Court of Queen's Bench of Alberta

Citation: Stagg v Condominium Plan No. 882-2999, 2013 ABQB 684

Date: 20131119
Docket: 1201 06002
Registry: Calgary

Between:

Rod Stagg and Greg Stokowski

Plaintiffs/Applicants

- and -

**The Owners: Condominium Plan 882-2999,
Sunreal Property Management Ltd. and Wayne Herve**

Defendants/Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice W. A. Tilleman**

I. INTRODUCTION

[1] Rodd Stagg and Greg Stokowski [the "Applicants"] seek against The Owners: Condominium Plan No. 882 299, a condominium corporation known as Points West Resort [the "Corporation"] an award of costs pursuant to rule 10.31 of *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*"] and section 67 of the *Condominium Property Act*, RSA 2000, c C-22 [the "*Act*"].

[2] This Application for costs is made against the Corporation for the Originating Application by the Applicants, filed on May 17, 2012, for relief pursuant to section 67 of the *Act* against The Owners: Condominium Plan No. 882 299, Sunreal Property Management Ltd. and Wayne Herve [collectively, the "Respondents"]. The Originating Application was made by the Applicants for, among other things, reimbursement to Greg Stokowski in the amount of $14,527.31 for a deposit paid by Mr. Stokowski [the "Deposit"] on behalf of the Corporation and rectification of minutes for a meeting of the Board that took place on July 23, 2011.

[3] The Applicants discontinued their action against Sunreal Property Management Ltd. on October 9, 2012.

[4] The Originating Application primarily concerned the fact that Mr. Stokowski, as a member on the Board of Directors of the Corporation and acting as a duly delegated agent of the Corporation, personally expended monies for the Corporation in the amount of $14,527.31, comprised of a deposit of $10,000.00 against the purchase of a new hot tub and $4,527.31 for the acquisition of sports pad related equipment, which amount the Board of the Corporation then failed to reimburse.

[5] The Originating Application also concerned the Board's subsequent actions and behaviour towards the Applicants, which included: refusing to approve and blocking attempts by the Applicants to approve the PDF version of minutes for the July 23, 2011 meeting of the Board; failing to convene a duly scheduled Board meeting on August 20, 2011 and re-characterizing the meeting as an informal informational meeting; actively participating in the removal of the Applicants from the Board following the payment of the Deposit by Mr. Stokowski and the Applicants' attempts to have the PDF minutes (which version was the correct version, as confirmed by the finding of the Investigator) approved.

[6] On October 16, 2012 an Order of this Court made a declaration that, among other things, the Board of Directors of the Corporation engaged in "improper conduct" within the meaning of section 67(1)(a) of the *Act* by failing to exercise their powers or conduct the business affairs of the Corporation fairly, and as an interim measure appointed an investigator [the "Investigator"] pursuant to section 67(2)(e) of the *Act* to investigate and report back to the Court on several issues.

[7] Ronald V. Clarke, Q.C. was appointed by the Court as the Investigator in accordance with the October 16, 2012 Order.

[8] A supplementary Order of this Court was also pronounced on January 18, 2013 as a result of the Investigator seeking supplemental terms to the Order of October 16, 2012. The Supplemental Order primarily concerned the role of the Investigator, required the parties to fully cooperate with the Investigator, and provided for payment to the Investigator, among other items.

[9] On March 2, 2013, Ronald V. Clarke produced a Report of Investigator [the "Report"], wherein he found, among others, that the following three actions of the Board fell within the ambit of a broad and liberal interpretation of "improper conduct" per section 67 of the *Act*: (1) refusing to reimburse Greg Stokowski for the Deposit, which he expended as the duly delegated agent of the Corporation; (2) blocking attempts by the Applicants to effect adoption of the PDF or final draft of the minutes of the Board Meeting of July 23, 2011 prepared by its contract manager, Sunreal Property Management Ltd. and, more than four months later, adopting the Word version or first draft of the minutes of that meeting; and (3) without authority, failing to convene the duly schedule Board meeting of August 20, 2011 and to proceed with the Agenda distributed for that meeting and, instead, electing to describe it as an informal "information" meeting where the said Agenda would not be followed and no motions would be permitted. In his Report, the Investigator also identified a number of actions taken by the Board that he did not

support, which actions in aggregate might constitute an incident of "improper conduct", although the Investigator was uncertain whether they would be so construed.

[10] The overall effect of the Report was that it confirmed the Originating Application of the Applicants with respect to the reimbursement of the Deposit in favour of the Applicants and the conduct of the Board with respect to the approval of the PDF version of minutes and the failure to convene the August 20, 2011 meeting.

