

CITATION: Toronto Standard Condominium Corporation No. 1908 v. StefcO, 2013 ONSC 7709
COURT FILE NO.: CV-12-454835
DATE: 20131213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
)
TORONTO STANDARD) *Yadvinder Singh Toor*, for the Applicant
CONDOMINIUM CORPORATION NO.)
1908 also known as Toronto Condominium)
Corporation No. 1908)
)
Applicant)
)
- and -)
)
STEFCO PLUMBING & MECHANICAL) *Brandon Jaffe*, for StefcO Plumbing &
CONTRACTING INC.) Mechanical Contracting Inc.
)
Respondent) *Doug Bourassa*, for the Interested Party,
) Business Development Bank of Canada
)
)
)
)
) **HEARD at Toronto:** October 25, 2012;
) reheard in writing November 25, 2013

2013 ONSC 7709 (CarLI)

REASONS FOR JUDGMENT

LOW J.

[1] The applicant seeks a declaration that the respondent (hereinafter “Stefco”) has breached its obligation to pay common expenses, an order declaring that the common expense arrears are damages, an order requiring StefcO to pay all its arrears together with interest and costs and an order that the damages as declared and costs as awarded are to be added as common expenses to StefcO’s units.

[2] StefcO does not challenge the fact of arrears.

[3] The central issue to be decided, however, is a question of priority as between the applicant condominium corporation and the interested party, the Business Development Bank of

Canada. The Business Development Bank has a mortgage against Stefcó's two units in the condominium.

Background

[4] The applicant Toronto Standard Condominium Corporation No. 1908 ("TSCC 1908"), is a non-profit corporation created under the *Condominium Act, 1998*, S.O. 1998, c. 19 ("the *Act*") by registration of a Declaration on January 21, 2008, at the Land Titles Division for the Land Registry Office for Toronto (No. 66).

[5] TSCC 1908 comprises 33 units, two sign units and appurtenant common elements for the property at 127 Westmore Drive, Toronto, Ontario.

[6] Stefcó owned units 18 and 27, Level 1 in the condominium. The title search shows that the units were purchased by Stefcó from the Declarant/Developer, 1288124 Ontario Inc. (the "Declarant") on January 7, 2009.

[7] The *Act* requires the Declarant of a condominium to hold a turn over meeting transferring control of the Condominium Corporation to a new board, elected by the unit owners, within 21 days of transfer of a majority of the units. The *Act* also requires the Declarant to hand over a list of specified documents to the new board elected at the turn over meeting. In this case no turn over meeting was ever held. Nor were any documents or accounting details provided by the Declarant despite the title to the majority of the units having been transferred on January 7, 2009. The result was that none of the unit owners had any information about the affairs of the condominium corporation, its management or its working details.

[8] The unit owners eventually decided to conduct a turn over meeting on their own initiative. They did so on September 7, 2011, electing a new board. The Declarant subsequently circulated a letter through its solicitors, declaring the new board elected to be invalid.

[9] As a result, an application was commenced under Court File No. CV-11-436144.

[10] On the hearing of the application on December 19, 2011 and January 5, 2012, the court validated the elected board and issued orders against the Declarant requiring it to comply with the *Act* by producing the required documents and information. The court also required the Declarant to provide, no later than February 12, 2012, a full accounting of the money received to support and maintain the common elements of the condominium since January 21, 2008, the date on which the condominium corporation came into existence, up to and including December 19, 2011. The Declarant failed to comply with the orders of the court and withheld information and documents relating to the affairs of TSCC 1908.

[11] Some information was obtained from the Toronto Dominion Bank, wherein TSCC 1908 maintains an account.

[12] According to the condominium documents, the monthly common expenses attributable to each unit owned by Stefcó was \$388.41. Monthly common expenses attributable to Stefcó's two units have been accruing in the amount of \$388.41 per unit per month since January 21, 2008.

[13] There is no record of StefcO ever having paid the common expenses allocated to its units since the inception of the condominium.

The Relevant Provisions of the *Condominium Act, 1998, S.O. 1998, C. 19 (the Act)*

[14] Section 84 of the *Act* provides as follows:

84. (1) Subject to the other provisions of this Act, the owners shall contribute to the common expenses in the proportions specified in the declaration.

