent application against the Condominium Corporation, and repeatedly sought to adjourn the Appeal. Lee J. adjourned the Appeal on October 15, 2014, and it was scheduled to be heard by me on November 13, 2014. I declined Haymour's continued adjournment applications, and heard the Appeal on that date.

B. Proceeding between the Condominium Corporation and Haymour

[3] The action was commenced by the Condominium Corporation in March 2013 by Statement of Claim. The Corporation sought an injunction requiring Haymour to comply with its bylaw, judgment for condominium fees owing, foreclosure and possession of the property, and legal costs and expenses, including costs on a solicitor and his own client basis, before and after judgment.

[4] From the beginning there were issues with serving Haymour, which have plagued these proceedings. The Statement of Claim was served substitutionally, and Haymour filed a Statement of Defence as a self-represented litigant, which provided the following address for service: Box 31141, Edmonton, Alberta T5Z 3P3, T/F 780-457-1729 (the "Post Box").

[5] The first relevant application was an application for summary judgment brought by the Condominium Corporation. The application was filed September 6, 2013, returnable September 12, 2013. Because of service difficulties, the Condominium Corporation obtained a substitutional

service order on September 12, 2013, and filed and served a second application returnable September 26, 2013.

[6] The affidavit in support of the substitutional service order indicated that attempted service on the Post Box by registered mail was returned unclaimed. Attempted service on the fax number was also unsuccessful as repeated transmissions allowed at most a limited number of pages to go through. The substitutional service order, which applied to the summary judgment application only, provided for service by ordinary prepaid mail at the Post Box.

[7] Service in accordance with the order was made on September 12, 2013. The application proceeded on September 26, 2013 with service presumed to be effective at that time. The solicitor for the Condominium Corporation advised that some time after September 26th, the package of documents sent by ordinary mail on September 12th was returned unclaimed. He noted that it was a large package that may not have fit in a standard size post office box.

[8] On September 26, 2013, Browne J. granted summary judgment to the Condominium Corporation. The Summary Judgment Order included injunctive relief requiring Haymour to provide information to the Corporation, and an *in personam* judgment the amount of $16,486.23 and costs on a solicitor and his own client basis that was declared to be "a valid and enforceable charge" against Haymour's condominium. The judgment amount was composed of legal costs in the amount of $10,677.58, with the remaining $5,808.65 consisting of outstanding condominium fees and interest. The Summary Judgment Order provided that Haymour had six months to repay the indebtedness, failing which the property should be offered for sale under a judicial listing agreement, at a list price of $155,000, which was the appraised value of the unit. The Order provided that it could be substitutionally served by ordinary prepaid mail addressed to the Post Box.

[9] The Summary Judgment Order was served in accordance with its substitutional service provision on September 27, 2013.

[10] On October 1, 2013 the Condominium Corporation served a financial report form under the *Civil Enforcement Regulation* on Haymour at his fax number.

[11] On October 11, 2013, the Condominium Corporation's bill for solicitor and client costs, inclusive of disbursements, was approved by the Assessment Officer in the amount of $7,145.51.

[12] By application filed October 24, 2013 returnable November 8, 2013, the Condominium Corporation sought to have Haymour held in civil contempt for failing to provide information as required in the Summary Judgment Order and for failing to complete the financial report form. The Corporation also sought to shorten the 180 day waiting period provided in section 72 of the *Civil Enforcement Act*, RSA 2000, c C-15 to one day, on the ground that Haymour had no exemption in the condominium unit as it was not his principal residence. The affidavit in support of the application, by Jeff Gunther, a director on the board of the Condominium Corporation, stated that Haymour did not reside in the condominium unit and had rented it out.