[11] To that effect, the Applicants and Respondents both agreed to a Consent Order on September 16, 2013, which ordered in favour of the Applicants that, among other things, the Corporation reimburse Greg Stokowski the full amount of the Deposit ($14,527.31) plus applicable pre-judgment interest, and that the matter of costs be determined in a Special Chambers Application on September 16, 2013. As of September 16, 2013, the Deposit amount had not been repaid by the Respondents.

[12] To that end, I have now heard the parties' submissions on the issue of costs, and received written briefs from both parties.

II. ISSUES

[13] The parties have agreed on the final form of the Consent Order of September 16, 2013, but have not agreed on costs. The Consent Order awarded is in favour of the Applicants. Accordingly, the issue of the appropriate costs to be awarded to the Applicants is the only outstanding matter to be decided by this Court.

III. POSITION OF THE PARTIES

[14] The Applicants seek solicitor-client costs on a full indemnity basis in the amount of approximately $75,000.00, which they request be payable by the Corporation on a proportionate unit factor basis. This would work out to a cost of approximately $650.00 per unit in the Corporation. The Applicants also request the Respondents bear the full cost of the Investigator's Report.

[15] The Applicants contend that the legislative intent of the costs provision in section 67 of the *Act* was to give the Court the ability and discretion to protect owners from having to pay the costs of litigation for making a board do what it is legally obligated to do. The Applicants also argue that as a matter of precedent, it would send the wrong message to condominium corporation boards if the end result of this case was that the Applicants had to bear the prohibitive legal fees they expended in order to recover $14,527.31 – money that was properly spent by them and would encourage the "I dare you" attitude to the detriment of the well-meaning, good natured volunteer who goes above and beyond in an attempt to better the collective whole in a collective ownership situation like a condominium corporation. (The "I dare you" comment arose in an Undertaking that, despite the advice of the condominium's professional management company to the Board to do whatever they could to avoid litigation, Mr. Herve stated on a few occasions that he "dared" the Applicants to "come after the Board", as then the Board would be obliged to enter into a lawsuit where the Applicants would lose.)

[16] In relying on rule 10.31 of the *Rules* and section 67 of the *Act*, the Applicants submit that they should be awarded full costs because they are the clear victors in these proceedings, that the necessity of these legal proceedings was only as a result of the Respondents' conduct and lack of cooperation at several instances during the litigation, that they attempted to settle with the Respondents, and that the issues raised by the litigation and the Investigator's Report are important issues.

[17] The Respondents respond that this Court ought to award party-party costs to the Applicants as a reasonable apportioning of the expense of litigation between parties, and an award of solicitor-client costs or a multiple of Schedule C: Tariff of Recoverable Fees ["Schedule C"] costs is exceptional. The Respondents also submit that increased tariff costs are an exception to the general rule, and the indicia supporting an award of increased Schedule C costs are similar to those supporting an award of solicitor-client costs.

[18] In the facts of the case at bar, the Respondents submit that there is no conduct by the Respondents warranting an award of solicitor-client costs or an increase to the Tariff of Recoverable Fees. The Respondents also argue that these proceedings were not legally complex nor particularly protracted, and submit that the Applicants, specifically Stokowski, did not properly mitigate. Instead, the Respondents request that any costs payable to the Applicants be set as one times the fees set out in Column 1 of Schedule C.

[19] The Respondents also request costs for this Application, and that the costs associated with the Investigator's Report be apportioned between the parties on a 50/50 basis.

IV. THE LAW

A. Trial Judge Discretion to Award Costs

[20] It is well-settled law that trial judges have a wide discretion to order costs: rule 10.31(1); *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21. This discretion extends to awarding "any amount that the Court considers to be appropriate in the circumstances, including ... an indemnity to a party for that party's lawyer's charges": rule 10.31(1)(b)(i). However, a trial judge's discretion must be exercised "judicially and in accordance with established principles": ***Lameman v Alberta***, 2011 ABQB 532 at para 6, leave to appeal refused, 2011 ABQB 724.

[21] As the Court of Appeal recently stated in the case of ***Hill v Hill***, 2013 ABCA 313 at para 38: "We must keep in mind that Schedule C is a purely-optional rubber stamp for a judge, who may use it or not, or amend it, as he or she sees fit."

