CITATION: CIBC Mortgages Inc. v. York Condominium Corporation No. 385, 2016 ONSC 7343
COURT FILE NO.: CV-14-517576
DATE: 20161124

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CIBC Mortgages Inc., Applicant

AND:

York Condominium Corporation No. 385, Respondent

BEFORE: S.F. Dunphy, J.

COUNSEL: *Benjamin Frydenberg*, for the Applicant

Chetan Phull, for the Respondent

HEARD: November 16, 2016

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ENDORSEMENT

[1] This case raises the narrow question of when an amount that is added to common expenses following an enforcement proceeding pursuant to s. 134(5) of the *Condominium Act, 1998*, S.O. 1998, c. 19 can be said to be in default for the purpose of giving rise to lien rights in favour of the corporation pursuant to s. 85(1) of the *Condominium Act*. The precise timing of the "default" will determine the time limit for registering notice of the lien under s. 85(2) of the *Condominium Act* in order to claim priority over the first mortgagee.

[2] This application will decide who should receive the proceeds of sale of a condominium unit. The unit was sold under power of sale and the net proceeds of sale were insufficient to pay the claims of either the mortgage holder or the common expense claim of the condominium corporation in full. If the default occurred earlier than three months prior to the December 12, 2011 registration of notice of lien, the lien will have expired, the mortgagee will receive all of the net the proceeds and the corporation will be required to account for certain deductions made from those proceeds for which it did not have priority; if the default occurred within three

months of December 12, 2011, the corporation perfected its lien in a timely way, its lien has priority over the first mortgage and thus the corporation is entitled to retain all of the proceeds.

[3] For the more detailed reasons that follow, I have found in favour of the mortgagee. While the provisions of s. 134 and s. 85 of the *Condominium Act* do not mesh perfectly with each other, a contextual reading of both reveals their clear intent with sufficient clarity. The exceptional right to assert priority lien rights under s. 85 of the *Condominium 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. Upon the issuance of the court order, s. 134(5) of the *Condominium Act* required the corporation to add the ordered amount of costs together with certain other expenses incurred in connection with obtaining the order to common expenses. There can be no sensible reason to imply an artificial and identical "second" obligation arising only when the condominium corporation gets around to fulfilling its statutory duty by actually adding the court-ordered amount to its own records of common expenses or issuing a demand letter asking for their payment. 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.

Background facts

[4] Mr. Frank Blowes and Ms. Xiomara Labour were at the relevant times owners of a condominium unit (No. 302) at 2645 Jane Street in Toronto. The condominium unit is part of the respondent York Condominium Corporation No. 385 ("YCC 385").

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[5] The owners of the unit granted CIBC Mortgages Inc. a first-ranking mortgage on January 28, 2010 securing payment of $135,000 plus interest and other charges. The Standard Charge Terms included, among other terms, the provisions deemed to be included therein by s. 88 of the *Condominium Act*.

[6] On November 29, 2010, Spence J. appointed an administrator of YCC 385.

[7] YCC 385 initiated compliance proceedings pursuant to s. 134(1) of the *Condominium Act* against, among others, Mr. Blowes. The Notice of Application in that proceeding indicated that it was commenced against Mr. Blowes as owner of Unit 302 and alleged that Mr. Blowes had violated various provisions of the *Condominium Act*. A hearing on the application of YCC 385 was held before Pollak J. and concluded on February 14, 2011 (there appear to have been earlier hearing dates in January as well, nothing turning on that issue). Mr. Blowes failed to appear at the hearing although he had defended earlier in the proceeding. Pollak J. issued a number of restraining orders directed at Mr. Blowes and also ordered him to pay YCC 385's costs that she fixed in the amount of $15,000.

[8] The order of Pollak J. provided in paragraph 5 thereof that the costs were "payable within thirty (30) days of the date of this Order".