[13] On November 8, 2013, Browne J. heard a portion of the application. Haymour was not present, although he and counsel for the Condominium Corporation spoke on the phone that day. Haymour's affidavits indicate that he contacted counsel to adjourn the application and that counsel agreed to adjourn it. Counsel's affidavit indicates that he advised Haymour he was proceeding with the application. Justice Browne shortened the 180 day waiting period in section 72 of the *Civil Enforcement Act* to one day. She also granted a substitutional service order. A

process server had attempted to serve Haymour at 7322- 166A Avenue, Edmonton, Alberta. This was believed to be his residence address on the basis of a demographic search. A search of the Certificate of Title to the property indicated that Haymour was the registered owner. On four occasions, the process server left messages on the door of the residence, which were removed but not responded to. Browne J. ordered that the Condominium Corporation could substitutionally serve Haymour by leaving a copy of the document at the 166A Avenue address, with service presumed effected two days after leaving, or by ordinary prepaid mail to the address, with service presumed to be effected seven days after the sending. The Condominium Corporation served all further documents in the action in this manner, except for a few months when Haymour was represented by counsel.

[14] On November 12, 2013, Haymour was substitutionally served with the November 8, 2013 Orders and a Notice of Intention to Sell the condominium unit. On November 20, 2013, Haymour was substitutionally served with a Notice of Method of Sale pertaining to the condominium unit. The Notice provided that the unit would be listed at $155,000 for 120 days with a minimum price of $130,000. The Notice of Method of Sale provided that if there was an objection to the land being sold for the minimum price, a notice of objection must be served on the civil enforcement agency in charge of the sale within 30 days of service of the Notice of Method of Sale.

[15] In an affidavit filed January 20, 2014, Haymour stated that he did not receive the Notice of Intention to Sell or Notice of Method of Sale, but that he was informed by counsel for the Condominium Corporation in early December 2013 of a pending sale, and filed a written objection to the sale. That "notice of objection of the notice(s) not yet received" was addressed to Consolidated Civil Enforcement, the civil enforcement agency in charge of the sale. It was dated December 18, 2013, less than 30 days after service of the Notice of Method of Sale. There is no explanation from Consolidated Civil Enforcement regarding whether they received the notice of objection and what if any action they took in response.

[16] The contempt application was heard on November 22, 2013, by Simpson J. Although his presence is not noted in the preamble to the order, the parties agree that Haymour was in fact present in court that day. Simpson J. found Haymour to be in civil contempt for failing to provide information as required in the Summary Judgment Order and for failing to provide a prescribed form of financial report. The Contempt Order gave Haymour 14 days after service of the Order to purge his civil contempt, and provided that, if he did not do so, a warrant would be issued for his arrest. Haymour was personally served with the Contempt Order on the day it was granted.

[17] On November 22, 2013, Haymour filed the first of several applications seeking to set aside the Summary Judgment Order, the November 8, 2013 Order shortening the waiting period under the *Civil Enforcement Act* and steps taken pursuant to those Orders. The application was returnable November 28, 2013. The application states that it is supported by Haymour's affidavit. The only pertinent affidavit appears to have been sworn and filed on December 5, 2013. There is no affidavit of service of Haymour's November 22nd application. There is an affidavit of counsel for the Condominium Corporation stating that he first received the application on December 23, 2013, from the judicial assistant to Browne J.

[18] Haymour did not purge his civil contempt as required by the Contempt Order. On December 9, 2013, a warrant issued for his arrest.

[19] On December 16, 2013, the Condominium Corporation's bill for further solicitor and client costs, inclusive of disbursements, was approved by the Assessment Officer in the amount of $9,773.20.

[20] Around this time, Haymour commenced corresponding with Browne J. A hearing before her was set for January 23, 2014, and the warrant was stayed.

[21] Haymour retained counsel and on January 21, 2014 he applied to set aside the sale of the condominium unit. Haymour deposed that he had paid $5,807.64 to the Condominium Corporation, bringing his condominium contributions up to date. A certificate of title to the condominium unit was filed which indicated that it had been transferred to Breezy Bay on January 21, 2014 for $135,000.

[22] An order of Master Smart on January 21, 2014 directed that sale proceeds be held in trust by Consolidated Civil Enforcement until January 23, 2014, and that Breezy Bay be informed that the sale was in dispute.