[22] Under section 67(2) of the *Act*, this Court also has broad statutory authority to make certain orders, including costs, where "improper conduct" has been found to exist. Section 67(2) of the *Act* reads as follows:

> 67(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

> (a) direct that an investigator be appointed to review the improper conduct and report to the Court;
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;
>
> (c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;
>
> (d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;
>
> (e) award costs;
>
> (f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

[23] Rule 10.31 of the *Rules* provides guidance to the Court ordering a costs award:

> 10.31(1) After considering the matters described in rule 10.33, the Court may order one party to pay to another party, as a costs award, one or a combination of the following:
>
> > (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
> >
> > (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
> >
> > > (i) an indemnity to a party for that party's lawyer's charges, or
> > >
> > > (ii) a lump sum instead of or in addition to assessed costs.
>
> (2) Reasonable and proper costs under subrule (1)(a)
>
> > (a) include the reasonable and proper costs that a party incurred to bring an action;
> >
> > ...
>
> (3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:
>
> > (a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C;

> (b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;
>
> (c) one party to pay to another party all or part of the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action;
>
> (d) one party to pay to another a percentage of assessed costs, or assessed costs up to or from a particular point in an action.
>
> ...
>
> (6) The Court's discretion under this rule is subject to any specific requirement of these rules about who is to pay costs and what costs are to be paid.

B. Solicitor-Client Costs

[24] Here, the Applicants request solicitor-client costs on a full indemnity basis; they have not submitted a Bill of Costs but have stated that their costs are approximately $75,000.00.

[25] There is some confusion in the jurisprudence regarding the recognition of a distinction between the different scales of costs awards, as well as the terminology used to refer to these different levels of costs. The common law traditionally recognized three different scales of costs in Alberta: party-party (sometimes referred to as "party and party"), solicitor-client (or "solicitor and client"), and solicitor and own client (or "solicitor and his own client") costs. See ***Sidorsky v CFCN Communications*** (1995), 167 AR 181 at para 5, 27 Alta LR (3d) 296 (QB) [*Sidorsky*], var'd on other grounds, 1997 ABCA 280, 206 AR 382, reconsideration or rehearing ref'd 1998 ABCA 127, 216 AR 151, additional reasons in 1999 ABCA 140, 232 AR 189:

> There are three levels of costs that may be payable by one party to another:
>
> 1. Party and party costs: calculated on the basis of Schedule C of the Alberta Rules of Court or some multiple thereof, plus reasonable disbursements.
>
> 2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
>
> 3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

[26] The issue has also been raised more recently in ***Brown v Silvera***, 2010 ABQB 224, var'd on other grounds 2011 ABCA 109.

[27] A review of the case law reveals that the award of costs to a party on a full indemnity basis has been described interchangeably as both "solicitor-client" and "solicitor and own client" costs, and it seems that the distinction between the two is often one of semantics. I agree with the statement made by Justice Veit of this Court in ***Max Sonnenberg Inc v Stewart, Smith (Canada) Ltd***, 48 Alta LR (2d) 367 at 371, [1987] 2 WWR 75 (QB) [*Max Sonnenberg*], which statement I note was made more than twenty-five years ago, although it remains relevant:

> Because of the confusion in the jurisprudence, I agree with the suggestion made by Megarry V.C. in *EMI Records Ltd. v. Ian Cameron Wallace Ltd.*, [1983] Ch. 59, [1982] 3 W.L.R. 245, [1982] 2 All E.R. 980 (Ch. D.), to the effect that when a judge wishes to indemnify a party in a costs award the phrase "indemnity basis" should be preferred to "solicitor and his own client".

[28] Justice Rooke (as he then was) also discussed the distinction between solicitor-client costs and solicitor and own client costs in ***Guarantee Co of North America v Beasse et al*** (1993), 139 AR 241 at para 4, 14 CPC (3d) 182 (QB) [*Beasse*] where he concluded the distinction was one "which is not well documented in case authority, and is (I state with some hesitation) perhaps not well understood by practitioners, and some judges (which included me)".

[29] Justice Rooke summarized the distinction at paras 7-9 of *Beasse*:

> Taxing Officer Morin of the Alberta Court of Queen's Bench in *Canada Permanent Trust Co. v. Santos* (1985), 63 A.R. 103, at 105, cited Orkin, *The Law of Costs* (Toronto: Canada Law Book, 1968), at 2-7, especially 5:
>
> > Orkin states that costs "as between solicitor and client" are intended to provide complete indemnity as to costs essential to and arising from the four corners of the litigation. This is more generous than costs on a party and party basis, but not necessarily the same as costs "as between a solicitor and his client".
>
> I would add reference to Orkin, *The Law of Costs*, second edition (Aurora: Canada Law Book, 1992) ("Orkin, 1992"), at 1-1 to 1-10, and note further that Orkin defined costs as between a solicitor and his client as being "the costs that a solicitor can tax against a resisting client" — see also: *Colquhoun v. Colquhoun* (1988), 52 Man. R. (2d) 193, at 197.
>
> Then Taxing Officer Morin went on to state his views, with which I am in accord:
>
> > My view is that costs "as between solicitor and client" are not necessarily less than costs "as between a solicitor and his client", but that unnecessary costs are not recoverable. This might be viewed as "no frills" litigation, whereas costs "as between a solicitor and his client" might allow for "extras", if properly instructed by the client ...