[9] On or about March 23, 2011, YCC 385 changed counsel. Its current counsel began the process of transitioning files from former counsel. Copies of the endorsement and order (un-entered) of Pollak J. were sent to YCC 385's current counsel on March 30, 2011. It appears that YCC 385 entered the amounts paid to such former counsel in respect of Mr. Blowes' application into its general ledger on or about March 23, 2011 but did not then enter the amount of those expenses directly on the common expense ledger of Unit 302.

[10] Mr. Blowes did not pay the $15,000 in costs on March 16, 2011 as ordered by Pollak J.

[11] There were unexplained difficulties in getting the order of Pollak J. formally entered. Efforts to do so in April and early May 2011 are in evidence.

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[12] The court-appointed administrator of YCC 385 changed property management companies on May 24, 2011.

[13] On June 23, 2011 the order of Pollak J. dated February 14, 2011 was formally entered.

[14] On August 3, 2011, YCC 385 made ledger entries on its books to charge back $44,272.63 against Unit 302, reversing the earlier charges made to its general ledger.

[15] On August 15, 2011, the new counsel for YCC 385 (and counsel in this proceeding) sent a demand letter to Mr. Blowes. The letter demanded payment of $15,000 in costs pursuant to the order of Pollak J. dated February 14, 2011 and $29,272.63 in costs recoverable as common expenses pursuant to s. 134(5) of the *Condominium Act*, both of which amounts were indicated to be "due within 30 days and collectible as common expenses if unpaid". The letter indicated "if you fail to make the payment of $44,272.63 to YCC 385 on or before September 14, 2011, YCC 385 will proceed with the registration of a lien against your unit".

[16] A Notice of Lien was sent to Mr. Blowes on November 10, 2011following his failure to pay pursuant to the demand letter. The amount claimed was increased to $48,391.74 including subsequent interest and legal fees.

[17] A Certificate of Lien was filed on December 12, 2011. The amount on the certificate was the amount demanded on August 15, 2011: $44,272.63. The Certificate of Lien was duly served upon CIBC as encumbrancer and, although CIBC has been unable to locate a copy of the notice of the lien served upon it, CIBC does not dispute that notice was in fact served on it on or about the date indicated.

[18] Mr. Blowes took steps – unsuccessfully – to set aside the order of Pollak J. Although the motion was originally brought in 2011, the matter was adjourned on more than one occasion and finally came on before McEwan J. on December 10, 2012. McEwan J. dismissed the motion by reason of Mr. Blowes failure to appear (again). McEwan J. ordered Mr. Blowes to pay UCC's costs fixed in the amount of $10,371. YCC 385 sent a demand letter to Mr. Blowes on

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December 11, 2012 requiring payment of its full legal costs in the amount of $16,666.91 which amount is added to the lien pursuant to s. 134(5) of the *Condominium Act*.

[19] On February 28, 2013, YCC 385 served a statement of claim seeking possession of the unit. The owners were noted in default and default judgment was signed on April 11, 2013.

[20] Notice of Sale was sent to the owners and CIBC on May 6, 2013 with the amount demanded to prevent sale being set at $77,709.74. Once again, CIBC does not dispute the delivery of these documents but has not found them. Once again, the notice appears to have gone entirely unremarked within CIBC.

[21] Mr. Blowes attempted a further motion to set aside Pollak J.'s original order. This was dismissed with costs by C. Brown J. on May 28, 2013 with further costs (in the amount of $1,935.51) being awarded.

[22] YCC 385 obtained a writ of possession on October 18, 2013 and received possession from the Sheriff on November 27, 2013.

[23] Mr. Blowes thereafter defaulted in payment under the CIBC mortgage in December 2013. CIBC began the process of making demands for payment.

[24] On April 7, 2014, YCC 385 agreed to a sale of the unit at a price of $110,000.

[25] CIBC commenced enforcement proceedings with a Statement of Claim issued on May 2, 2014, ultimately obtaining default judgment on October 22, 2014 against Mr. Blowes in the amount of $135,411.79 plus costs.