....

[15] Section 85 of the *Act* provides as follows:

85. (1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its appurtenant common interest for the unpaid amount together with all interest owing and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

(3) A certificate of lien when registered covers,

- (a) the amount owing under all of the corporation's liens against the owner's unit that have not expired at the time of registration of the certificate;
- (b) the amount by which the owner defaults in the obligation to contribute to the common expenses after the registration of the certificate; and
- (c) all interest owing and all reasonable legal costs and reasonable expenses that the corporation incurs in connection with the collection or attempted collection of the amounts described in clauses (a) and (b), including the costs of preparing and registering the certificate of lien and a discharge of it.

(4) At least 10 days before the day a certificate of lien is registered, the corporation shall give written notice of the lien to the owner whose unit is affected by the lien.

(5) The corporation shall give the notice by personal service or by sending it by prepaid mail addressed to the owner at the address for service that appears in the record of the corporation maintained under subsection 47 (2).

(6) The lien may be enforced in the same manner as a mortgage.

(7) Upon payment of the amounts described in subsection (3), the corporation shall prepare and register a discharge of the certificate of lien in the form prescribed by the Minister and shall advise the owner in writing of the particulars of the registration.

[16] Section 119 of the *Act* provides, in part, as follows:

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

[17] Section 134 of the *Act* provides as follows:

134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes.

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

...

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[18] Section 136 of the *Act* provides as follows:

136. Unless this Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act.

[19] Section 85 creates an extraordinary mechanism by which a condominium corporation may enforce collection of common expenses which are in default. Section 136 of the *Act* creates jurisdiction for this court to make an order under s. 134 requiring Stefcó pay to the condominium damages and costs incurred as a result of non-compliance of the respondent. The applicant submits that the damages suffered by TSCC 1908 for the purposes of s. 134(3)(b)(i) of the *Act* is the amount of common expenses that Stefcó has failed to pay.

[20] The condominium did not register any lien in respect of defaulted common expense payments owed by Stefcó.

Relief Requested

[21] The applicant requests the following relief:

- (a) A declaration that Stefcó is in breach of s. 84 of the *Act*, due to failure to pay the common expenses payable in respect of the units owned by it, since January 2009.
- (b) An order under s. 134(1) of the *Act* requiring Stefcó to comply with its duties and obligations under the *Act*, more particularly, an order requiring Stefcó to comply with s. 84 of the *Act*.
- (c) An order under s. 134 (3)(b)(i) of the *Act* that Stefcó pay to TSCC 1908 the full arrears of common expenses and interest thereon at the rate of 18% per annum, calculated and compounded monthly, not in advance, starting in January 2009.
- (d) An order under s. 134(3)(b)(ii) of the *Act* that Stefcó pay to TSCC 1908 its full and actual costs of these proceedings, and all actual costs associated with the collection and attempted collection of the sum claimed.

- (e) An order under s. 134(5) of the *Act* that all damages (\$24,895.42 for each unit) and costs awarded to TSCC 1908 shall be added to the common expenses payable in respect of the units and for such amount to be registered and enforceable as a lien in priority to registered mortgages.

Position of the Business Development Bank of Canada

[22] I turn now to the position of the Business Development Bank of Canada (“BDC”). BDC holds a first mortgage against the two units owned by StefcO. Its interests are negatively impacted if the court should hold that unpaid arrears of common expenses constitute damages to the condominium corporation and that such damages shall be added to the common expenses payable in respect of the units.

[23] StefcO’s mortgage to BDC is in default. The units are subject to power of sale proceedings. The price obtainable for the 2 units will not be sufficient to pay StefcO’s mortgage debt to the BDC and, a *fortiori*, will not be sufficient to pay both the mortgage and the amounts that it owes in common expense arrears.

[24] The BDC’s position is that notwithstanding that even if declaration is made that StefcO is found liable damages and costs to the applicant for failure to pay common expenses, such an order is not the basis upon which the applicant ought to be permitted to assert and register a lien on the respondent’s units.