> Where neither unnecessary legal services are provided nor unnecessary disbursements incurred, the practical outcome would seem to be that costs "as between a solicitor and his client" would equal the same amount as costs calculated "as between solicitor and client".

[30] I accept in principle that such a distinction was intended to exist in this Court as between "solicitor-client" and "solicitor and own client" scales of costs. However, given the interchangeable use of these two terms in the jurisprudence, as well as the inconsistent application of the actual costs awarded, I am not convinced that the distinction exists on a practical level.

[31] Nonetheless, in my view, the significant issue to be determined by this Court is whether the costs are to be awarded on a full indemnity or partial indemnity basis. To that end, when I use the term "solicitor-client" costs, I am referring to costs awarded on a full indemnity basis for costs essential to and arising from the four corners of the litigation, and have relied on the jurisprudence awarding "solicitor and own client costs" and "solicitor and client costs" where such costs were awarded on a full indemnity basis.

[32] Further, judicial authority to order solicitor-client costs is not totally unfettered, and must be awarded in accordance with established legal principles regarding when such an "exceptional" award is justified. In ***Jackson v Trimac Industries Ltd*** (1993), 138 AR 161 at para 28, 8 Alta LR (3d) 403 (QB), aff'd on costs (1994), 155 AR 42, 20 Alta LR (3d) 117 (CA) [*Jackson*], Justice Hutchinson listed the following authorities as examples of the "rare and exceptional or unusual" cases in which solicitor-client or solicitor and own client costs may be awarded:

> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (Reese);
>
> 2. cases in which justice can only be done by a complete indemnification for costs (Foulis v. Robinson);
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (Sonnenberg);
>
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson);

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (Dusik v. Newton);

6. defendants found to be acting fraudulently and in breach of trust (Davis v. Davis);

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (Kepic v. Tecumseh Road Builder et al.);

8. fraudulent conduct (Sturrock);

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (Pharand).

C. Solicitor-Client Costs Awarded Under Section 67 of the *Act*

[33] Jurisprudence considering section 67 of the *Act* is limited, particularly on the award of solicitor-client costs in the context of improper conduct of a condo board.

[34] In ***Condominium Corporation No 0111505 v Anders***, 2005 ABQB 401 [*Anders*], Justice Clark awarded "full indemnity costs" to the Defendant against the Plaintiff condo board, holding that she "should not have been put to the cost of retaining counsel ... [and] is entitled to her costs against the Board on a full indemnity basis": para 9. As I will discuss further in my analysis, the facts of *Anders* resemble the facts in the case at bar insofar as the board in *Anders* chose to proceed with unnecessary litigation before this Court and ought not to have put the Defendant to the cost of such litigation in the first place. Justice Clark did not, however, make a finding of improper conduct against the Board in *Anders*, focusing instead on the fact that the litigation was ultimately unnecessary.

[35] In ***Condominium Plan No 772 0093 v Rathbone***, 2010 ABQB 69 [*Rathbone*], Master Smart canvassed the jurisprudence awarding costs under the *Act* in deciding whether it was appropriate to award solicitor-client costs in relation to a finding of improper conduct on the part of an owner under section 67. Although section 67 provides for the award of costs in a finding of improper conduct, the condominium corporation relied on sections 39 and 42 of the *Act* (which reliance was, in my respectful opinion, an error) in order to recover solicitor-client costs from the Defendant. In his analysis at paras 15-18, Master Smart focused on the award of solicitor-client costs under the *Act* and whether the condominium by-laws in question provided for the award of solicitor-client costs:

> In *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2008 ABCA 221, which involved an appeal from a decision of the chambers judge relating to whether certain behaviour of the unit owner was improper conduct for purposes of s. 67 of the Act, the Court of Appeal granted solicitor-client costs of the appeal, but such costs were provided for in the bylaws.