[23] The January 23, 2014 application before Browne J. to set aside the sale of the condominium unit was adjourned *sine die* to permit questioning of Haymour on his affidavits. Haymour was also ordered to produce relevant records prior to questioning. The order further provided that should Haymour's counsel withdraw as lawyer of record for Haymour, "the address provided by that law firm as the last known address for the Defendant shall be a physical address, rather than a post-office box."

[24] On January 28, 2014, Haymour, through counsel, filed an application seeking an injunction against Jeff Gunther, a director of the Condominium Corporation, and Breezy Bay to prevent them from dealing with the condominium unit. The application was returnable February 3, 2014, and was adjourned to February 24, 2014, with Breezy Bay enjoined from dealing with the unit in the interim.

[25] James Lott, the sole shareholder and director of Breezy Bay, swore an affidavit opposing the injunction application. He deposed that Gunther introduced him to the unit, and acted as agent for Breezy Bay in the purchase. Breezy Bay agreed to purchase the unit on December 31, 2013 for $145,000, conditional on a property inspection. Gunther requested but was unable to arrange a "walkthrough" inspection, and reduced the offer price to $135,000. The reduced price was accepted and the sale closed. Lott deposed that Breezy Bay did not have notice of Haymour's claim in respect of the sale prior to closing.

[26] On February 24, 2014, Sullivan J. dismissed the application for an injunction. This order was appealed by counsel for Haymour on March 27, 2014. Shortly thereafter, on April 2, 2014, counsel for Haymour filed a Notice of Withdrawal as Counsel of Record. The appeal was subsequently struck from the list and dismissed due to a failure to comply with Court of Appeal rules.

[27] The Notice of Withdrawal stated that Haymour's last known address was 7322 166A Avenue, the address in the November 8, 2013 substitutional service order. Haymour's former counsel had trouble serving Haymour with the Notice of Withdrawal. Affidavits of their efforts in this regard were filed. Attempts to fax his fax number were unsuccessful; they served the Notice substitutionally at the 166A Avenue address, and by ordinary mail at the Post Box. On April 11, 2014, Master Smart deemed service of the Notice of Withdrawal good and sufficient.

[28] Haymour, again self-represented, did not produce records nor appear for questioning on his affidavits in relation to his application to set aside the sale. On April 11, 2014, Master Smart ordered that he do so, and directed his former counsel to "use her best efforts to provide notice" to him, and deemed "that notice. . . good and sufficient". Haymour again failed to comply. On May 7, 2014 the Condominium Corporation filed an application, returnable May 30, 2014, seeking to have Haymour declared in civil contempt and his January 23, 2014 application to set aside the sale dismissed. Haymour did not appear on May 30, 2014. Clackson J. declared him in civil contempt and dismissed his January 23, 2014 application (the First Dismissal Order).

[29] The First Dismissal Order was served by being left at the 166A Avenue address on May 30, 2014. It is noteworthy that this document seems to have come promptly to Haymour's attention, as on June 2, 2014 he filed an application returnable June 3, 2014 seeking to set aside the First Dismissal Order on the ground that he did not receive notice of the May 30th application.

[30] Haymour did not appear on June 3, 2014. His subsequent affidavit indicates that he expected to attend at 2 pm, even though the application was set for morning chambers. Sulyma J. dismissed the June 3, 2013 application and ordered that Haymour "may not file any further applications in the within action without first obtaining leave from a Justice of this Court with notice to the Plaintiff" (the Second Dismissal Order).

[31] On June 3, 2014, Haymour filed an application for leave and an application to set aside the Second Dismissal Order. The leave application was heard on June 12, 2014 with counsel for the Condominium Corporation and Haymour in attendance. Goss J. granted the application for leave. The set aside application was heard on June 13, 2014, again with counsel for the Condominium Corporation and Haymour in attendance. Topolniski J. dismissed the application, with the preamble to the Order stating "upon it appearing that the only possible recourse available to the Defendant is an appeal to the Court of Appeal" (the Third Dismissal Order).

