Court of Queen's Bench of Alberta

Citation: Condominium Plan No 052 6233 v Seehra, 2014 ABQB 588

Date: 20140925
Docket: 1303 07069
Registry: Edmonton

Between:

The Owners: Condominium Plan No 052 6233

Applicant

- and -

Kulwant Seehra

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

Background

[1] The Applicant [Condominium Corporation]seeks a full indemnity award of costs from the Respondent [Unit Owner] pursuant to the Condominium Bylaws [Bylaws] governing the Corporation and Condominium Property, and in accordance with the *Condominium Property Act*, RSA 2000 c C-22 [*CPA*].

[2] Without the knowledge or permission of the Condominium Corporation, and according to the Respondent, without his knowledge, the tenants operated or permitted the operation of a

licenced, marijuana grow operation in the relevant Condominium Unit [Respondent's Unit], in violation of the Bylaws. The marijuana grow operation was initially detected by owners/occupants of adjacent and nearby condominium units who noticed and complained of noxious odors passing through shared vents, loud humming noises coming from the Respondent's Unit, and strangers coming and going to the Unit at odd times. These complaints were reported to the property manager of the Condominium Corporation.

[3] The Bylaws prohibit owners from conducting a marijuana grow operation in the Unit, even if the owner is licenced to do so by an appropriate governmental department or authority. The Applicant submits that the Respondent breached the Bylaws by allowing his Unit to be used in a manner that caused a serious hazard to the condominium property, and that was harmful and injurious to the health and safety of other owners/occupants, as well as jeopardizing a policy of insurance maintained by the Condominium Corporation.

[4] On or about May 22, 2013, the Unit was inspected by an Alberta Health Services [AHS] Executive Officer, who confirmed that a marijuana grow operation was being conducted in the Unit. The AHS Executive Officer issued an Order under section 62 of the *Public Health Act* [*PHA*] with respect to the Unit in which he identified several breaches of the *PHA* and regulations arising from the marijuana grow operation, which rendered the Unit unfit for human habitation. A series of remedial steps outlined in the Executive Order, dated May 23, 2013, were also listed.

[5] The Respondent deposes that he took positive steps, following the complaint of the property manager of May 16, 2013, to rectify the situation with his tenants. The Respondent immediately evicted his tenants who were allegedly involved in the marijuana grow operation, and he began to comply with the Executive Order from AHS. The Respondent also deposes that the Unit had always been primarily a rental unit, and that the Condominium Corporation was aware of all of these tenancies.

[6] On May 21, 2013, the Applicant obtained an Interim Inspection Order in this Court to determine the extent of the health hazards and the required remediation in the Respondent's Unit. On November 16, 2013, the Applicant obtained a Repair Order with respect to the repair and/or replacement of broken overhead garage doors attached to the Unit, and restoring/maintaining utilities. The parties agreed to adjourn the matter of costs at the time these Orders were obtained.

[7] The Applicant's Bill of Costs total approximately $40,000 and is made up almost entirely of legal fees and property management fees. However, only approximately one-quarter of the legal fees were for obtaining and carrying out the emergency interim inspection order, whereas three-quarters of the costs occurred after notice of the application was given to the Respondent by the Condominium Corporation.

[8] The Royal Bank of Canada [RBC] is the first mortgagee of the Respondent's Unit, and appears in this matter as an Interested Party.

Issues

[9] The two issues before me are:

(a) Whether this is an appropriate case for the Court to make an award of full indemnity, solicitor-client costs, in favour of the Applicant Condominium Corporation as against the Respondent, a registered Unit Owner on the Condominium Property; and

(b) If so, are these solicitor-client costs in priority to the RBC mortgage on the Unit?

Discussion

Issue 1: Is this an appropriate case to award full indemnity, solicitor-client costs

Applicant's position

[10] The Condominium Corporation recognizes that although the circumstances under which solicitor-client costs are awarded in this jurisdiction are rare, the courts have done so where: (a) justice can only be done by complete indemnification for costs; (b) a party is guilty of positive misconduct and should be penalized beyond the ordinary order of costs and others should be deterred from similar conduct; and (c) there is evidence that a party unnecessarily hindered, delayed or confused the litigation, or "contemptuously" forced aggrieved party to exhaust legal proceedings: ***Jackson v Trimac Industries Ltd***, [1993] 4 WWR 670 at para 28; 8 Alta LR (3d) 403 [CanLII].