> Solicitor-client costs have been awarded in certain other cases dealing with s. 67 of the Act, but largely without comment as to whether the bylaws provided for such.
>
> In *934859 Alberta Inc. v. Condominium Corporation*, 2007 ABQB 640, 434 A.R. 41, Chrumka J. heard an appeal by a condominium corporation from a Master's order granted on a s. 67 application in favour of the applicant unit owner. The appeal was allowed and the corporation was granted party-party costs against the unit owner.
>
> In *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, 318 A.R. 386, the applicant unit owner sought a declaration that a restrictive covenant against leasing the condominium units was void. He was successful and asked for solicitor-client costs. No mention was made as to whether the bylaws allowed for such costs. Power J. pointed out (at para. 28) that costs are in the discretion of the Court under the Alberta Rules of Court, but that discretion is limited by judicial propriety. While he acknowledged that he had the discretion to order solicitor/client costs in a proper case, he was of the view that the matter before him was not such a case. In the end result, he ordered party-party costs.

[36] Ultimately, Master Smart concluded in *Rathbone* that it was not appropriate to award solicitor-client costs to the Plaintiff condominium corporation under sections 39 and 42 of the *Act* because the condominium corporation did not establish that there was money owing from the Defendant pursuant to section 39 and did not take steps to collect any amount. Further, in his analysis, Master Smart noted that he reviewed the bylaws of the condominium corporation and they did not provide for solicitor-client costs. Party-party costs were awarded. I note that Master Smart has written several condo decisions, specifically considering section 67 of the *Act* in a number of them.

[37] I agree with the analysis of Master Smart in *Rathbone* that sections 39 and 42 of the *Act* are not the appropriate basis for an award of solicitor-client costs upon a finding of improper conduct under section 67 of the *Act*. In my view, the award of costs under sections 39/42 of the *Act* requires a different analysis and involves markedly different issues than the award of costs under section 67 of the *Act*. Sections 39/42 concern a condominium corporation's ability to recover debts owing to it from owners, including (i) the recovery of reasonable costs, including legal expenses and interest, incurred by the corporation in collecting such amounts, or (ii) the reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of a caveat when a caveat is required for such debts. This language is different than that embodied in section 67, which gives the Court the power to "award costs". Further, and most significantly in my opinion, sections 39 and 42 do not deal with findings of improper conduct.

[38] Master Smart, in undertaking an analysis and review of the section 67 costs cases vis-à-vis whether such costs are provided for in the by-laws of the condominium corporation, appears to be relying on the Court of Appeal's statement in ***Maverick Equities Inc v Condominium Plan***

No 942 2336, 2008 ABCA 221 at para 15 [*Maverick Equities (CA)*] that: "The appellant is entitled to solicitor and client appellate costs, as provided for in the bylaws".

[39] Similarly, Justice Lee in ***Owners: Condominium Plan No 022 1347 v N Y***, 2003 ABQB 790 at para 80 granted solicitor-client costs to the plaintiff condominium corporation on an indemnity basis "pursuant to ... the Bylaws", finding improper conduct on the part of the Defendant owner. However, in his reasons at para 79, Justice Lee stated: "The Condominium Corporation is entitled to its costs as the sole reason it is in court proceedings is because the Appellant failed to comply with the Bylaws, and then failed to leave the premises when she was evicted" [emphasis added].

[40] With the greatest respect, I do not interpret the Court of Appeal's holding in *Maverick Equities (CA)* to impose an additional requirement under section 67 of the *Act* that a Court may only award solicitor-client costs where such solicitor-client costs are provided for in the by-laws of the condominium in question. Such a requirement is not prescribed by the *Act*, and I see no reason to add this requirement to the analysis of a costs award under section 67; to do so would unnecessarily circumscribe judicial discretion. The Courts are already guided by the legal principles enunciated in *Jackson* and by the considerations in rules 10.31 and 10.33 in determining the appropriateness of a solicitor-client costs award.

[41] It is significant that the Court in *Devlin* and *Rathbone* recognized that it had the discretion to award solicitor-client costs, but declined to do so on the basis that the circumstances required for the award of solicitor-client costs did not exist on the facts. Similarly, Justice Chrumka in his very useful decision of ***934859 Alberta Inc v Condominium Corporation No 0312180***, 2007 ABQB 640, granted party-party costs in favour of the condominium corporation, reversing the order of the Master on the basis that there was no improper conduct on the part of the Board in that case.

[42] Whether a condo's by-laws provide for solicitor-client costs may at times factor into the Court's analysis in awarding such costs; however, I do not think it is a useful or relevant consideration in the present situation and I would not import it as a requirement into the Court's analysis of a costs award under section 67(2) of the *Act*. The case at bar involved the improper conduct of a Board of Directors that resulted in significant prejudice to the Applicants. Having considered the relevant facts, I have determined that the circumstances described in *Jackson* are satisfied in the present case, for reasons I will elaborate on in my analysis.

