

COURT OF APPEAL FOR ONTARIO

CITATION: CIBC Mortgages Inc. v. York Condominium Corporation No. 385,
2017 ONCA 542
DATE: 20170628
DOCKET: C63135

Strathy C.J.O., Cronk and Pepall JJ.A.

BETWEEN

CIBC Mortgages Inc.

Applicant (Respondent)

and

York Condominium Corporation No. 385

Respondent (Appellant)

AND BETWEEN

York Condominium Corporation No. 385

Applicant (Appellant)

and

CIBC Mortgages Inc.

Respondent (Respondent)

Jonathan Fine and Maria Dimakas, for the appellant

Benjamin Frydenberg, for the respondent

Heard: May 8, 2017

On appeal from the judgment of Justice Sean F. Dunphy of the Superior Court of Justice, dated November 24, 2016, with reasons reported at 2016 ONSC 7343, and the costs order of Justice Dunphy, dated December 21, 2016, with reasons reported at 2016 ONSC 8036.

Cronk J.A.:

Introduction

[1] This statutory interpretation case involves a priorities contest between the appellant, York Condominium Corporation No. 385 (“YCC”), and the respondent, CIBC Mortgages Inc. (“CIBC”), under the provisions of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the “Act”). The primary issue on appeal is whether YCC’s statutory lien under s. 85(1) of the Act against a particular unit in the condominium (Unit 302) regarding unpaid common expenses owing under s. 134(5) of the Act lost priority over CIBC’s first mortgage on the property because YCC allegedly failed to register a lien certificate in a timely fashion.

[2] Section 134(1) of the Act permits a condominium corporation, among others, to bring proceedings in the Superior Court for an order enforcing compliance by a unit owner with the provisions of the Act, the Condominium Declaration or the condominium corporation’s by-laws and rules. Section 134(5) requires the corporation to add to the common expenses for the unit any award of damages or costs made in such proceedings, together with its own additional actual costs in obtaining the compliance order. These sums can then be

collected through the lien enforcement provisions in s. 85 and, ultimately, through the sale of the unit, if necessary. Under s. 85(2), the lien expires “three months after the default that gave rise to the lien occurred”, unless the corporation registers a certificate of lien. The main issue in this appeal is when that default occurred.

Relevant Statutory Provisions

[3] YCC’s lien claim is based on s. 85(1) of the Act. That section reads:

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.

[4] Section 85(2) of the Act addresses the perfection of a lien arising under s. 85(1). It directs:

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. [Emphasis added.]

[5] The Act also provides for notice of a statutory lien to be furnished to the affected unit owner, and for the manner of enforcement of the lien. Sections 85(4) and (6) state:

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.

...

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

[6] Section 86 addresses the priority of a s. 85(1) statutory lien. As relevant to this appeal, ss. 86(1), (3) and (5) provide:

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

...

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.

...

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

[7] Section 134 of the Act concerns the institution of proceedings to enforce compliance by a unit owner with the provisions of the Act, the condominium Declaration, the condominium corporation's by-laws and rules, and related matters. Section 134(1) reads in part:

Subject to subsection (2) ... a corporation ... 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, [or] the rules

[8] Section 134(5), the provision at the heart of the dispute in this case, provides for the recovery by a condominium corporation, as common expenses, of damages or costs awarded under a compliance order, plus any “additional actual costs to the corporation in obtaining the [compliance] order” (“Additional Actual Costs”). The common expenses aggregated under s. 134(5) can trigger a s. 85(1) lien claim. Section 134(5) states:

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. [Emphasis added.]

Background Facts

[9] The following chronology sets out, in brief, the pertinent background facts.