[11] From the perspective of condominium corporations and unit owners, the existing caselaw indicates that other factors which may support the award of solicitor-client costs include: (a) the indemnification provisions in the bylaws of the condominium corporation; and (b) a finding of improper conduct, pursuant to the *CPA*, s 67: ***Stagg v Condominium Plan No 882-2999***, 2013 ABQB 684.

[12] The Applicant says the Respondent violated the Corporation's Bylaws in an egregious manner by "conducting or allowing a marihuana grow operation" in his Unit, and this infraction constitutes an "improper conduct" under the *CPA*, s 67(1)(a)(i). The facts and details of the infraction are contained in the Affidavits of D Grymaloski, sworn May 16, 2013, and July 25, 2013. They include, *inter alia*, using his Unit in a manner that: (i) causes a serious hazard to the Condominium Property; (ii) is injurious to other owners and occupiers by allowing hazardous vapours and noxious odours to escape from his Unit; (ii) is damaging to the reputation of the Corporation; (iv) interfered with common property without consent of the Corporation; and (v) is unsafe by storing offensive goods on the Unit.

[13] The Applicant also relies on the provisions of sections 2.1(e)(i) and (ii), 3.3 (m), (n), (q) and 3.4(a)(ii) of the Condominium Corporation's Bylaws. The relevant sections of the Bylaws are reproduced, in part, below:

> 2.1 Specific Obligations
>
> Subject to, and generally in addition to those specific obligations, restrictions and rules from time to time promulgated by the Corporation, each Owner shall:
>
> (e) indemnify and save harmless the Corporation from and against air and every liability, loss, expense, cost, outgoing, claim, and demand, whatsoever (and including without limiting the generality of the foregoing, all expenditures made directly by the Corporation in remedy, without claims by a third party), directly and indirectly arising out of or as a result of:
>
> (i) the failure of either or both of the Owner and any Occupant of the Unit to adhere to, comply with, and strictly

> observe this By-law, and all By-laws, Resolutions, Rules and Regulations;
>
> (ii) the failure of the Owner to repair, maintain, and keep clean his Unit and any improvements or additions thereto or the Common Property in accordance with this By-law, and all By-laws, Resolutions, Rules and Regulations;
>
> 3.3 Powers of Corporation
> In addition to the powers and rights conferred upon the Corporation under the Act, the Corporation may, and is hereby authorized to:
>
> ...
>
> (n) recover from an Owner by an action for debt in any court of competent jurisdiction any sum of money which the Corporation is required to expend as a result of any act or omission by the owner, his servants, agents, licensees, invitees, or tenants, which violates the By-laws or any rules, regulations or resolutions established by the Corporation and there shall be added to any judgment, all costs of such action including costs as between solicitor and client. Nothing herein shall be deemed to limit any right of any Owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise of his remedies;
>
> ...
>
> 3.4 Additional Power of Corporation
>
> (a) In addition to any and all powers, rights, privileges, authority and remedy given to the Corporation, either to enforce its Bylaws or to censure Occupants or Owners for breach or default thereof, the Corporation may, subject to any limitations imposed by the Act:
>
> > (ii) to the extent that the Board determines that it may reasonably cure or effect a remedy of the situation or circumstances of breach or default of the Bylaws, on behalf of any such Owner or Occupant, the Board may implement and carry out such cure or remedy, as the case may be, and impose the cost of such cure or remedy, including all actual solicitor's costs and a reasonable supervisory and administration fee (at no less than 20% of the actual costs incurred by the Corporation), as a fine upon such Owner or Occupant. [*Emphasis added*].

[14] The Applicant Corporation submits that in the present matter, both the provisions of the *CPA* and the Corporation's Bylaws empower this Court to make an award of solicitor-client costs, where the Respondent has violated the Bylaws, and these proceedings were directly necessitated by that violation.

Respondent's position

[15] The Respondent states that when he was served with court orders and affidavits in May 2013, he took steps to remove the tenants from the Unit within two days; and also "sought to take the necessary steps to ensure that the Unit was remediated." The Respondent submits that the Condominium Corporation could have raised any concerns they had with the marijuana grow

operation in the Unit with the Respondent before commencing legal action against him in May 2013, thereby avoiding his legal expenses in this case.

[16] The Respondent invites this Court to note that 85% of the Applicant's Bill of Costs of approximately $40,000.00 represents legal fees, and the remaining amounts reflect the "additional property management time, utility maintenances, and arrears." He contends that this Bill of Costs is excessive and unreasonable, especially when "there has been no breakdown of these legal fees." He argues that it is unclear whether all the legal fees incurred by the Applicant Corporation "stemmed from the present action or from other legal expenses or actions in which the Applicant is involved."