[25] On page 2 of its factum, BDC sets out the basis of its submission that the *Act* does not permit the applicant to obtain the priority lien that it seeks:

- (a) There is no case law addressing the question of priority of [the condominium corporation’s lien] over a mortgagee. The only two cases purporting to address this strategy were unopposed and do not mention priority in respect to mortgagees;
- (b) Section 134 of the *Act* is not intended to permit a condominium corporation to ‘revive’ an otherwise expired lien. Granting the relief sought in this case would render the expiry of the lien in section 85(2) meaningless. Any lien could be ‘revived’ simply by commencing an application under section 134;
- (c) The relief sought upends the balance struck by the scheme of the *Act* which provides priority to a condominium corporation’s lien, but only provided it gives notice to the mortgagee against which it claims priority. In this case, BDC had no opportunity to protect itself the consequences of accumulating maintenance arrears;
- (d) The condominium corporation in this case is not left without a remedy: its contract with the former property manager provides that ‘In the event the

Manager fails to ensure the filing of a Notice of Lien...the Manager shall be directly liable for such loss...to the Corporation.'

[26] BDC also disputes that TSCC 1908 has proven the quantum of the lien it is seeking:

- (a) The Applicant has little to no documents supporting its assertion that any arrears were unpaid. It relies on banking records which do not identify the source of any deposits. There are no cancelled cheques evidencing payment from other unit owners.
- (b) The Applicant cannot prove the (i) monthly amount due for common expenses (it has offered at least four different figures); (ii) the proper rate of interest for arrears; (iii) the date at which the arrears ostensibly began to accumulate; and
- (c) A significant portion of the arrears claimed are statute-barred as they allegedly arose in 2009 – this application was commenced in May 2012.

[27] Facts relevant to the BDC's position are simple and largely uncontested.

[28] BDC holds a first ranking mortgage registered against both of Stefcó's units. Stefcó defaulted, and BDC launched enforcement proceedings by issuing a statement of claim dated December 9, 2011. BDC obtained default judgment against Stefcó for in excess of \$1 million.

[29] BDC also issued a notice of sale under charge/mortgage in respect of the units. The notice of sale was served on all parties who were (a) listed as subsequent encumbrancers on the parcel register for the units, (b) were execution creditors, or (c) were guarantors under the loan.

[30] BDC has listed the units for sale jointly, with a total list price of \$380,000 for both units. The BDC debt is in excess of \$1 million. There will be a large deficiency on the sale of the units.

[31] This application by TSCC 1908 was commenced on May 30, 2012. Stefcó was the only named respondent in the application. TSCC 1908 seeks an order permitting it to add the sum of \$24,895.42 to the common expenses of each unit, and for that amount to be enforceable by registration of a lien. The sum of \$24,895.42 represents common expense arrears that TSCC 1908 alleges are due and owing from Stefcó.

[32] Notwithstanding Stefcó's alleged failure to pay any common expenses since 2009, TSCC 1908 did not register liens in respect of those arrears as they went into default and the lien rights accordingly expired.

[33] This application seeks to 'revive' expired lien rights, and to claim priority over the BDC mortgage for the entire amount of unpaid common expenses dating back to 2009.

[34] The initial return date for the application was Monday, August 27, 2012. Notwithstanding the fact that BDC is a party with a direct interest in the outcome of the application, the applicant did not notify BDC of the application until Wednesday, August 22, 2012.

[35] On August 27, 2012, the applicant and BDC agreed to an adjournment of the application and a schedule for the delivery of materials and cross-examinations. In the result, BDC participated in the final hearing.

Analysis

[36] Section 85 of the *Act* confers on condominium corporations an extraordinary and powerful tool, the statutory condominium lien.

[37] The *Act* accords the lien priority over all registered encumbrances, regardless of when they were registered:

86. (1) Subject to subsection (2), a lien mentioned in subsection 85 (1) has priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose

[38] The lien rights are, however, time-limited. Section 85(2) provides that the lien expires after 3 months, unless a certificate of lien is registered:

(2) The lien expires three months after the default that gave rise to the lien occurred unless the corporation within that time registers a certificate of lien in a form prescribed by the Minister.