[32] On June 5, 2014, the Condominium Corporation's bill for additional solicitor and client costs, inclusive of disbursements, was approved by the Assessment Officer in the amount of $28,560.78. On June 23, 2014, the Condominium Corporation's bill for further solicitor and client costs, inclusive of disbursements, was approved by the Assessment Officer in the amount of $5,646.47.

[33] On June 25, 2014, Haymour filed a Notice of Appeal of the First, Second and Third Dismissal Orders. That appeal remains outstanding. Counsel for the Condominium Corporation advises that its judgment and solicitor and client costs have been paid from the sales proceeds. The remaining proceeds have not been disbursed. Consolidated Civil Enforcement has been directed by counsel to retain the proceeds while the appeal to the Court of Appeal remains outstanding.

[34] As noted in the introduction, Haymour sought to commence an application to be heard concurrently with the Appeal, seeking to set aside the sale of the condominium unit. I declined to hear his application because he had not complied with my filing deadline. However, having now had the opportunity to review prior proceedings, I conclude that it would clearly be inappropriate for this Court to hear another application by Haymour against the Condominium Corporation to set aside the sale. He has commenced three such applications; all have been dismissed and all of the dismissals are the subject of an appeal to the Court of Appeal. The proceeding between the

Condominium Corporation and Haymour has been finally determined by this Court, subject only to his appeal to the Court of Appeal.

C. Proceedings between Breezy Bay and Haymour

[35] As noted above, Breezy Bay purchased the condominium unit on January 21, 2014. The agent who introduced Breezy Bay to the property and acted for it in the purchase was Gunther, a director of the Condominium Corporation who has been directly involved in the proceedings between Haymour and the Condominium Corporation.

[36] Breezy Bay and Gunther were both named as respondents in Haymour's application for an injunction to prohibit their further dealing with the property. The injunction application was filed on January 28, 2014 and heard and dismissed on February 24, 2014. In the interim, Haymour through counsel filed a caveat against the condominium unit on February 10, 2014, claiming to be the "beneficial owner, by virtue of, amongst other things, a Resulting Trust" (the First Caveat).

[37] On April 4, 2014 Breezy Bay filed an application returnable on April 11, 2014 calling on Haymour to show cause why the First Caveat should not be discharged. The application was served on the office of Haymour's then counsel, whose Notice of Withdrawal had been filed but was not yet effective.

[38] On April 11, 2014 former counsel for Haymour appeared. The application was adjourned to April 25, 2014, peremptory on Haymour. The adjournment order provided that further service on Haymour in respect of the First Caveat should be by regular mail to both Haymour's last known address as set out in the Notice of Withdrawal, and to the Post Box.

[39] By application filed April 17, 2014, returnable April 22, 2014, and adjourned to April 23, 2014, Haymour applied to vary the April 11, 2014 order, further adjourning Breezy Bay's application to May 1, 2014. The order provided that it was peremptory on Haymour to respond on May 1, 2014.

[40] On May 1, 2014 counsel for Breezy Bay and Haymour appeared before Master Breitkreuz. Haymour applied for an adjournment of the application, stating that he had obtained new counsel who was not available. The background of Breezy Bay's purchase of the condominium unit was described to Master Breitkreuz, and the Master advised counsel for Breezy Bay that he could either adjourn the application or it would be dismissed on the ground that there was a triable issue. Counsel elected the former. There are two forms of the resulting order on the court file. Both indicated that the application was adjourned to a mutually convenient date and contemplated that Haymour's new counsel would contact counsel for Breezy Bay within a week. Haymour did not retain new counsel.

[41] Unknown to Breezy Bay on May 1, 2014, the First Caveat had been discharged on April 25, 2014. Another caveat had been filed by then counsel for Haymour on April 15, 2014, similar in all respects to the First Caveat except that it referred to a constructive trust rather than a resulting trust (the Second Caveat).