V. ANALYSIS

A. Solicitor-Client Costs

[43] Taking into account all of the facts of the case at bar, and relying on rule 10.31(1)(b)(i) of the *Rules* and section 67(2)(e) of the *Act*, as well as the established legal principles enunciated in *Jackson*, I consider it appropriate to award the Applicants solicitor-client costs.

i. Circumstances Enunciated in *Jackson v Trimac*

[44] The Board's aberrant conduct falls within the exceptional circumstances listed in *Jackson* as justifying an award of solicitor-client costs in the present case. I accept the Applicants' argument and find circumstances constituting blameworthiness in the conduct of litigation by the Respondents, and conduct which constituted an attempt to hinder and delay the litigation, requiring the plaintiff to prove facts that should have been admitted, and failure to produce material documents in a timely fashion.

[45] The Applicants were forced to make unnecessary Applications in this Court due to a lack of cooperation on the part of the Respondents. This includes the July 30, 2012 Application by the Applicants for an Order making directions for the efficient progression of this matter. Such an Application and Order were only required due to the fact that the Respondents failed to file Affidavits by the end of July, notwithstanding counsel's agreement to hold mutual questionings by then. This Order was granted. This also includes the urgent October 11, 2012 application to sanitize the Court file prior to the October 16, 2012 hearing, which was a result of the Respondents' breach of the July 30, 2012 Order by filing an additional affidavit after the Court-ordered deadline and seeking to rely upon this evidence in their Brief. This Order was also granted.

[46] This conduct also includes the fact that the Applicants made several attempts to avoid litigation entirely, both directly and through their counsel, even attempting to settle as late as the questioning stage of this litigation. I accept the argument of the Applicants in this regard and find that the Board, against the advice of their professional property manager, remained steadfast and stubborn in its refusal to deal with the Applicants and to settle this matter prior to proceeding to litigation. Such steadfast refusal continued even after this Court made a clear finding of improper conduct on the part of the Board in its October 16, 2012 Order.

[47] For example, despite the Investigator's Report being filed on March 2, 2013, which Report recognized that the PDF version of meeting minutes was the correct version, the incorrect version of the meeting minutes (the Word version) was still posted on the Corporation's website nearly six months later, at the time of the September 16, 2013 special hearing in this Court on costs.

[48] I also note that the Corporation actively misinformed condominium owners regarding this Court's October 16, 2012 Order by mailing an "update" to owners on or about January 11, 2013 stating that an investigator had been appointed to determine if there was any wrongdoing on the part of the Board, and not stating that this Court made a finding of improper conduct on the part of the Board in its October 16, 2012 Order. This misinformation was posted on the Sunreal Property Management Ltd. website on or about January 11, 2013 as an "Update on Legal Proceedings and Special Assessment" which levied a special assessment of $500.00 on all unit owners to fund this litigation for the Corporation against the Applicants.

[49] Further, on or about May 9, 2013, Sunreal Property Management Ltd. issued a newsletter to owners at the condominium essentially blaming the Applicants for this litigation, and misinforming owners that the Applicants were responsible for this litigation specifically proceeding to this Court, an argument which they repeated at the September 16, 2013 special hearing. The newsletter states:

> The Applicants and their solicitor established the venue of these legal proceedings. They have been provided numerous opportunities and options to revise the sixteen (16) remedies sought under their Originating Application, use more appropriate and efficient venues for seeking remedy, but they continue to support their legal rights through the Court of Queen's Bench of Alberta. Therefore, we have been advised we are obligated to participate in this process to ensure an equitable and fair decision.

[50] I reject this position, and find the Board has continuously behaved in a harsh and oppressive manner toward the Applicants, including: vilifying the Applicants to all owners at the condominium, removing them from the Board, and placing the blame for these proceedings on the Applicants in their official communications with owners, such as the newsletter quoted above. This represents the abuse of power I find in the way that the Board has conducted itself, both by actively misinforming the owners at the condominium of the facts of these proceedings, and by preventing the Applicants from having an opportunity to present their facts to other unit owners. The Respondents argue that the Applicants have not been prejudiced in this process; I disagree.

[51] Neither do I accept the Respondents' argument that the case of ***Evans v The Sports Corporation***, 2011 ABQB 616 [*Evans*] somehow stands for the proposition that a party's bad behaviour is justified in "a bitterly contested lawsuit" where the parties do not like each other: *Evans* at para 31. Further, this Court has already made a finding of improper conduct on the part of the Respondents. That is quite opposite to the facts in *Evans*, where Justice Graesser stated at para 47: "The [unfounded] allegations created noise, but were irrelevant."