- | | |
|-------------------|--|
| January 28, 2010 | The owners of Unit 302 grant a first mortgage on their condominium unit, in the amount of \$135,000, to CIBC; |
| February 14, 2011 | YCC obtains a compliance order under s. 134(1) of the Act in the Superior Court of Justice against one of the owners of Unit 302, restraining that owner from harassing YCC staff and other residents. In granting the compliance order, the court also awards costs in favour of YCC, in the amount of \$15,000, payable within 30 days from the date of the order (the “Costs Order”); |
| March 16, 2011 | The unit owner fails to pay the Costs Order as required; |

- August 3, 2011 In accordance with s. 134(5) of the Act, YCC adds the amount of the outstanding Costs Order and Additional Actual Costs, totalling \$44,272.63, to the amount of common expenses owed by the owners of Unit 302 (the "Claimed Common Expenses");
- August 15, 2011 YCC, for the first time, demands payment of the Claimed Common Expenses from the defaulting unit owner, on or before September 14, 2011. In its demand letter, YCC warns that if payment is not forthcoming by September 14, it will register a lien under the Act against Unit 302;
- September 15, 2011 The unit owner fails to pay the Claimed Common Expenses, as demanded;
- November 10, 2011 YCC delivers a notice of lien to the owners of Unit 302;
- December 12, 2011 YCC registers a certificate of lien on title to Unit 302 for the Claimed Common Expenses, having also served CIBC with a copy of the certificate;
- February 28, 2013 YCC commences litigation against the owners of Unit 302, seeking possession of the unit and payment of the Claimed Common Expenses;
- May 6, 2013 YCC serves the owners of Unit 302 and CIBC with a Notice of Sale Under Lien regarding the unit;
- October 18, 2013 YCC obtains a writ of possession regarding Unit 302;
- November 27, 2013 YCC obtains possession of Unit 302;

December 27, 2013	The owners of Unit 302 default in payment under the CIBC first mortgage;
April 7, 2014	YCC agrees to sell Unit 302 to a third party for \$110,000, with a closing date of May 30, 2014;
May 2, 2014	CIBC commences enforcement proceedings on its mortgage;
May 13, 2014	CIBC first learns of the sale of Unit 302. By this time, the amount of YCC's lien for the Claimed Common Expenses has increased to \$113,616.68. In light of the pending closing of the sale of Unit 302, YCC and CIBC agree that the sale should proceed, with the net sale proceeds to be held in trust pending determination of entitlement to them;
May 30, 2014	The closing of the sale of Unit 302 occurs, yielding gross proceeds in the sum of \$110,173.02;
October 22, 2014	CIBC obtains judgment on its mortgage against the owners of Unit 302, in the amount of \$135,411.79, plus interest and costs, and an order for possession of the unit.

[10] YCC maintains that its statutory lien for the Claimed Common Expenses has priority over CIBC's first mortgage by reason of s. 86(1) of the Act. The amount of the lien (comprised of the Costs Order and Additional Actual Costs, including legal costs incurred by YCC with two different law firms in connection with its s. 134 compliance proceeding) is said to be \$113,616.68 as of the date of sale of Unit 302. As agreed by the parties, the net amount of \$94,006.01 is

currently held in trust by YCC's lawyers, pending resolution of the parties' competing claims to the net proceeds of sale of Unit 302.

Applications Judge's Decision

[11] In late 2014, both parties applied for relief in the Superior Court of Justice. In its application, YCC sought, among other things, declarations that its lien is "good and valid" and that CIBC is not entitled to any part of the Unit 302 sale proceeds. CIBC also claimed declaratory relief, including declarations that YCC's lien is invalid and ought to be discharged and that YCC's lien rights, if any, expired prior to registration of its lien certificate on December 12, 2011. CIBC also sought an order requiring that the net sale proceeds, and certain other funds that it claimed had been wrongly deducted by YCC's lawyers from the sale proceeds, be paid to it.

[12] The applications judge held that YCC's lien had expired prior to the registration of its lien certificate. In his view, the relevant owner of Unit 302 defaulted for the purpose of s. 85(2) of the Act on March 17, 2011 when the owner failed to comply with the Costs Order by March 16, 2011, as required. This default, he held, triggered the three-month perfection period under s. 85(2) of the Act. As the three-month period had run its course prior to YCC's registration of its lien certificate on December 12, 2011, its lien lost its priority status, otherwise conferred by s. 86(1) of the Act, over CIBC's first mortgage.