[42] On May 29, 2014, Breezy Bay applied *ex parte* to Master Schulz to shorten the period provided for a notice to take proceedings under section 138 of the *Land Titles Act*, RSA 2000, c L-4, from 60 days to 10 days. The application was brought as a new action. In an affidavit in support, Breezy Bay disclosed to the Master that it had served a Notice to Take Proceedings on

the First Caveat, for which the notice period would have lapsed on June 3, 2014. When the First Caveat was withdrawn and the Second Caveat filed, this defeated the operation of the Notice to Take Proceedings. Counsel for Breezy Bay did not advise the Master of the adjourned show cause application relating to the First Caveat. Master Schulz granted the order permitting a shortened notice period.

[43] Breezy Bay served Master Schulz' Order and a Notice to Take Proceedings on the Second Caveat. Service was effected on the address shown on the Second Caveat, which was the address of Haymour's former counsel. Breezy Bay filed the necessary paperwork with the Land Titles Office and the Second Caveat was discharged on June 13, 2014.

[44] On June 18, 2014 Haymour obtained an *ex parte* Order from Master Schulz staying her May 29, 2014 Order for 10 days.

[45] On June 23, 2014 Haymour appeared *ex parte* before Master Breitkreuz and obtained the Order which is the subject of this appeal. That Order reinstated the Second Caveat "effective just prior to removal of the Caveat". The new action by Breezy Bay was consolidated with the former action between the Condominium Corporation and Haymour. Master Schulz's May 29, 2014 Order was stayed for a further 10 days pending the appearance of both parties before Master Breitkreuz. On June 27, 2014, both parties as well as counsel for the Condominium Corporation appeared before Master Breitkreuz. The Master did not vary the June 23, 2014 Order.

[46] Breezy Bay appealed the June 23, 2014 Order. After several appearances in morning chambers and continued efforts by Haymour to adjourn the appeal, it was heard as described above.

[47] Haymour sought other relief from Master Breitkreuz on June 27, 2014, including an order setting aside the sale of the condominium unit. He still seeks to have this application heard by the Master in a special application. Master Breitkreuz adjourned this application, neither dismissing it nor taking jurisdiction. It would clearly be inappropriate for the Master to hear an application to set aside the sale, as this application has been dismissed by three Justices, and all of the Dismissal Orders have been appealed to the Court of Appeal.

D. Issues regarding Haymour's Conduct

[48] Haymour has been his own worst enemy in these proceedings. His approach to service is a predominant problem. The address for service which he provided, the Post Box and fax number, does not respect the intent of the *Alberta Rules of Court*, which contemplate in Rule 11.15 that service on an address for service may be made by leaving a document at the address or sending it by recorded mail to the address. Haymour has been made aware on numerous occasions of service difficulties with this address for service and has refused to provide a physical address. He claims that service under the terms of the substitutional service order of November 8, 2013 at the 166A Avenue address, is not reaching him, but has not explained why that is the case when the residence is owned by him and apparently listed on his driver's license. He has challenged orders claiming lack of notice, but has not provided details as to how or when these orders came to his attention. Even his own counsel was unable to serve him. Over and over again, Haymour has attempted to use the *Rules of Court* to frustrate service, rather than to facilitate it.

[49] In addition to service issues, Haymour has been held in civil contempt twice. He has failed to purge his contempt. He has repeatedly sought and obtained adjournments of applications based on representations to the Court that he is obtaining counsel, and has repeatedly failed to do so. He has brought the same application on repeated occasions on very short notice, to the point that he was made subject to an order prohibiting filing further applications without leave of the Court.

E. Issues Relating to the Sale of the Condominium Unit

[50] While Haymour bears much responsibility for what has occurred in these proceedings, I am also concerned by actions taken by the Condominium Corporation leading to the sale of the condominium unit.

[51] The Summary Judgment Order of September 26, 2013 provided that Haymour had six months to pay his indebtedness of $16,486.23 failing which the condominium unit might be listed at $155,000 and sold in a judicial sale. There was no mortgage registered against the unit. A six month redemption period was conceded to be appropriate given the amount of the debt as compared with the equity in the condominium unit.