[52] The argument that the Applicants chose this Court as the venue for these proceedings is also without merit, as the *Act* directs applicants to this Court, the Court of Queen's Bench, as the appropriate forum for resolving disputes related to improper conduct under the *Act*. This is significant as it precluded the Applicants from filing in Provincial Court, thereby increasing their legal fees and expenses. Taking into consideration the total amount of the claim for the Deposit (less than $15,000.00), the ability to make an application in Provincial Court would have minimized legal fees on all sides. On this point, the Respondents' argument that the Applicants "chose" to proceed in this Court is in error, as they were in fact required to proceed in the Court of Queen's Bench in order to litigate these matters.

[53] The Respondents have made numerous arguments regarding the characterization of this litigation, arguing that this dispute was not about a $14,527.31 debt, nor about the correct version of board meeting minutes. Rather, they continue to assert that the Board members acted honestly and in good faith and that the refusal of the Board to reimburse Stokowski for the Deposit and to rectify the incorrect version of meeting minutes is due to the fact that this matter is ultimately about the powers of a Board of Directors, and how a condominium board fulfills its duties to "interested parties". The Respondents argued that the fundamental issues to be determined relate to a condominium board's ability to ensure that projects are properly approved, that decisions are clearly and fully understood and that a condominium corporation's scarce financial resources are properly accounted for and spent. I reject this argument.

[54] This litigation fundamentally concerned the improper conduct of a Board of Directors of a condominium corporation, and the use of oppressive, prejudicial, and coercive tactics taken by the Board towards the Applicants. As already discussed, these tactics continued throughout litigation. The argument put forth by the Respondents is not consistent with the manner in which they have conducted this litigation, nor in their repeated refusal to settle with or deal with the Applicants who attempted to avoid litigation, nor in their failure to accurately inform owners at the Corporation of the facts regarding the litigation.

[55] There were instances of positive misconduct on the part of the Respondents, and others should be deterred from like conduct. In that regard, the Respondents should be penalized beyond the ordinary order of costs. This is also illustrated by the "I dare you to sue" attitude taken by the Board during the conduct of this litigation. I would expect that a Board of Directors acting on behalf of a condominium corporation honestly and in good faith would not take such an approach to costly and time-consuming litigation where such litigation could and ought to have been avoided. The Board members ought to have been acting in the best interests of the Corporation, not on their own personal agendas.

[56] The Respondents argued repeatedly in oral argument that the conduct of the Board was not sufficient to justify an award of costs: that there has been no scandalous, outrageous or reprehensible conduct on the part of the Board during the course of the litigation itself. As well, the Respondents downplayed both the "I dare you to sue because you'll lose" comment made by a member of the Board (my paraphrasing) and the intent of the Board in misinforming the owners regarding the status of the litigation, arguing that it was an honest mistake and there was no intent to deceive the owners. I similarly reject these arguments. (At some point, words carry meaning and this is a prime example.)

[57] Here, I believe a complete indemnification for costs is warranted and, from what I have seen, a proper exercise of my authorities under the *Act* and the *Rules* can only be done by awarding a full indemnification of costs.

ii. Consideration of Factors Listed in Rule 10.33

[58] In making this award, I am also guided by rule 10.33 of the *Rules*, which sets out a number of factors that may be considered by the Court in making a costs award:

> 10.33(1) In making a costs award, the Court may consider all or any of the following:
>
> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the action;
>
> (e) the apportionment of liability;

(f) the conduct of a party that tended to shorten the action;

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that of another party;

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct.

[59] The Applicants were the successful party of this Application and the Originating Application (rule 10.33(1)(a)), and have claimed and been awarded the full amount of $14,527.31 (rule 10.33(1)(b)). There is no apportioning of liability (rule 10.33(1)(e)). The Respondents argue that the Applicants were not wholly successful; I reject this argument.

[60] I have also considered the importance of the issues here, which I agree with the Applicants will ultimately benefit all of the unit owners at the Corporation (rule 10.33(1)(c)). I accept the Applicants' argument that the Report is clear and unequivocal, and makes recommendations and provides advice to the Board relating to the overall governance of the Corporation, being information which will benefit all owners in the Corporation.

[61] I have also considered, as discussed above, the conduct of the Respondents (rules 10.33(2)(a)(b)(d)(g)), including conduct which amounted to applications, proceedings or steps in the Action which were unnecessary, and that unnecessarily lengthened or delayed the action or any stage or step of the action; as well as the Respondents' denial of or refusal to admit facts that should have been admitted; and the Respondents' misconduct.