[26] In the course of attempting to secure possession of the unit and exercise its mortgage remedies, CIBC first learned of the power of sale proceedings initiated by YCC 385 and the fact that a sale was in fact due to close within days. The prior notices sent by YCC 385 had been misplaced or misdirected in some fashion. The parties exchanged information. At that point, YCC 385 claimed that its lien amounted to $113,616.68. The parties agreed to permit the sale

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process commenced by YCC 385 to be completed with the net proceeds held in trust pending determination of priority.

[27] YCC 385's counsel has delivered a statement of adjustments indicating that it holds $94,006.01 in net proceeds of the sale. CIBC takes that position that, if it is successful, the amount held in trust by Fine & Deo should be augmented by $4,530.98 in respect of YCC 385 legal expenses paid out of closing proceeds that did not relate directly to the sale but to claimed expenses under s. 134(5) of the *Condominium Act*.

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Issues to be decided

[28] When did "the default that gave rise to the lien" claimed by YCC 385 occur?

[29] Is YCC 385 entitled to assert its alternative argument that its lien is valid on equitable principles?

[30] What expenses is YCC 385 entitled to deduct from the net proceeds of sale?

Discussion and analysis

(a) When did "the default that gave rise to the lien" claimed by YCC 385 occur?

[31] The genesis of the dispute giving rise to this proceeding is that the *Condominium Act* treats two very different amounts as common expenses and secures both by the same lien under s. 85 of the *Condominium Act* subject to conditions that fit more readily to the one than the other.

[32] The common expenses required to be contributed pursuant to s. 84 of the *Condominium Act* are the truly "common" common expenses that are calculated by the corporation globally and then divided among all of the owners in accordance with their relevant proportion as specified in the declaration. All owners are required to contribute to them in an amount that varies only relative to their respective share of the whole condominium. They are normally reasonably predictable in amount, varying as the budget for the condominium is modified or reserves for capital expenses are created.

[33] There is a completely different type of expense that, while also characterized as a "common expense" is in fact nothing of the sort. Pursuant to s. 134 of the *Condominium Act*,

owners, occupiers and a variety of stakeholders including the corporation are permitted to make application to the Superior Court for a compliance order. Where the corporation is the applicant and obtains either an award of damages or costs as against a unit owner or occupier, then that amount together with the remaining actual costs of obtaining the order "shall be added to the common expenses for the unit". These amounts are not "common" to all units. They are not paid by all owners in proportion to their share of the condominium. Rather, they are charged to and required to be paid by the owner of the relevant unit alone.

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[34] In its relevant portions, s. 134 of the *Condominium 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.
> …
>
> (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."

[35] Section 85 of the *Condominium Act* creates a lien in favour of the condominium corporation for defaults in the payment of "common expenses" without differentiation of type and gives the lien priority over prior encumbrances, including mortgages. However, the right of the corporation to prime prior encumbrances is not unlimited. The lien expires if not perfected within three months of the default giving rise to it:

> 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.

[36] The corporation has little to no role in the timing of what I have termed "normal" common expenses. These accrue at a more or less constant rate in most cases. A mortgage lender is able to anticipate within reason what three months of such common expenses amounts to in terms of priority risk and price or manage that risk accordingly.

[37] In contrast to the predictable common expenses of s. 84 of the *Condominium Act*, the amounts added to the common expenses for an individual unit under s. 134 are neither periodic nor particularly discoverable by due diligence. They can arise at any time. There is no limit to their amount. They may result in priority expenses that exceed the value of the relevant unit and thereby entirely displace the mortgage in terms of security position. This is what occurred here.