[13] The applications judge summarized his conclusions, at para. 3 of his reasons, in this fashion:

The exceptional right to assert priority lien rights under s. 85 of the [Act] strikes a delicate balance between the rights of a variety of affected stakeholders, including unit owners and mortgage holders. The common-sense meaning of default when used in relation to an obligation to pay is that default occurs when the payment is due but not made. Payment of the court-ordered costs by the unit holder was first due but not paid on March 17, 2011 ... There is but one default arising from non-payment of the costs ordered and that default occurred when those costs were not paid on the last day specified for their payment. While section 134(5) authorizes but does not require the condominium corporation to extend the time for payment of amounts that are required to be added to common expenses, no such extension of time was granted by the condominium corporation before the default occurred or indeed at any time before the three month period for registering a lien expired. Having failed to register a lien within three months of the time that the default first occurred, there was no lien right to revive (or perfect) on December 12, 2011 when notice of the lien was registered.

[14] The applications judge, therefore, dismissed YCC's application and granted declarations that its certificate of lien is invalid and that its lien rights had expired prior to the registration of its lien certificate. He ordered that YCC's lien certificate be discharged and that the funds held in trust by YCC's lawyers from the sale of Unit 302, together with certain other funds described later in these reasons, be paid to CIBC. He also awarded CIBC its costs of the applications, fixed in the total amount of \$62,510.85, inclusive of disbursements and HST.

[15] YCC appeals. Its main argument is that the applications judge erred in his interpretation of s. 134(5) of the Act, leading him to further err in his determination of the commencement date for the three-month lien perfection period provided for under s. 85(2) of the Act. YCC also seeks leave to appeal and, if leave be granted, appeals from the applications judge's costs ruling.

Issues

[16] There are two issues on appeal. The central issue is whether YCC preserved the priority assigned to its statutory lien by s. 86(1) of the Act, by registering its lien certificate within three months of the unit owner's "default that gave rise to the lien", as required by s. 85(2).¹ The determination of this question turns on the interplay between ss. 85(2) and 134(5) of the Act and, in particular, on when the default giving rise to the lien occurred, thereby triggering the three-month perfection period under s. 85(2). As I have said, YCC also seeks leave to appeal the applications judge's costs award in favour of CIBC.

Discussion

(1) Priorities Dispute

[17] In my view, the applications judge correctly interpreted ss. 85(2) and 134(5) of the Act and properly applied them to the facts of this case. As a result,

¹ In its factum, YCC also raised a limitations period argument in support of its attack on the applications judge's decision. It abandoned this argument shortly before the appeal hearing.

I see no basis for appellate interference with his findings that CIBC's mortgage has priority over YCC's lien and that CIBC is entitled to receipt of the net sale proceeds from Unit 302 now held in trust by YCC's solicitors. I reach these conclusions for the following reasons.

(i) Interpretive Approach

[18] At the outset, I observe that the interpretation of ss. 85(2) and 134(5) of the Act must be undertaken in accordance with the well-established modern approach to statutory interpretation. This approach requires that “the words of [an] Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21, quoting Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87.

(ii) Purpose of Sections 85(2) and 134(5)

[19] Section 85(2) of the Act is concerned with the perfection of a statutory lien arising under s. 85(1). It requires that, to preserve the priority of a s. 85(1) lien accorded by s. 86(1) over other encumbrances, a lien claimant must register a certificate of lien in prescribed form within three months after the unit owner's default that gave rise to the lien.

[20] Section 134(5) of the Act is primarily directed at ensuring the recovery by a condominium corporation of damages or costs awarded in its favour in a compliance proceeding, together with any Additional Actual Costs. For this purpose, it requires, in mandatory terms, that the condominium corporation add the awarded damages or costs and any Additional Actual Costs to the amount of common expenses otherwise owed by the responsible unit owner. As this court held in *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline Executive Properties Inc.*, [2005] 253 D.L.R. (4th) 656, at para. 39, s. 134(5) thus affords a condominium corporation a broad right of recovery for costs incurred in obtaining a compliance order and also provides an effective enforcement mechanism for the collection of those costs.

[21] Recently, in *Toronto Standard Condominium Corporation No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc.*, 2014 ONCA 696, 377 D.L.R. (4th) 369, this court examined the legislative purpose behind the provisions of the Act dealing with the collection of common expenses, including s. 134. While recognizing that the Act has consumer protection aspects, the court also held with respect to these provisions, at para. 41:

[T]his part of the Act is designed to safeguard the financial viability of a condominium corporation in a manner that fairly balances the rights of the various stakeholders. Lane J. was correct in *York Condominium Corp. No. 482 v. Christiansen* (2003), 64 O.R. (3d) 65 (Ont. S.C.J.) when he observed, at para. 5: “[A] principal object of the Act is to achieve fairness

among the parties – owners, their tenants, their mortgagees, the corporation itself – in raising the money to keep the common enterprise solvent.”