[39] It is not disputed that TSCC 1908 failed to register a lien for common expense arrears until September 2012. Accordingly therefore, any right to a lien for amounts accruing due prior to July 2012 has expired pursuant to s. 85(2) of the *Act*.

[40] Having failed to preserve its lien rights under s. 85(2), TSCC 1908 seeks to employ s.134 of the *Act* to 'revive' the lien rights.

[41] Section 134(1), by itself, does not afford TSCC 1908 the lien it seeks. TSCC 1908 relies on s. 134(5) for the additional relief:

(5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

[42] If TSCC 1908's position is accepted, a condominium corporation can 'revive' an expired lien by characterizing it as damages for failure to pay common expenses, obtaining an award therefor, and adding those damages to the common expenses for the unit. In this case, when Stefcó fails to pay this amount, TSCC 1908 will register a new lien, capturing all of the common expenses arrears dating back to 2009.

[43] The 'revival strategy' has been the subject of significant negative commentary in Marriott and Dunn: *Practice in Mortgage Remedies in Ontario*, 5th ed. (Carswell, Toronto, 1995) at 56-8.2:

It is the authors' position that to allow condominium corporations to obtain compliance orders for arrears beyond the three month limitation provided for in s. 85(2) is a direct circumvention of the Act. To allow a condominium corporation to obtain a lien for these common expenses arrears would nullify s. 85(2) of the Act and make it meaningless. It would also allow condominium corporations to bypass the safeguards afforded to mortgagees in ss. 86(3) and (5). Condominium corporations could, in effect, allow common expenses arrears to accumulate indefinitely without providing any notice to a mortgagee which might allow it to exercise its rights under s. 88. Arguably, this was not the intention of the Legislature when passing the Act.

[44] In contrast to the strong language in *Marriott and Dunn*, the case law in support of this proposition is negligible. There are two reported cases where this strategy of 'reviving' expired arrears has been employed. Neither case involved any opposition and neither case considered the consequences of the relief on a prior ranking mortgagee.

[45] In *York Condominium Corp. No. 298 v. Knight*, [2004] O.J. No. 6051, the respondent did not appear on the application and the mortgagee was not named as a party. The reported decision does not contain any reasons for decision, and merely recites the form of order that was granted, without explanation. This decision is, in my view, of no precedential value.

[46] In *York Region Condominium Corp. No. 633 v. 1262018 Ontario Inc.*, 2008 CarswellOnt 7668 (S.C.), the respondent had not filed any material and sought an adjournment of the application. There was no mortgagee named as a party. The adjournment was refused, and the matter proceeded. The reported decision does not contain reasons considering the relief sought, and largely recites the form of order that was granted. This decision has not been cited in any subsequent decisions. This decision also cannot be relied upon for any precedential value.

[47] In contrast to the two decisions cited above, my sister Greer J. commented on the topic of court enforcement of common expense arrears in *National Trust Co. v. Grey Condominium Corp. No. 36*, 1995 CarswellOnt 400 (Gen. Div.):

I have made reference in these Reasons to the Special Assessment of approximately \$150,000 passed by the Old Board. It wants an Order compelling

National to pay its proportionate share. I have no power under the Act or at common law to make such an Order. The Old Board has its statutory remedies and its By-law remedies and these must be followed by it. It also has its statutory remedies with respect to the payment of the common elements fees.

[48] The *Act* provides the court with broad discretion in response to a compliance order under section 134. Section 134(3) provides:

- (3) On an application, the court may, subject to subsection (4)¹,
 - (a) grant the order applied for;
 - (b) require the persons named in the order to pay,
 - (i) the damages incurred by the applicant as a result of the acts of non-compliance, and
 - (ii) the costs incurred by the applicant in obtaining the order; or
 - (c) grant such other relief as is fair and equitable in the circumstances.