[38] If the condominium corporation fails to be sufficiently vigilant in collecting common expenses or in perfecting its lien within three months of a default, the consequences are a loss of priority to mortgage lenders: *Toronto Standard Condominium Corp. No. 1908 v. Stefco Plumbing & Mechanical Contracting Inc*., 2014 ONCA 696. As Hourigan J. A. noted in *Stefco*, the priority lien granted for such common expenses represented a carefully crafted balancing of interests among stakeholders: *Stefco* at paras. 39-40 and 45.

[39] The need for a balancing of interests is readily apparent. The safety of the investment of condominium owners in their home depends in part on the availability of a ready market for mortgage financing of condominiums, whether to refinance their own investment or to assist potential buyers in purchasing from them. A failure to achieve a reasonable equilibrium between the need for lenders to have certainty and the fairness to other unit owners in having to pay for the consequences of a breach by one single owner would have dire consequences for all.

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[40] This issue to be determined in this case is when the default in the payment of common expenses incurred. If the default occurred more than three months before the lien was perfected, then the lien right will have expired before it was perfected pursuant to s. 85(2) of the *Condominium Act* and the priority position of CIBC will remain unchanged. If, to the contrary, the default giving rise to the lien occurred within three months of December 12, 2011 (the date the lien was perfected by registration), then YCC 385 has priority over CIBC's mortgage pursuant to s. 86(1) of the *Condominium Act*.

[41] Pursuant to s. 85(4) of the *Condominium Act*, the corporation was required to give notice of "the lien" to the owner whose unit is affected by the lien. The notice of lien given on November 10, 2011 referenced unpaid common expenses of $44,272.63 consisting of the $15,000 in costs ordered by Pollak J. on February 14, 2014 and additional actual legal costs due pursuant to s. 134(5) of the *Condominium Act* in the amount of $29,272.63. The actual lien as filed on December 12, 2011 certified this amount ($44,272.63) as being "unpaid common expenses".

[42] The "default that gave rise to the lien" under s. 85(2) of the *Condominium Act* must therefore be the default in payment of the two listed amounts – the $15,000 in costs under Pollak J.'s order and the $29,272.63 in additional actual costs that s. 134(5) provides "shall be added" to the common expenses of the unit. When did the default in making those two payments occur?

[43] The parties have diametrically opposite views on how to answer such an apparently simple question.

[44] For YCC 385 it is submitted that s. 134(5) of the *Condominium Act* does not automatically deem either damages or costs awarded in a proceeding pursuant to s. 134(2) or the additional actual costs to be common expenses for the unit. Rather, it provides that these "shall be added" to the common expenses for the unit. This suggests that a two-step process is entailed: the making of the order or the incurring of the expense (as the case may be) and the adding of the amount to the common expenses for the unit. The former is done by the court or in consequence of the proceeding before the court; the latter occurs when the condominium corporation takes some additional step. YCC 385 also notes s. 134(5) of the *Condominium Act* allows it to grant

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the unit owner time to pay the expenses added, an exercise of discretion that would necessarily carry with it an ability on the part of the corporation to change the time of default. Given the *Condominium Act*'s status as a consumer protection statute, YCC 385 submits that I should prefer its interpretation since otherwise the burden of the default of the single unit owner will fall upon all of the other innocent unit owners.

[45] CIBC on the other hand submits that the corporation did not in fact provide for an extension of time to the unit owner to pay the additional common expenses. The demand letter of August 15, 2011 stipulated a date for payment but was issued many months after the payment obligation first arose under s. 134(5) of the *Condominium Act*. CIBC further submits that YCC 385's interpretation of s. 134(5) and s. 85(2) of the *Condominium Act* would result in the 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. This would utterly defeat the "delicate balance" struck by the Legislature between stakeholder rights when the three month deadline to perfect a lien was created. CIBC submits that the default occurs when the payment was due under the order giving rise to the statutory obligation under s. 134(5) of the *Condominium Act*.

[46] In my view, CIBC's interpretation is the correct one.