[22] The *Stefco* court went on to state, at para. 42:

In restricting the availability of the priority for common expenses to circumstances where the condominium corporation has registered its lien and provided notice to encumbrancers, the legislature has balanced the right and obligation of a condominium corporation to collect common expenses against the right of a mortgagee to have notice of a default in the payment of common expenses. This right of notice is of significant benefit to a mortgagee. It allows a mortgagee to determine if it should take steps to protect its interests under s. 88, by paying the common expenses, treating the failure to pay as a default under the mortgage, and commencing enforcement proceedings. [Emphasis added.]

[23] In *Stefco*, the court also examined the purpose of s. 134(5) itself. The court cited with approval, at para. 43, the following passage from *Skyline*, at para. 40, regarding s. 134(5):

[T]he 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 [compliance] order. Furthermore, the section was enacted to provide a means whereby the condominium corporation could, if necessary, recover those costs from the unit owner through the sale of the unit.

[24] *Stefco* and *Skyline* confirm that the Act does not seek to prefer the rights of a condominium corporation at the expense of the rights of an affected mortgagee. They instruct that the purpose of the common expenses collection

provisions of the Act generally, and s. 134(5) specifically, is to provide a remedial mechanism for a condominium corporation to recover the damages or costs awarded in its favour under a compliance order, together with any Additional Actual Costs, directly from the unit owner whose conduct precipitated the compliance proceeding. However, this statutory objective is intended to be achieved in a manner that respects the delicate balancing of the interests of all stakeholders, including those of non-defaulting unit owners and affected mortgagees, which underlies the Act as a whole and the common expenses collection provisions themselves.

[25] Section 134(5) must be interpreted in light of these guiding principles.

(iii) Interpretation of Sections 85(2) and 134(5): Date of Default

[26] The applications judge held that default occurred for the purpose of s. 85(2) of the Act when payment was due under the Costs Order by March 16, 2011 and not made by March 17, 2011. He reasoned as follows, at para. 51:

The common-sense meaning of default when used in relation to an obligation to pay is that default occurs when the payment is due but not made. Payment of the court-ordered costs by the unit holder was first due but not paid before March 17, 2011. Whether or not the payee had notice of the order, he had notice of the proceeding giving rise to it. As with any order, including default judgments, the order was effective when made and in accordance with its terms. The order on its face required payment by March 16, 2011. The payee was in default within the meaning of s. 85(2) of the [Act] – whether he knew it or not – on March 17, 2011. No step

was required on the part of YCC 385 to make the amount payable. It was payable whether or not the corporation took some additional step on its own books to “add” the amount to its ledger of common expenses for the unit. [Emphasis added.]

[27] YCC attacks these critical findings on several grounds. Its central argument is that the applications judge’s finding regarding the timing of the unit owner’s default for the purpose of s. 85(2) rests on a misinterpretation of s. 134(5) of the Act. In its factum, YCC submits the applications judge erred in “wrongly extending the jurisdiction of the court”, by holding that the setting of a default date for the payment of the Costs Order also constitutes the default date for the payment of the Claimed Common Expenses.

[28] This argument focuses on the wording “specify a time for payment by the owner of the unit”, in s. 134(5). YCC maintains that default under the Costs Order is distinct from, and unrelated to, default in payment of common expenses under s. 134(5). The applications judge’s alleged error regarding the timing of the unit owner’s default, YCC says, essentially disregarded and “rendered meaningless” its discretionary power under s. 134(5) of the Act to “specify a time for payment by the owner of the unit”.

[29] YCC further argues that, because s. 134(5) provides discretionary authority to a condominium corporation to “specify a time for payment by the owner of the unit” of common expenses, that is, those sums added to common expenses in compliance with s. 134(5), the section operates to empower the corporation to

give a unit owner extra time to pay common expenses, prior to the commencement of the three-month lien perfection period set out under s. 85(2). In other words, YCC submits, s. 134(5) provides “a discretionary redemption period during which a unit owner is able to cure a default in the payment of common expenses”, without the necessity of the registration of a lien.