[49] The Court of Appeal in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, 2005 CarswellOnt 1576 (C.A.) at para. 40 described the purpose behind the s. 134 regime as shifting compliance costs to the unit owners who caused the problem. It is not directed at otherwise innocent mortgagees, such as BDC in this case, who will bear the entire burden of the arrears if the arrears are permitted to form the basis for a new lien:

My review of the terms of s. 134(5) leads me to agree ... that the section was intended to shift the financial burden of obtaining compliance orders from the condominium corporation and ultimately, the innocent unit owners, to the unit owners whose conduct necessitated the obtaining of the order.

[50] It is submitted by BDC that it would not be 'fair and equitable' in the circumstances to grant the relief sought in this application for the following reasons:

- (a) BDC was never provided with any notice of the accumulating arrears. Therefore, it was never in a position to protect itself from the substantial priority claim now being advanced by the condominium corporation;

¹ Subsection (4) deals with leasehold interests and tenants' rights. It has no application in this case.

- (b) The condominium corporation has an alternative remedy available to it: pursuit of the property manager that failed to register liens as and when the arrears first arose; and
- (c) Section 134 compliance orders are aimed at 'people, pets and parking',² and are not intended to serve as a parallel regime for common expense collection.

[51] The lien registration scheme in s. 86 balances the rights of condominium corporations to collect common expenses with the rights of mortgagees to limit their exposure to priority claims. Section 86 of the *Act* sets out the scheme underlying the priority regime. A central feature of the priority regime is that the lien loses priority if notice is not given:

Notice of lien

(3) The corporation shall, on or before the day a certificate of lien is registered, give written notice of the lien to every encumbrancer whose encumbrance is registered against the title of the unit affected by the lien.

Service of notice

(4) The corporation shall give the notice by personal service or by sending it by registered prepaid mail addressed to the encumbrancer at the encumbrancer's last known address.

Effect of no notice

(5) Subject to subsection (6), the lien loses its priority over an encumbrance unless the corporation gives the required notice to the encumbrancer.

Priority if notice late

(6) If a corporation gives notice of a lien to an encumbrancer after the day the certificate of lien is registered, the lien shall have priority over the encumbrance to the extent of,

- (a) the arrears of common expenses that accrued during the three months before the day notice is given and that continue to accrue subsequent to that day; and

² *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.* 2004 CarswellOnt 3330 (SCJ) rev'd on other grounds at 2005 CarswellOnt 1576 (CA)

- (b) all interest owing on the arrears and all reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the arrears.

[52] The function of the notice requirement is to permit encumbrancers to take such steps as are necessary, available and advisable to protect their respective interests in the property. Where no notice is given, and, *a fortiori*, where no lien is registered at all, an encumbrancer is lulled into the belief that nothing is amiss. The opportunity to protect its interests is denied to the encumbrancer.

[53] While the condominium corporation may have a grievance against the Declarant for failure to comply with the its obligations to give full disclosure of the affairs of the condominium upon turnover, as between TSCC 1908 and the mortgagee BDC, the equities lie with the mortgagee in this case. TSCC 1908 did not comply with the statute in asserting any lien rights it would have. That non-compliance was prejudicial to the rights of the encumbrancers, of which BDC was one.

[54] I do not consider that the failure to pay common expenses by the StefcO results in damages to the condominium corporation. The condominium corporation is a statutory conduit. Damages, if any, accrue to the unit owners who have borne the consequences of under-contribution to common expenses. In my view, it would not be fair and equitable to declare the product of this litigation a basis for a new lien right and thus in effect revive lien rights that the applicant has long ago allowed to expire. Accordingly, I do not make a declaration that the common expense arrears constitute damages to the condominium corporation.

Disposition

[55] I am satisfied, on a balance of probabilities, that StefcO has failed to pay the common expenses attributable to its two units. The following relief is granted:

An order that StefcO pay common expenses arrears commencing January 1, 2009 with interest accruing from the date upon which each such payment came due.

Given that StefcO did not oppose the application, costs on an uncontested basis. A costs outline is to be forwarded to me within 14 days.

[56] As between TSCC 1908 and BDC, if the parties are not in agreement that there should be no costs, then submissions may be made in writing of no more than 3 pages in length: by BDC within 2 weeks from the date of these reasons and by TSCC 1908 within 1 week thereafter. The submissions should be sent to my attention and delivered to The Court House, 361 University Avenue, Judges' Administration, Room 170, Toronto, ON M5G 1T3.