[17] He observes that the *CPA*, s 42 provides that the corporation may:

> (a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and
> (b) if a caveat is registered against the title to the unit, recover from the owner all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

He submits that these statutory provisions limit the recovery of costs to only those that are reasonable, and that the Applicant should not be permitted by this Court to recover "all legal expenses and costs incurred in this litigation without full disclosure of how those funds were appropriated."

[18] Further, the Respondent argues that this Court is authorized to exercise its discretion by only awarding costs that are reasonable. He notes that in making a costs award, the *Alberta Rules of Court*, Alta Reg 124/2010, rule 10.33(1)(g) [*ARC*] provides that "the Court may consider ... any other matter related to the question of reasonable and proper costs that the Court considers appropriate." In addition to this power, the Respondent points out where the Applicant seeks an "unreasonable amount of solicitor-client costs," this Court has discretion to direct that an assessment of costs be conducted by an assessment officer, pursuant to the *ARC*, r 10.34.

RBC's position

[19] The RBC, as an interested party, takes no position as to whether the Applicant is entitled (or not) to solicitor-client costs against the Respondent Unit Owner.

Analysis and conclusion – Issue 1

[20] Section 67(2)(e) of the *CPA* states that "[w]here on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may ... award costs."

[21] On the evidence before me, I am satisfied that the Respondent violated the Corporation's Bylaws when, among other things, he allowed the conduct of a marihuana grow operation in his Unit, and that this infraction constitutes an improper conduct, pursuant to the *CPA*, s 67(1)(a)(i).

[22] Section 32 (6) of the *CPA* provides that "[t]he bylaws bind the corporation and the owners to the same extent as if the bylaws had been signed and sealed by the corporation and by each owner and contained covenants on the part of each owner with every other owner and with the corporation to observe and perform all the provisions of the bylaws."

[23] The present Corporation Bylaws clearly provide for solicitor-client costs in only two circumstances: Bylaw 3.3(n), and Bylaw 3.4(a)(ii). For ease of reference, the relevant provisions read:

> 3.3 Powers of Corporation
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> [T]he Corporation ... may, and is hereby authorized to:
>
> (n) recover from an Owner by an action for debt in any court of competent jurisdiction any sum of money which the Corporation is required to expend as a result of any act or omission by the owner, his servants, agents, licensees, invitees, or tenants, which violates the By-laws or any rules, regulations or resolutions established by the Corporation and there shall be added to any judgment, all costs of such action including costs as between solicitor and client. Nothing herein shall be deemed to limit any right of any Owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise of his remedies;
>
> 3.4 Additional Power of Corporation
>
> (a) In addition to any and all powers, rights, privileges, authority and remedy given to the Corporation, either to enforce its Bylaws or to censure Occupants or Owners for breach or default thereof, the Corporation may, subject to any limitations imposed by the Act:
>
> > (ii) to the extent that the Board determines that it may reasonably cure or effect a remedy of the situation or circumstances of breach or default of the Bylaws, on behalf of any such Owner or Occupant, the Board may implement and carry out such cure or remedy, as the case may be, and impose the cost of such cure or remedy, including all actual solicitor's costs and a reasonable supervisory and administration fee (at no less than 20% of the actual costs incurred by the Corporation), as a fine upon such Owner or Occupant.

[24] On the evidence before me, neither the Respondent Owner nor the RBC, as an interested party, dispute the fact the Applicant incurred required expenses – including legal fees – as a result of the act of the Respondent Unit Owner and his tenants, which violated the Applicant Corporation's Bylaws. The Respondent's act caused the Applicant to seek and obtain: (i) an Interim Inspection Order in this Court in order to determine the extent of the health hazards and required remediation in the Respondent's Unit – on May 21, 2013; (ii) a Repair Order with respect to the repair and/or replacement of broken overhead garage doors attached to the Unit, and restoring/maintaining utilities – on November 16, 2013.

[25] Following the applications for and the grant of these court Orders, the parties agreed to adjourn the matter of costs at the time they were obtained. Consequently, although the within proceedings did not originate as "an action for debt" in the strict sense, it is clear that they relate to the recovery of the sum of money which the Applicant Corporation was required to, and did expend as a result of the Respondent's act or omission which violated the Condominium Corporation's Bylaws.