[62] In my opinion, which is confirmed by the findings outlined in the Investigator's Report, the Applicants should never have had to resort to litigation in this Court in the first place. The actions of the Board, in refusing to reimburse a duly delegated agent of the Corporation for the amount of $14,527.31 (which amount I note is less than 25% of the costs being sought), in repeatedly refusing to settle with the Applicants and instead "daring" them to sue, instead engaging in a campaign of public rebuke and criticism of the Applicants, was behaviour that both necessitated and prolonged this litigation. So, too, was the conduct of the Board in steadfastly refusing to approve the PDF version of the meeting minutes in question.

[63] In making these findings, I feel compelled to state that this is not a case where the Board asserted in good faith a legal position through established legal procedures, which legal position turned out to be erroneous: *Maverick Equities CA* at para 14. This Court's finding, which finding was confirmed by the Report of the Investigator, was improper conduct on the part of the Board, which conduct was carried out quite intentionally and against the advice of the Board's professional management company. Had the Board acted appropriately, and taken steps to reimburse the Applicants for the Deposit amount and approve the appropriate version of meeting minutes, this matter would never have proceeded to litigation, thereby eliminating significant legal costs for all parties. The conduct of the Board was frivolous and unnecessary and such frivolous and unnecessary litigation ought to be discouraged.

[64] As I have already discussed, I accept the Applicants' argument that they only took necessary legal action and have been successful at every step of this litigation.

B. Quantum of Costs to Be Awarded

[65] Solicitor-client costs provide a "full indemnity for all legal costs contracted for between solicitor and client which are necessary for the proper presentation of the case": ***Boje v Boje (Estate of)***, 2005 ABCA 73 at para 34. In other words, solicitor-client costs are based on what a solicitor could claim against a resisting client for work "reasonably connected to the proceedings": ***Trizec Equities Ltd. v Ellis-Don Management Services***, 1999 ABQB 801 at para 19; see also *Sidorsky, Max Sonnenberg*.

[66] In awarding the Applicants' requested solicitor-client costs, I am cognizant of Justice Kenny's statement in ***Cooper v Cooper***, 2013 ABQB 117 [*Cooper*] at para 14 that the amount of solicitor and own client costs awarded must "bear some resemblance to the quantum in dispute." Generally, I agree. In *Cooper*, Justice Kenny reasoned that it was inappropriate to award $28,000.00 in solicitor and own client costs, exclusive of disbursements, for a matter in which the plaintiff was awarded $56,000.00 in pension benefits. As a result, Justice Kenny awarded solicitor and own client costs of only $15,000.00 plus reasonable disbursements: *Cooper* at paras 14-15.

[67] The Respondents, relying on *Cooper*, argued that it is difficult to justify an award of solicitor-client costs especially when the quantum in dispute is low. The Respondents also submit that this Court ought to take into consideration the quantum in the present dispute in determining the quantum of costs to be awarded.

[68] With respect to Justice Kenny's *Cooper* decision and the problematic circumstances of the case at bar, I do not think it appropriate to calibrate the Applicants' costs in proportion to the quantum in dispute. A principled analysis focuses on whether the amount of costs to be awarded is reasonable, necessary and prudent, and whether the costs are reasonably connected to the work. I have also looked at the factors in rules 10.33(2)(a)(b)(d) and (g), as discussed above.

[69] The Applicants have identified their costs as being in the range of $75,000.00. I am satisfied that the Applicants are entitled to a full indemnity for their costs, but have not fixed the amount of solicitor-client costs to be awarded as the Applicants have not submitted a Bill of Costs. For greater certainty, the quantum of the solicitor-client costs to be awarded should provide a complete indemnity for the Applicants' costs which were necessary for the proper presentation of their case and which were arising from the four corners of the litigation.

VI. CONCLUSION

[70] I award the Applicants solicitor-client costs and, should there be a dispute about what that amount is, I direct it to taxation.

[71] I order that the Report of the Investigator be filed with the Court and made available to all parties, with the cost of the Report being borne by the Corporation. The Report and this Judgment should be specifically provided to all of the unit owners in the Corporation without charge, as they are the beneficiaries of this information.

Heard on the 16th day of September, 2013.
Dated at the City of Calgary, Alberta this 19th day of November, 2013.

W.A. Tilleman
J.C.Q.B.A.

Appearances:

Laurie S. Kiedrowski
for the Plaintiffs/Applicants

Harvey Hait
for the Defendants/Respondents