[30] I would reject YCC’s interpretation of the interplay between ss. 85(2) and 134(5) of the Act, for several reasons.

[31] First, the language of the Costs Order is straightforward. The costs awarded under it were expressed to be “payable within thirty (30) days of the date of this Order”, that is, by March 16, 2011. The costs were not paid by that date, with the result that the unit owner was in default of the Costs Order on March 17, 2011. I did not understand YCC to suggest to the contrary.

[32] The important point in this context is that it is the obligation created by the Costs Order that anchors YCC’s lien claim. It was the unit owner’s non-compliance with the Costs Order that YCC relied on to assert a statutory lien under s. 85(1). It follows that this was the default event “that gave rise to the lien” within the meaning of s. 85(2).

[33] Second, and importantly, nothing in ss. 85(2) or 134(5) provides that a condominium corporation that asserts a lien for unpaid s. 134(5) common

expenses is relieved of its obligation to perfect its lien in accordance with s. 85(2), in order to maintain the priority of the lien over other encumbrances.

[34] YCC relies on the decision of this court in *Skyline* to argue that there is a difference between “an award of costs” and any Additional Actual Costs under s. 134(5). It submits that while the courts have jurisdiction over awards of costs, including the timing for payment of court-ordered or assessed costs, condominium corporations have “exclusive jurisdiction” over the timing for payment of s. 134(5) common expenses, including Additional Actual Costs added to common expenses under the section. As a result, YCC maintains, there can be no default in payment of common expenses until the corporation, in the exercise of its discretion under s. 134(5), specifies a date for payment of them.

[35] In my view, YCC’s reliance on *Skyline* to ground this argument is misplaced. Neither *Skyline* nor *Stefco* involve the timing of a unit owner’s default for the purposes of ss. 85(2) or 134(5).

[36] It is true that *Skyline*, like s. 134(5), differentiates between Additional Actual Costs, which *Skyline* holds can include legal costs owing as between a client and its own lawyer beyond those ordered by a court to be paid or assessed against an opposing party, and an award of costs that the court directs one litigant to pay to another litigant: *Skyline*, at para. 8. However, *Skyline* does not address the notion of differing dates of default for the failure to pay an award of

costs, on the one hand, and the failure to pay s. 134(5) common expenses, on the other hand.

[37] In the end, when ss. 85(2) and 134(5) are read in their grammatical and ordinary sense, in the context of their legislative purposes and the scheme of the Act itself, I see no support for the proposition that s. 134(5) is intended to permit a condominium corporation, in the exercise of its discretion under s. 134(5) to “specify a time for payment” of common expenses, to effectively enlarge the lien perfection period after a default in payment has already occurred.

[38] Third, the applications judge accepted, at para. 45, CIBC’s argument that YCC’s interpretation of the interplay between ss. 85(2) and 134(5): “would result in the [condominium] corporation having the unilateral ability to alter the deadline for perfecting its lien (and notifying the mortgagee whose rights are thereby impacted negatively) for a potentially unlimited amount of time”. YCC disputes this, arguing that there is no prejudice to an involved mortgagee arising from the deferred registration by a condominium corporation of a lien certificate for the payment of s. 134(5) common expenses.

[39] I agree with the applications judge. I again underscore this court’s holding in *Stefco* that the provisions of the Act dealing with the collection of common expenses seek to maintain a balance between a condominium corporation’s mandate to collect those expenses and a mortgagee’s right to have notice of a

unit owner's default in the payment of common expenses. YCC's argument discounts the importance of a mortgagee's rights to receive notice of a unit owner's default and, upon receipt of such notice, to elect whether to take remedial steps to cure the default.

[40] A mortgagee is not entitled to notice of a s. 134(1) compliance proceeding initiated by a condominium corporation. And, under s. 86(3) of the Act, the corporation is required to give written notice of its lien to a mortgagee only "on or before the day a certificate of lien is registered". Any significant delay in registration of the lien, therefore, can result in significant delay in the provision of notice to an affected mortgagee of the unit owner's default and the corporation's assertion of a statutory lien consequent upon that default.