[52] Approximately six weeks later, in an application that was brought on notice but heard in Haymour's absence, the Condominium Corporation sought and obtained an order shortening the waiting period to permit a sale of the condominium unit under section 72 of the *Civil Enforcement Act* from six months to one day. The sole ground for the application was that the unit was not Haymour's residence.

[53] Section 72 of the *Civil Enforcement Act* provides:

> 72(1) Once the regulations governing the giving of notice of intention to sell have been complied with, an agency shall not, unless otherwise permitted by the Court, offer the land for sale until a waiting period of 180 days has expired from the day that all the requirements of those regulations have been complied with.
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> (2) A Court may, subject to subsection (3), extend or shorten the 180-day waiting period.
>
> (3) The Court may shorten the 180-day waiting period only if the Court is satisfied that the land is not exempt.

[54] Section 72 indicates that the Court may shorten the waiting period if there is no exemption. It is not obligated to do so. Furthermore, if the waiting period is shortened, it does not have to be to one day. This is all at the Court's discretion. The same factors that justified a six month redemption period in the Summary Judgment Order would have supported a waiting period longer than one day to sell under the *Civil Enforcement Act*. There is no indication in the application materials that the Court's discretion or factors relevant to the exercise of that discretion were brought to the attention of the Court.

[55] The sale proceeded apace. The Notice of Method of Sale provided for a listing of the unit for 120 days at $155,000, but also provided that it could be sold for a minimum price of $130,000.

[56] Section. 74 of the *Civil Enforcement Act* provides:

> 74(3) If the notice of the method of sale sets out the minimum price for which the agency proposes to sell the land, the following applies:
>
> (a) the notice must state that any person who objects to the land being sold for the proposed minimum price must serve a notice of objection on the agency within 30 days from the day of being served with notice of the method of sale;
>
> (b) if any person serves a notice of objection on the agency within the time mentioned in clause (a), the agency must not sell the land except on terms that are approved of by the Court;
>
> (c) if a notice of objection is not served on the agency within the time mentioned in clause (a), the agency may, without an order of the Court, complete the sale of the land for a price that equals or exceeds the proposed minimum price.

[57] A notice of objection is valid if the judgment debtor objects to the proposed minimum price, and if it is served within the 30 day time limit: ***Alex Cole Ltd v Wannet,*** 2009 ABQB 642 at para 11, [2009] AJ No 1276. If the notice of objection is valid, the agency is precluded from selling the land except on terms that are approved of by the Court. In this case the notice of objection appears to have been served in time, but it did not specifically object to the minimum price. This is not surprising as Haymour stated in the notice of objection that he had not been served with the Notice of Method of Sale, so he would not have been aware of the proposed minimum price.

[58] The condominium unit was sold for $135,000 in less than one month. Unlike the sale in ***Alex Cole Ltd v Wannet***, the sale does not appear to have been to an arm's length party. A director of the Condominium Corporation who was directly involved in the proceedings against Haymour introduced the purchaser to the property and acted as the purchaser's agent in the transaction.

[59] In addition to issues relating to the sale, there is an issue in relation to the reasonableness of the costs incurred by the Condominium Corporation in pursuing a sale under the *Civil Enforcement Act*. The Corporation is entitled under section 42 of the *Condominium Property Act*, RSA 2000, c C-22 to recover "all reasonable costs, including legal expenses" incurred in collecting condominium fees. The Corporation's Summary Judgment Order against Haymour was well secured – it was protected by caveat and the amount was far less than Haymour's equitable interest. The Corporation was aware, prior to the sale of the unit, that Haymour was challenging the Summary Judgment Order, and elected to proceed with the sale in any event. The enforcement processes pursued by the Corporation led to it incurring $61,803.54 in legal costs to recover less than $6,000 in outstanding condominium fees. I question whether these are reasonable costs.