[26] In my view, the act of the Respondent and his tenants in conducting a marihuana grow operation in his Unit in violation of the Applicant Corporation Bylaw triggered the expenses incurred by the Corporation. Accordingly, Bylaw 3.3(n), in conjunction with the *CPA*, 32 (6),

provide the legal bases for the recovery of costs and expenses incurred in respect of related proceedings "including costs as between solicitor and client" that are associated with them.

[27] Significantly, this Court notes that in ***Maverick Equities Inc v Owners: Condominium Plan 942 2336***, 2008 ABCA 221 at para 15 (CanLII), our Court of Appeal similarly held that the Appellant condominium corporation was entitled to solicitor and client costs "as provided in the bylaws." See also, ***Owners: Condominium Plan No 022 1347 v NY***, 2003 ABQB 790 at para 80, 351 AR 76.

[28] In the result, on the basis of the evidence before me, the provisions of the *ARC*, r 10.33(1)(g), the *CPA*, 67(2)(e), and section 3.3(n) of the Corporation's Bylaws, I conclude that it is appropriate to award full indemnity, solicitor-client costs against the Respondent in this case.

[29] However, pursuant to the provisions of *ARC*, r 10.34, an Order is hereby issued for an assessment of the solicitor-client costs by the assessment officer. The assessment officer is directed to ensure and confirm that the Applicant's Bill of Costs reflects only all the costs and legal expenses incurred by the Applicant Corporation in connection with the proceedings that relate to the act or omission of the Respondent Unit Owner, which violated the Corporation's Bylaws.

Issue 2: Are these solicitor-client costs in priority to the RBC's mortgage on the Unit

Applicant's position

[30] The Applicant observes that the issue of priority was addressed by Master Schlosser in ***Condominium Plan No 8722887 v Callaghan***, 2011 ABQB 638 [***Callaghan***]; and Master Smart in ***Condominium Corporation No 0425177 v Jessamine***, 2011 ABQB 644 [***Jessamine***]. However, the Applicant contends that in ***Condominium Plan No 8210034 v King***, 2012 ABQB 127 [***King***], Master Prowse specifically disagrees with the ***Callaghan*** and ***Jessamine*** decisions.

[31] It contends that the ***Callaghan*** and ***Jessamine*** decisions ignore the obvious effect that if the corporation's legal fees are not charged to the single unit responsible for the expense, they form a collective obligation of the condominium corporation that must be borne by all unit holders, a result that is inconsistent which the statutory objective of achieving fairness amongst members of the Condominium Corporation. The Applicant notes that RBC's submissions, which rely heavily on ***Callaghan*** and ***Jessamine***, completely disregard the 2000 Amendments to the *Condominium Act* that allow for the assessment of contributions on a basis other than unit factor, if the Bylaws so provide.

[32] The Condominium Corporation submits that in the present matter, the Bylaws provide for alternate method(s) of assessment as follows:

> 3.3 [The] Corporation may, and is hereby authorized to:
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> ...
>
> (m) in the event of any infraction or violation of, or default under these By-laws or any rules, regulations or resolutions of the Corporation on the part of an Owner, his servants, agents, licensees, invitees or occupants, fine, correct, remedy or cure, and pursuant to Section 3.4 of these Bylaws, any fine, costs or expenses incurred or expended by the Corporation in correcting, remedying or curing such infraction, violation or default may be charged to such Owner and shall be added to and become part of the assessment of such Owner for the month next following

> the date when such costs or expenses or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest at the Interest Rate until paid;
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> ...
>
> (q) whenever and if the allocation of expenses, costs or charges hereunder are inequitably assessed on the basis prescribed by these Bylaws, weight, allocate and assess against the Owners and their respective Units such expenses, costs and charges in such equitable manner as the Board shall from time to time and at any time resolve, provided that such manner of weighting, allocation and assessment will be notified to Owners on assessment and without limiting the generality of the foregoing, allocation and assessment of the whole of an expense, cost or charge to a single Owner or Unit shall be permitted;

The Applicant indicates that its Bylaws – containing the provisions above – have never been modified, and the RBC was provided a copy prior to registering its mortgage on the Respondent's Unit.

[33] It maintains that the provisions of the Bylaws are clear in that its: (a) section 3.3(m) authorizes the Applicant to "add any fine, costs or expenses incurred or expended by the Corporation in correcting, remedying or curing" an owner's default under the Bylaws to "the assessment of such Owner"; (b) section 3.3(q) provides that the Applicant may assess its expenses on a basis other than unit factor where it is equitable to do so, and charge the particular expense to a single unit; and (c) section 3.4(a)(ii) stipulates, *inter alia*, that the Applicant may "impose the cost of such cure or remedy, including all actual solicitor's costs ... as a fine upon such Owner or Occupant."