[41] This result, in my opinion, would cut sharply against the carefully calibrated balancing of stakeholder interests embodied in the Act, including under the lien enforcement scheme envisaged by s. 85 and the common expenses collection scheme under s. 134.

[42] As *Stefco* instructs, at para. 42, a mortgagee's right to receive notice of a unit owner's default in the payment of common expenses is of "significant benefit to a mortgagee". Delayed notice of a lien to a mortgagee, occasioned by the delayed registration of the lien on title, can compromise the mortgagee's position and statutory rights between the date of the unit owner's default and the date of

the lien claimant's lien registration. The requirement that notice of the lien be given to the mortgagee permits the mortgagee to deal with the outstanding common expense arrears as soon as possible to limit further erosion of its mortgage security.

[43] Consider this example of the risk of prejudice to the mortgagee. Assume, as occurred here, that a condominium corporation does not register its lien certificate for many months after the unit owner's default giving rise to the lien. The mortgagee, unaware that the unit owner has defaulted, advances further funds to the unit owner under the existing mortgage. In these circumstances, the prejudice to the mortgagee arising from late notice of a condominium corporation's statutory lien is manifest. The mortgagee's exposure has been increased.

[44] Fourth, YCC argues that its interpretation of ss. 85(2) and 134(5) furthers the consumer protection focus of the Act because it permits a condominium corporation to defer the collection of a monetary award (damages or costs) obtained under a compliance order and recovery of any Additional Actual Costs, by affording a unit owner additional time within which to pay outstanding common expenses. This, YCC submits, furthers the public interest by providing a mechanism for the avoidance by the unit owner of the jeopardy posed by enforcement proceedings including, potentially, the forced sale of the unit in question.

[45] I would also not accede to this argument.

[46] I agree that s. 134(5) is designed to permit a condominium corporation to forbear enforcement of its right to collect s. 134(5) common expenses by specifying a particular time for payment of those common expenses by the unit owner. But it does not follow that the condominium corporation is thereby relieved of its obligation to perfect its lien under s. 85(2) simply because the amount claimed under the lien is, as a matter of law, to be added to existing common expenses in accordance with s. 134(5). The default giving rise to the lien is the failure to pay a monetary award obtained in a compliance proceeding, together with any Additional Actual Costs incurred in obtaining the compliance order. In this case, the failure to pay relied upon by YCC to assert a lien is the default in payment under the Costs Order. Once that default occurred, s. 85(2) was engaged.

[47] Fifth, meaning may be accorded to both ss. 85(2) and 134(5) of the Act without accepting the interpretation of these provisions urged by YCC and without forfeiting the opportunity to provide a unit owner with additional time to pay outstanding s. 134(5) common expenses.

[48] As I see it, ss. 85(2) and 134(5) interact in the following fashion: i) s. 85(2) contemplates that, in order to preserve priority for its statutory lien over other encumbrances, a condominium corporation must perfect its lien within the three-

month period set out under s. 85(2); ii) the three-month period begins to run when the unit owner fails to pay the obligation relied upon to invoke the lien; iii) where that obligation arises by reason of a damages or costs award in a compliance proceeding, the corporation is obliged under s. 134(5) to add those amounts and any Additional Actual Costs, to the common expenses owed by the applicable unit owner; and iv) having done so, and armed with a perfected lien, the condominium corporation is then free, in the exercise of its discretion under s. 134(5), to defer payment of the aggregated s. 134(5) common expenses by “specify[ing] a time for payment by the owner of the unit”.

[49] This interpretation of ss. 85(2) and 134(5), in my opinion, conforms with both the lien perfection and the common expenses recovery schemes set out under the Act. It also preserves, in the public interest, the balancing of stakeholder interests that underlies the Act by ensuring that a condominium corporation must provide notice of and perfect its statutory lien on a timely basis. And, it avoids inconsistency or conflict between ss. 85(2) and 134(5).

[50] I make this final point regarding the interplay of ss. 85(2) and 134(5) of the Act.

[51] It is true, as YCC points out, that condominium corporations have a duty under s. 17(3) of the Act to take all reasonable steps to ensure compliance by unit owners with the Act and the condominium Declaration, by-laws and rules.