F. Issues Regarding Breezy Bay's Proceedings

[60] Breezy Bay responded to the First Caveat in two ways: with a show cause application under section 141 of the *Land Titles Act* and a Notice to Take Proceedings under section 138. The show cause application was adjourned by Master Breitkreuz, who made it clear that based

on material before him he was of the view that there was a triable issue regarding Haymour's claimed interest in the condominium unit.

[61] When the First Caveat was discharged by counsel for Haymour, and replaced by the Second Caveat, Breezy Bay applied *ex parte* to Master Schulz for a shortened period in a Notice to Take Proceedings on the Second Caveat. Breezy Bay claimed that a shortened period was justified in view of Haymour's failure to take proceedings in response to the Notice on the First Caveat. Counsel did not advise Master Schulz of the existence or status of the parallel show cause application relating to the First Caveat. This did not comply with counsel's obligation to make full and frank disclosure to the court on an *ex parte* application: ***Luo v Wang***, 2005 ABCA 394 at para 6, 144 ACWS (3d) 454, citing ***Duke Energy Corporation v Duke/Louis Dreyfus Canada Corp.*** (1998) 219 AR 38 (CA).

[62] Breezy Bay submits that the procedure it followed was acceptable because the First and Second Caveats were separate and distinct claims based on different legal theories (constructive trust versus resulting trust). This argument is disingenuous. Whether the Caveats related to the same or different claims in land, Breezy Bay took the position that they were sufficiently related to justify a shortened notice period for the Second Caveat. The existence of two Caveats does not justify counsel's selective disclosure to the Court on the *ex parte* application.

[63] Breezy Bay served Master Schulz's order and the Notice to Take Proceedings on the Second Caveat, giving only 10 days to take proceedings, on the address in the Second Caveat, which was the office address of Haymour's former counsel. While this service complied with section 138(1)(b) of the *Land Titles Act*, counsel for Breezy Bay was aware that former counsel was no longer acting for Haymour and had difficulty getting in touch with him. I infer that Breezy Bay was aware that there would be a significant possibility that Haymour would not learn of the Notice to Take Proceedings within the stipulated 10 day period. Counsel did not advise Master Schulz of the potential issue with service when requesting that she shorten the notice period.

[64] The failure to advise the Master regarding this known service issue was another instance of failure to comply with counsel's obligation to be fully forthcoming with the court. I concur with the comments in ***Fink v Trakware Systems Inc***, 2014 ABQB 512, [2014] AJ No 864, regarding notice served on a party at his last known address for service which was now occupied by another company. In chambers, the Master was not made aware of this fact. On appeal, Lee J. stated at para 28:

> I conclude that Counsel should have gone further in discussing the issue of service and advised the Master everything that he knew that was relevant to the issue of service namely that the process server had put in an endorsement at the bottom of his invoice that the address for service was currently occupied by another company called DES Engineering; that the woman that the process server had left the documents with, who was the office manager of DES Engineering, had advised the process server that she had never heard of either Defendant; and that there was little chance that they would receive the documents that had been left with her.
>
> (Emphasis added)

[65] In the result, Haymour did not have a reasonable opportunity to take proceedings on the Second Caveat before its discharge. It is true that he had not taken proceedings on the First Caveat, but this is understandable in view of the adjourned show cause application and Master Breitkreuz's comments.

[66] Breezy Bay argues that Haymour's caveats were improper as he had unsuccessfully applied to prohibit Breezy Bay from dealing with the condominium unit in his injunction application. However, an interim injunction involves different considerations, including, notably, the requirement to provide an undertaking to pay any damages that may result from the injunction. During the hearing of the Appeal, counsel advised me that it was their understanding that Haymour's injunction application was denied due to failure to provide the appropriate undertaking, not because there was no triable issue regarding his claimed interest in the condominium unit.

G. Analysis of the Appeal

[67] The standard of review of an appeal from a Master's decision is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30, 524 AR 382.