[34] The Applicant contends that the use of the term "fine" in section 3.4(a)(ii) of its Bylaws "clearly applies to actual costs and expenses, and not monetary sanctions, which are addressed under section 3.4(a)(i)." It submits that this interpretation will fairly ensure that the Respondent's neighbours – and fellow members of the Condominium Corporation – are not forced to pay for the Respondent's improper conduct, in respect of which the Applicant is entitled to complete indemnity under the Bylaws.

[35] Further, the Condominium Corporation notes that the provision of the *CPA*, s 39(3) authorizes mortgagees, such as the RBC, to pay contributions levied but unpaid by a unit owner, pursuant to *CPA*, s 39(1). In addition, section 25(4) of the *CPA* permits the Condominium Corporation to retain and instruct legal counsel – as agents – for the purpose of managing its affairs; and the Applicant's right to sue, which derives from the *CPA*, s 25(3), implicitly enables it to claim legal costs. It submits that in Alberta, secured lenders are fully aware that they rank behind condominium corporations' claims for collection costs, and that the practice in this province is that secured lenders add such pay-outs, made at the request of condominium corporations, to the relevant unit's mortgage balance: ***King*** at para 9.

[36] The Applicant argues that the appropriate procedure to be followed in determining the priority of claims of a condominium corporation was outlined by Master Prowse in ***King*** at para 49, where he states:

> Given the conclusions set out above, it [is] my view that claims made by a condominium corporation should be evaluated as follows:
>
> 1. Firstly, if the claim is for a typical assessment, or overdue interest on such assessment, then the claim is protected by the statutory charges under section 39 and section 41 of the Act. There is no need for any review of the bylaws in this regard, other than to confirm the interest rate chargeable on overdue assessments. That interest rate is capped by regulation, and the current cap is 18% per annum.
>
> 2. If the claim is for other expenses incurred with respect to a particular unit ('expenses' does not include uncollected revenue such a fines or rents) then the bylaws of the corporation have to be examined to determine if they allow these expenses to be included as part of the assessment against that particular unit. If the bylaws are clear in this regard then these individually assessed expenses, and overdue interest on them, are covered by the statutory charges under section 39 and 41 of the Act.
>
> 3. Claims which do not fall under item 1 or item 2 may be subject to a contractual charge pursuant to the bylaws of the corporation. For example, some bylaws I have examined grant a charge against units to secure all amounts owed by that unit owner to the corporation. If adequately worded, this contractual charge would cover things such as collection expenses not brought under item 2, unpaid fines, unpaid rents, etc.
>
> 4. Any claims which do not fall under items 1, 2, or 3 are unsecured. [*Emphasis in Original*].

[37] Accordingly, the Applicant submits that based on the express provisions of its Bylaws, the expenses and costs, including legal fees, which it incurred in these proceedings as a result of the Respondent's infraction of the Corporation's Bylaws, constitute a caveatable interest/charge and forms part of the Respondent Unit's assessment for contributions under the *CPA*, s 39.

Respondent's position

[38] The Respondent argues that the Corporation's Bylaws provide for solicitor-client costs only in the situation where there is an action for debt or the Corporation has implemented a cure or remedy in the event of a breach of the Bylaws. The Respondent submits that section 3.4(a)(ii) of the Bylaws permits the solicitor-client costs as a "fine," charged back to the owners of the unit.

[39] He aligns his position with RBC's submissions – outlined below – that the Applicant Corporation's Bylaws "are ambiguous with respect to solicitor-client costs forming a statutory charge pursuant to s 39, *CPA*."

RBC's position

[40] RBC submits that the expenses and solicitor-client costs claimed by the Applicant Condominium Corporation, for obtaining the Orders in question here against the Respondent Unit owner, do not constitute an "assessment" or a "contribution" pursuant to section 39 of the

CPA. RBC submits that they are not statutory charges, and do not constitute caveatable interests in priority to RBC's registered mortgage.