There is also no doubt that s. 134(5), as remedial legislation, is intended to insulate a condominium corporation, in the interests of all unit owners, from the financial burden of obtaining a compliance order against a defaulting unit owner: *Skyline*, at paras. 40 and 46. Further, it is clear that the s. 85(1) lien mechanism can be utilized by a condominium corporation to collect both the costs of obtaining a compliance order and any damages or costs awarded by the court under such an order: *Skyline*, at para. 50.

[52] However, this does not mean that YCC was obliged to resort to s. 85(1) to recover the amount owing under the Costs Order. That order was enforceable against the defaulting unit owner in the same manner as any other money judgment: see *Skyline*, at para. 50. YCC elected to invoke the s. 85(1) statutory lien mechanism in respect of the Costs Order, as it was entitled to do. But having so elected, it could not then assert the priority of its lien over that of other encumbrances without complying with the lien perfection rule established by s. 85(2). Such compliance did not occur here.

(iv) Conclusion

[53] For these reasons, I conclude that the applications judge did not err in his interpretation of ss. 85(2) and 134(5) of the Act or in the application of those provisions to the facts of this case. YCC failed to register its lien certificate within three months of the unit owner's default in payment of the Costs Order, the

default which gave rise to YCC's lien claim. YCC therefore failed to perfect its lien security in accordance with s. 85(2) of the Act. Consequently, its lien lost the priority over CIBC's first mortgage that it otherwise would have possessed under s. 86(1) of the Act.

(v) Other Considerations

[54] One additional consideration, particular to the facts of this case, must be addressed.

[55] The Costs Order in favour of YCC was made on February 14, 2011. Default under the Costs Order occurred on March 17, 2011. Yet, YCC did not register its lien certificate until December 12, 2011, almost six months after the June 2011 expiration of the three-month lien perfection period set out under s. 85(2).

[56] There is no evidence that, at any time prior to the registration of its lien certificate, YCC entered into discussions or other communications with either of the owners of Unit 302 regarding the timing for payment of the Claimed Common Expenses under s. 134(5), which, as I have stressed, originated with the Costs Order. To the point, there is no evidence that YCC's delay in registering its lien certificate was intended to assist the unit owners by deferring collection efforts regarding the Claimed Common Expenses.

[57] Yet the quantum of the Claimed Common Expenses continued to mount significantly. The costs awarded under the Costs Order are in the sum of \$15,000. As I have said, by May 2014, YCC's lien claim totalled \$113,616.68.

[58] On the record before this court, it appears that YCC's delay in registering its lien certificate and the ballooning costs forming part of the Claimed Common Expenses arose because of internal YCC matters, including the involvement of two different law firms to assist it in obtaining the compliance order and in responding to unsuccessful efforts by the defaulting unit owner to challenge the validity of the order.

[59] In brief, it is undisputed that YCC was placed under the administration of a court-appointed administrator in November 2010, the administrator fired YCC's property manager and YCC's lawyers who had carriage of the compliance proceeding, the administrator retained new solicitors for YCC in March 2011 and a new property manager, and the outgoing property manager failed to inform its successor of the compliance proceeding and the Costs Order. As a result, YCC's new property manager appears to have first learned of these matters on an unspecified date in June or July, 2011.

[60] Further, the record indicates that, although YCC's new solicitors obtained a copy of the issued and entered Costs Order by June 23, 2011, a demand for

payment of the Claimed Common Expenses was not forthcoming until August 15, 2011, almost two months later.

[61] The main component of YCC's \$113,616.68 lien claim as at May 2014 consisted of \$82,261.88 for legal costs, of which \$44,272.63 represented costs billed by YCC's first solicitors. The balance represented costs charged by YCC's second solicitors, in the sum of \$37,989.25, plus interest and additional miscellaneous costs. In the result, by the time Unit 302 was sold, the amount owed by the unit owners as s. 134(5) Claimed Common Expenses was more than seven and a half times the amount originally awarded under the Costs Order.

[62] These facts, of course, do not affect the proper interpretation of ss. 85(2) and 134(5) of the Act. However, they do paint a compelling picture of undue delay by YCC in seeking to enforce its lien claim and recover the Claimed Common Expenses, with attendant adverse financial consequences for the owners of Unit 302.