[68] Breezy Bay objected to Master Breitkreuz's order as not justified based on the evidence before him. However, new evidence can and has been filed on the Appeal, and I have also, with advice to the parties that I would be doing so, reviewed materials on the court file.

[69] Master Breitkreuz's Order varied or set aside Master Schulz's order and reinstated the Second Caveat. That Order would be correct, in my view, if I conclude that Master Schulz's decision to shorten the notice period, considered in light of the evidence before me, was not justified, and that Haymour should yet have the opportunity to prove the interest claimed in the Second Caveat as contemplated by section 138 of the *Land Titles Act*. He should have that opportunity if there is a triable issue regarding his claimed interest, and if there is a reasonable explanation for his failure to commence a claim.

[70] I agree with Master Breitkreuz's view that there is a triable issue regarding Haymour's claimed interest in land. Breezy Bay argues that someone who is aggrieved by a sale of land by a Civil Enforcement Agency may have a claim in damages against the civil enforcement agency or the judgment creditor, but has no further interest in land. That would be the case if the purchaser were a *bona fide* purchaser for value: ***Alex Cole Ltd v Wannet***, at paras 24-26. There is in my view a triable issue in that regard due to the apparently close relationship between Breezy Bay and Gunther.

[71] There is a reasonable explanation for Haymour's failure to take proceedings on the Second Caveat. Master Schulz was not fully informed of the circumstances by counsel when she shortened the notice period from 60 days to 10 days. The Notice to Take Proceedings was served on an address that counsel had reason to know would not immediately come to Haymour's attention. Haymour applied to stay Master Schulz's Order on June 18, 2014, five days after the Second Caveat had been discharged. His affidavits do not indicate when or how he learned of the Notice to Take Proceedings, but he could at most have had only a very short time, if any, to commence an action before the discharge of the Second Caveat.

H. Conclusion

[72] I conclude that Master Breitkreuz correctly set aside Master Schulz's Order and reinstated the Second Caveat. Haymour should have the opportunity provided in section 138 of the *Land Titles* Act to take proceedings to prove the interest in land asserted in the Second Caveat. However, in view of Haymour's prior conduct in these proceedings, that opportunity comes with conditions.

[73] Counsel for Breezy Bay is directed to prepare the Order resulting from this decision. Rule 9.4(2)(c) is invoked in relation to Haymour. I will sign the Order personally. The Order will provide that it may be served substitutionally by ordinary mail at both the 166A Avenue address and the Post Box, with service deemed effective seven days after mailing. The Order will state that Haymour has 60 days from service of the Order to take proceedings to prove the interest claimed in the Second Caveat. Given the complexity of a constructive trust claim and of the facts that may be relied on in support, I am directing that the proceedings should take the form of an action commenced by Statement of Claim, rather than an application. The normal filing fee will apply. If Haymour is represented by counsel in the action, the usual rules regarding address for service will apply. If Haymour is self-represented in the action, he is required to provide as his address for service a physical address where documents may be either mailed or left for service. If Haymour fails to commence an action within the stipulated time period or fails to provide an address for service as stipulated herein, the Second Caveat will be discharged.

[74] The action to be commenced must include a claim in respect of the interest in land that is the subject of the Second Caveat. Apart from that, the content of the action will be governed by the *Rules of Court*. The action may include additional claims and parties, subject to the Rules regarding joinder.

[75] I have been appointed as case manager of the within proceeding. If Haymour commences an action as described, that action will be included in the scope of the case management. The parties will be required to comply with my case management directions. Haymour is cautioned that a failure to do so may result in the dismissal of the action and discharge of the Second Caveat.

Heard on the 13th day of November, 2014.
Dated at Edmonton, Alberta this 10th day of December, 2014.

J.M. Ross
J.C.Q.B.A.

Appearances:

Mr. B. Sussman
for The Owners: Condominium Plan No. 802 2845

Mr. T. Kurian
for Breezy Bay Holdings Inc.

Mr. A. Haymour
Self-Represented - Defendant