[41] In support of its position, the RBC points to the decision of Master Schlosser in ***Callaghan*** at paras 5-10, where he held:

> 5 The *Condominium Property Act,* RSA 2000 c. C-22 supports a distinction between obligations that are fundamentally common, or 'collective', and those that are individual. The collective obligations achieve an *in rem* quality and are sometimes thought to have a 'super-priority': *Condominium Plan 882 0814 v. Birchwood Village Green Ltd.*, 1998 ABQB 458, per Nation J., *Alder Fulman & Assoc. Ltd. v. Condominium Plan CDE 13442* 1985 ABCA 1. *Central & Eastern Trust Co. v. Borland,* (1981) 14 Alta L.R. (2d) 376, 36 AR 260 per Funduk, M. Individual duties remain *in personam* and are enforced with the usual range of personal remedies.
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> 6 Obligations of the first type are called contributions in the Act. They are described in sections 39(1)(a) - (c) and 39(2). Interest may be included in this category (s. 40)(1)). The Bylaws in this case use the term "common expense".
>
> 7 In recognition of the super priority, a practice has developed whereby foreclosing mortgagees pay the outstanding contributions together with legal expenses. Section 42(a) permits the recovery of costs and expenses incurred by the corporation but it does not give legal expenses any special status, or priority. Payment of outstanding condominium fees is referred to in paragraph 4(b) of the template Order Confirming Sale and Vesting Title. It is silent about legal expenses.
>
> 8 Unpaid *contributions* will support a Caveat (s. 39(7), (8)). Section 42(b) permits the recovery of reasonable expenses arising from the preparation, registration, enforcement and discharge of the Caveat but the subsection does not otherwise include legal fees.
>
> 9 In this case, the costs and related legal expenses are said to arise from the breach of a bylaw by an individual owner. They have been treated by the Plaintiff as an individual obligation rather than a common, or collective obligation. As such, this is a section 39(1)(d) scenario and falls within Bylaws 12.01 and 12.03. Section 39(1)(d) applies 'in respect of the unit or common property that is leased to that owner'. The obligation is individual. The Defendant was the only one assessed. The duties are personal and the Act allows recovery of the claim as a debt. Accordingly, this claim will not sustain a Caveat.
>
> 10 The Condominium Corporation is directed to remove its Caveat with respect to the clean-up and extermination costs, and related legal costs.

[42] RBC also draws this Court's attention to the decision of Master Smart in ***Jessamine*** at para 28, in support of its interpretation:

> 28 Section 42(1) permits the Condo Corp to recover from the person against whom steps were taken all reasonable costs including legal expenses in collecting the amount owing for condominium contributions. Despite language in Bylaws 4.09 and 4.10 which purports to expand liability for costs, I am of the view that the Act governs. Costs on a solicitor and client basis are payable for the action only. Legal expenses are not permitted by s.42(2) for preparation, registration, enforcement and discharge of the caveat but only reasonable expenses may be recovered. Those expenses must be claimed as part of the action with the appropriate evidence. Outstanding contributions constitute a charge

> against the property under s.39(7) and interest is deemed a charge by virtue of s.41. Legal costs are not given the same characterization under the Act. Despite wording in the Bylaws which purport to capture legal costs as a charge under their caveat, the Act governs.

[43] RBC argues that the costs claimed by the Applicant relate to legal expenses incurred with respect to obtaining Orders for an interim inspection to determine the scope of the health hazards, and for repair/replacement of broken garage doors, "both of which arise due to the owner's improper conduct": RBC Brief, para 63. It notes that these expenses were not incurred as collection costs of contributions, pursuant to the *CPA*, s 42; and as such, cannot form a statutory charge.

[44] RBC contends that if this Court awards solicitor-client costs against the Respondent, on the basis of his improper conduct and the provisions of the *CPA*, s 67, those costs would properly rank below RBC's mortgage. It maintains that such costs constitute "a debt owing by the owner for amounts expended by the Applicant in respect of the [Respondent Owner's] unit."

[45] Alternatively, RBC argues that if this Court accepts the analytical scheme outlined in ***King***, a review of the Condominium Corporation Bylaws is required. It submits that the Bylaws are unclear and ambiguous with respect to solicitor-client costs forming a statutory charge under the *CPA*, s 39.

[46] RBC contends that "it is not clear if any monies expended will be considered 'any fine, costs or expenses incurred' that may become an assessment under section 3.3(m), or whether it will be considered as a 'sum of money... required to be expended' under section 3.3(n) that is actionable as a debt." It notes that although section 3.3(n) is relatively clear on the issue of solicitor-client costs, the "Bylaws restore ambiguity [in] section 3.4(a)(ii) by again referring to solicitor costs, but including them as a cost for 'cures or remedies' to be 'imposed' 'as a fine' upon an owner": RBC Brief, paras 86-87. RBC submits that since the Applicant drafted the Bylaws, it should be held responsible for the ambiguity, which should be "construed more forcibly against" it: ***Hillis Oil & Sales v Wynn's Canada***, [1986] 1 SCR 57 at para 17, 71 NSR (2d) 353.