Released: December 13, 2013

CITATION: Toronto Standard Condominium Corporation No. 1908 v. Stefcó, 2013 ONSC 7709
COURT FILE NO.: CV-12-454835
DATE: 20131213

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TORONTO STANDARD CONDOMINIUM
CORPORATION NO. 1908 also known as Toronto
Condominium Corporation No. 1908

Applicant

– and –

STEFÇO PLUMBING & MECHANICAL
CONTRACTING INC.

Respondent

REASONS FOR JUDGMENT

Low J.

Released: December 13, 2013

2013 ONSC 7709 (CarLI)

CITATION: Toronto Standard Condominium Corporation No. 1908 v. StefcO, 2014 ONSC 160
COURT FILE NO.: CV-12-454835
DATE: 20140109

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: TORONTO STANDARD CONDOMINIUM CORPORATION NO. 1908 also known as Toronto Condominium Corporation No. 1908, Applicants

AND:

STEFCO PLUMBING & MECHANICAL CONTRACTING INC., Respondent

BEFORE: Low J.

COUNSEL: *Yadvinder Singh Toor*, for the Applicant

Brandon Jaffe, for StefcO Plumbing & Mechanical Contracting Inc.

Doug Bourassa, for the Interested Party, Business Development Bank of Canada

HEARD: In writing

COSTS ENDORSEMENT

[1] Two sets of costs are to be determined.

[2] The first is costs of the applicant as against the respondent StefcO Plumbing & Mechanical Contracting Inc. The applicant claims total costs of \$13,734.85 comprising \$11,387.00 in fees, the balance being disbursements and HST.

[3] The second is costs claimed by Business Development Bank of Canada (BDC), the interested party, following its success on the priority issue as against the applicant.

[4] Dealing first with the applicant's costs as against StefcO Plumbing, it appears to me that the most significant factors in fixing costs are the absence of opposition and the total amount at stake, approximately \$50,000. The application was uncomplicated.

[5] In my view, the costs claimed are significantly disproportionate to the amount of effort reasonably and necessarily expended on the application given that it was undefended. The fact that the applicant had difficulty quantifying its claim was attributable to misconduct by the condominium declarant which was not a party to this proceeding. The applicant's costs as

against the declarant are or were the subject matter of other proceedings in this court and are appropriately dealt with there.

[6] In my view, a reasonable amount for costs of the application as against Stefcio Plumbing, on a substantial indemnity basis, is \$5,000 plus HST of \$650. I would allow the disbursements of \$867.54. Costs as against Stefcio Plumbing in favour of the applicant are fixed at \$6,517.54.

[7] The interested party, BDC, was successful as against the applicant on the question of priority and seeks its costs of the application on a full indemnity basis of \$23,656.45 of which \$19,005.00 is for fees.

[8] In my view, this is a case where it is appropriate to depart from the general rule that costs follow the event.

[9] It should be made clear at the outset that there was no misconduct on the part of BDC or its solicitors. This was an important issue of general application in both the lending industry and in the administration of condominium affairs, and it was reasonable that a significant amount of effort be expended on the application.

[10] The issue was, however, for all practical purposes, one of first impression. There was no prior reasoned judicial consideration of the issue which could have given guidance to the parties. The argument advanced by the applicant for revival of lien rights was a novel one which, if acceded to, would have had a significant impact on the balancing of rights as between mortgage lenders and other encumbrancers on one hand and condominium corporations on the other.

[11] This is therefore an appropriate case for no costs. There is, however, one aspect of the matter for which BDC ought to be awarded costs: the service of notice of the application upon BDC a mere 4 days prior to the hearing date and the attendance for purposes of argument for adjournment and terms. Given that BDC was in effect the only party with a monetary stake in the outcome other than the applicant, it ought to have been joined as a proper and necessary party at the outset. The applicant failed to do this. Had the applicant proceeded in proper fashion the attendance and argument on August 27, 2012 would have been avoided.

[12] For that reason, I would award costs to BCD only for that attendance which I fix at \$2,000 all inclusive.

Low J.

Date: January 9, 2014