[63] I therefore agree with CIBC's submission that, on this record, it appears that the perfection of YCC's lien claim simply "fell between the cracks". This strongly militates in favour of the conclusion that YCC's August 2011 demand letter did not form part of any intended accommodation or forbearance plan for

the owners of Unit 302 but, rather, that it was a misplaced effort to pursue a lien claim that had been forgotten or overlooked, and already expired.

(2) Funds Wrongly Deducted from Sale Proceeds

[64] On the closing of the sale of Unit 302, YCC's solicitors applied the sum of \$9,952.01 against the sale proceeds on account of invoices rendered by them to YCC. The applications judge found that, of this sum, \$4,530.98 related to matters that did not directly concern the process of selling Unit 302. He therefore ordered that \$4,530.98 be disgorged and paid to CIBC, together with the \$94,006.01 net proceeds of sale.

[65] I do not understand YCC to challenge this part of the applications judge's decision on this appeal and I see no basis for appellate interference with it.

(3) Costs Appeal

[66] YCC's factum does not address its proposed appeal from the quantum of the applications judge's costs award in favour of CIBC. However, during oral argument, YCC submitted that the applications judge erred in his costs ruling by fashioning an award that is excessive and that fails to take account of alleged misconduct by CIBC in conducting out-of-court cross-examinations and examinations, which resulted in unnecessary costs and the generation of largely irrelevant or useless materials, including unnecessary transcripts.

[67] There are several difficulties with this submission. First, it is true that the applications judge concluded, at para. 17 of his costs reasons, that the process of gathering out-of-court testimony in this case was “laborious” and yielded “negligible” output that was “out of all proportion both to the issues and the amounts at issue”.

[68] However, the applications judge did not fix responsibility for the costs associated with that out-of-court process solely on CIBC. To the contrary, he was critical of the conduct of both parties, stating, at para. 18: “My observations of the conduct of this case born of having had to wade through the great bulk of that largely unhelpful output suggests that there is plenty of responsibility to be shared on all sides” (emphasis added).

[69] Second, having addressed what he viewed as the unnecessary expense and unproductive nature of many of the cross-examinations and examinations conducted by the parties, the applications judge, at para. 19, reduced the fees recoverable as costs by CIBC to take account of “the excessive time and energy expended in these examinations”. In so doing, he expressly considered, and rejected, YCC’s submission that CIBC should be awarded no costs or only nominal or reduced costs in the circumstances of this case. He stated, at para. 23:

I have already sufficiently accounted for the examinations undertaken and have noted that the

excesses are a shared responsibility. The degree of sharing should reflect that one party [CIBC] made sincere and advantageous settlement offers that were rejected and the unsuccessful party bore significant responsibility for the length and number of examinations that were undertaken.

[70] Third, the applications judge also considered whether CIBC's costs should be further discounted, or disallowed altogether, either because of the suggested novelty of the issue raised or the consumer protection aims of the Act. He provided clear and cogent reasons for his conclusion that neither factor warranted any further adjustment. I see no reversible error in his reasoning or conclusions on these issues.

[71] Finally, the applications judge was alert to the governing principles regarding an award of costs. In the end, he concluded, at para. 26:

Accordingly, I have determined to award CIBC total costs for fees and disbursements of \$62,510.85 including HST. This figure is still unacceptably high in relation to the amount at issue. However, it was an expense that CIBC offered YCC reasonable and early prospects of avoiding and it was one that was inflated due to lack of pragmatism and cooperation for which I find fault cannot be laid solely or even predominantly at CIBC's feet. It is, alas, the fairest result I can fashion from the clay that I have been given.

[72] In all these circumstances, I am not persuaded that the applications judge's costs award is plainly wrong or tainted by an error in principle. Accordingly, there is no basis for appellate interference with his discretionary costs ruling.

Disposition

[73] For the reasons given, I would dismiss the appeal, grant leave to appeal costs and dismiss the costs appeal. I would also order that CIBC deliver its brief written costs submissions to the Registrar of this court within 15 days from the date of the release of these reasons and that YCC deliver its brief responding costs submissions to the Registrar within 15 days thereafter.

Released:

“JUN 28 2017”
“GRS”

“E.A. Cronk J.A.”
“I agree G.R. Strathy C.J.O.”
“I agree S.E. Pepall J.A.”