[47] Accordingly, RBC submits that based on the ambiguity of the provisions of the Corporation's Bylaws and Master Prowse's 4-step process in ***King***, the Applicant's solicitor-client costs would either fall in Category 3, as a contractual charge (which is secured charge against the title to the property, ranking behind RBC's existing mortgage) or Category 4, as a regular debt judgment (which is unsecured claim).

Analysis and conclusion – Issue 2

[48] I note that the analysis of Master Prowse, in ***King*** at paras 32 – 44, is particularly relevant and helpful for the determination of the issue of priority in the present case between the solicitor-client costs awarded to the Applicant and the RBC's mortgage on the Respondent's Unit. Master Prowse reasons as follows:

> 32 Section 42 deals with the corporation's entitlement to collection expenses, not with how the corporation can recover collection expenses. Accordingly, I do not think that there is a conflict between section 42 and the inclusion of these expenses in an assessment. With respect, I disagree with the conclusion of Master Smart to the contrary

in *Condominium Corp. No. 0425177 v. Jessamine*, 2011 ABQB 644, 2011 CarswellAlta 2013, para 28.

...

33 Section 39(1)(d) deals with the recovery by the corporation of certain expenses incurred by the corporation with respect to a unit. It states:

[the powers of a corporation include the following]

... (d) to recover from an owner by an action in debt any sum of money spent by the corporation

(i) pursuant to a bylaw ...

in respect of the unit or common property that is leased to that owner under section 50.

34 As can be seen, section 39(1)(d) does specifically provide a method for the collection of such debts, namely, an action in debt. In my view, this provision does not implicitly prohibit a corporation from including these expenses in the assessment of a unit. With respect, I disagree with the conclusion of Master Schlosser to the contrary in *Condominium Plan No. 872287 v. Callaghan*, 2011 ABQB 638, 2011 CarswellAlta 2011 at para 9.

...

39 Unpaid collection expenses are expenses, and can be included in assessments for that reason alone. Uncollected overdue interest is not an 'expense' and for that reason cannot be included in an assessment. It is for that reason that there was a need to deem unpaid interest to be an assessment (contribution), and thus covered by a statutory charge.

...

40 The Act does not list any types of expenses which cannot be included in an assessment. I do not see any reason to interpret provisions in the Act, which permit the recovery of collection expenses, and authorize a debt action to collect funds expended pursuant to a municipal authority, as prohibiting the inclusion of those expenses in an assessment. It would be odd to interpret these permissive sections in a way which would place a condominium corporation in a worse position to recover expenses, than if those expenses had never been mentioned in the Act at all.

...

44 What many condominium corporations have done to collect unpaid rent is to pass a bylaw which grants a contractual charge against the unit to support payment. The bylaws form a contract between the condominium corporation and all the unit owners: see subsections 32(2) and 32(6) of the Act. I know of no reason why obtaining this contractual charge should be considered *ultra vires* of the corporation.

[49] In ***Bank of Montreal v Rajakaruna***, 2014 ABQB 415 at para 82, 14 CBR (6th) 220 [***Rajakaruna***], Dario J endorses the procedure to determine the priority of claims of a condominium corporation, as set out by Master Prowse in ***King*** at para 49.

[50] I also accept the analytical framework proffered by Master Prowse in ***King***, as earlier endorsed by my colleague, Dario J in ***Rajakaruna***.

[51] Specifically in ***King***, Master Prowse articulates under his Category 2 evaluation that if the condominium corporation's claim is for other expenses incurred with respect to a particular unit, and the bylaws of the corporation allow these expenses to be included as part of the assessment (contribution) against that particular unit, "then these individually assessed expenses, and overdue interest on them, are covered by the statutory charges under section 39 and 41 of the [CPA]." I agree with this reasoning.

[52] In the present case, the section 3.3(m) of the Bylaws provides that the Condominium Corporation is authorized:

> (m) in the event of any infraction or violation of, or default under these By-laws or any rules, regulations or resolutions of the Corporation on the part of an Owner, his servants, agents, licensees, invitees or occupants, [to] fine, correct, remedy or cure, and pursuant to Section 3.4 of these Bylaws, [and] any fine, costs or expenses incurred or expended by the Corporation in correcting, remedying or curing such infraction, violation or default may be charged to such Owner and shall be added to ***and become part of the assessment*** of such Owner for the month next following the date when such costs or expenses or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest at the Interest Rate until paid; [*Emphasis added*].

Critically, neither the Respondent nor RBC challenged the validity of the Condominium Corporation's Bylaws or alleged that section 3.3(m) of the Bylaws conflict with the provisions of the *CPA*.

[53] In my opinion, the above reproduced provisions of the Bylaws, s 3.3(m) is clear to the effect that "expenses incurred or expended by the Corporation in correcting, remedying or curing" any infraction or violation of its Bylaws "may be charged to" and "shall be added to and become part of the assessment" of a unit owner who violates the Bylaw.

[54] Although section 3.4(a)(ii) of the Corporation's Bylaws appears to introduce an element of complexity to the whole analysis when it provides that the Condominium Corporation "may implement and carry out such cure or remedy, as the case may be, *and impose the cost* of such cure or remedy, *including all actual solicitor's costs* and a reasonable supervisory and administration fee [as] a fine upon such Owner or Occupant," I am satisfied that a purposive reading of that provision – in the context of the clear provisions of section 3.3(m) of the same Bylaws – supports the conclusion that the expenses incurred by the present Applicant were made in the course of "correcting, remedying or curing" the Respondent's infraction of the Corporation Bylaws; and as such, "may be charged to" as well as "added to and become part of the assessment" of the Respondent Unit Owner.

[55] There is no evidence before this Court which indicates that RBC was unaware of the Applicant Condominium Corporation's Bylaws at the point it advanced mortgage to the Respondent Unit Owner. It seems to me that it's rather late in the day for RBC to now contend that the provisions of the Bylaws are confusing and unclear. From the commercial and business relations' perspective, RBC's complaint about the ambiguity (or lack thereof) could have been

(and ought to have been) reasonably raised and/or resolved prior to the grant of mortgage to the Respondent in this matter.

[56] The expenses incurred by the Applicant in the circumstances of this matter, and for which it seeks recovery, were made or expended as a result of the operation of a licenced, marijuana grow operation in the Respondent's Condominium Unit. Those expenses are not simple or ordinary "fines" in the sense contemplated as exemptions by Master Prowse in the second category of his analytical scheme. Neither do the solicitor-client costs awarded as a result of the infraction of the Corporation's Bylaws constitute "fines' as contemplated for exclusion in ***King***. The expenses and costs all arose in the context of the Applicant's efforts to correct or remedy the effects of the Respondent's act or omission that violated the Condominium Corporation's Bylaws. In other words, the expenses and costs relate to monies actually spent by the Applicant in relation to the Respondent's Unit and his improper conduct that breached the Corporation's Bylaws, when he allowed the conduct of a marihuana grow operation in his Unit.

[57] In terms of the public policy implications of upholding the Applicant's Bylaws which add expenses – such as that incurred in these proceedings as a result of the infraction of the Corporation's Bylaws – to the assessments owing by the Respondent Unit owner, it is significant that the uncontested evidence of the Respondent in his affidavit indicates that the mortgage with RBC has been brought into "good standing": Affidavit of Kulwant Seehra, at para 32 (sworn July 3, 2014). Where RBC continues as the registered mortgagee on the Respondent's Unit, and given that it has previously engaged in the practice of adding assessments of contributions to mortgages of unit owners at the request of condominium corporations, I see no compelling reason for RBC's deviation from or unwillingness to follow that industry convention in the circumstances of this case: see ***King*** at para 9.

Disposition

[58] Accordingly, I conclude that since the Applicant Condominium Corporation's claims are for expenses incurred with respect to the Respondent's particular Unit – following his infraction of the Bylaws – and the relevant Corporation Bylaws, in its section 3.3(m), allow these expenses to be included as part of the assessment (contribution) against the Respondent's particular Unit, the individually assessed expenses, and overdue interest on them, are covered by the statutory charges under section 39 and 41 of the *CPA*.

[59] In the result, subject to assessment of the solicitor-client costs by the assessment officer, the Applicant's expenses in the circumstances of this matter form part of the Respondent Unit's

assessment for contributions under the *CPA*, s 39, and constitute caveatable interests in priority to RBC's registered mortgage.

[60] Costs may be spoken to within 30 days of this Decision.

Heard on the 13th day of June, 2014. Further submissions received July 4th and July 15th, 2014.
Dated at the City of Edmonton, Alberta this 25th day of September, 2014.

Donald Lee
J.C.Q.B.A.

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