[47] Statutory construction is not always a simple task, but "there is only one principle or approach, namely, 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: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 SCR 559, 2002 SCC 42 (CanLII) (at para. 26).

[48] The Legislature in this case clearly did not select language that harmonized the application of two different types of liens (s. 84 and s. 135), so I must consider the words it used in their grammatical sense *harmoniously with the scheme of the Act*.

[49] While not addressing precisely the question at issue before me, the court in *Stefco* considered the scheme of the *Condominium Act* in the context of a contest between the

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corporation (and though it the innocent unit owners) and a mortgagee and is instructive. In that case, the court rejected a scheme to revive an expired lien for uncollected "normal" common expenses by attempting to collect them as "damages" claimed in an enforcement application under s. 134 of the *Condominium Act*. Such a scheme was found to be "inconsistent with the purpose of the Act and the intention of the legislature" since it "upsets the balancing of the rights of stakeholders, by granting an unfettered right to a priority to condominium corporations, to the detriment of the mortgagees": *Stefco* at para. 45.

[50] In my view it is not reasonable to assume that the legislature intended to restrict the knowable, predictable s. 84 common expenses to three months of priority arrears while granting an unfettered discretion to the corporation to manage the timing of giving the mortgagee notice of claims for liens in respect of potentially much larger damages or costs that might be awarded in compliance proceedings under s. 134 of the *Condominium Act*. That is precisely the right YCC 385 claims in this case by asserting that it alone has the right to determine the timing of the "default" that gives rise to a lien and starts the clock ticking for perfection under s. 85(2) of the *Condominium Act*. Such an interpretation would also frustrate the rights granted to a mortgagee to protect itself from being primed further under s. 88 of the *Condominium Act* since it is the registration of a notice of lien that notifies the mortgagee of the existence of a default in payment of common expenses and permits the mortgagee to decide whether and to what extent it wishes to step in to protect its rights.

[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 *Condominium 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.

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[52] If the lien in respect of the costs order arose upon the default on March 17, 2011, a notice of lien registered more than three months later (June 17, 2011) is ineffective to perfect the lien. Pursuant to s. 85(2) of the *Condominium Act*, the lien securing the costs order expired on that day. It cannot be revived thereafter.

[53] I can see no principled reason to apply a different reasoning to the question of the additional expenses that were also required to be added to common expenses for the unit under s. 134(5) of the *Condominium Act*. The obligation to pay the additional amounts is a statutory one and is not dependent upon the exercise of any discretion on the part of the corporation. The obligation to pay the additional expenses cannot be severed from the order of costs or damages giving rise to it and the default analysis is the same for both.

[54] 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.

(b) Is YCC 385 entitled to assert its alternative argument that its lien is valid on equitable principles?

[55] In its factum, YCC 385 took the position that even if its lien were found not to have been perfected in a timely fashion pursuant to s. 85(2) of the *Condominium Act*, its priority lien might nevertheless be confirmed on equitable grounds. In support of this proposition, YCC 385 relied upon the decision of Corbett J. in *National Trust Company v. Newmaster*, 2003 CanLII 64233 (ON SC) and submits that it should be entitled to "equitable restitution" arising from its "error during an unavoidable and temporary period of compromised information flow".

[56] Shortly after Pollak J.'s order of February 14, 2011, there was a reorganization of the corporation. This saw a change of law firms in March 2011 and a change in the management company in May, 2011. The transfer of the files between the law firms was not completed until August 2011. The matter of enforcing Pollak J.'s order appears to have fallen somewhat between the cracks during this period of transition and change. It cannot be said however that

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the matter was simply forgotten. New counsel did receive the order and did take steps – however slowly – to press for the issuance of a formal entered order.

[57] Of course the formal entry of the order was not a condition precedent to its effectiveness. The order of Pollak J. was effective when made on February 14, 2011. If someone was alert enough to read the order and direct clerks to get it taken out, the information flow was not so compromised as to prevent minds from turning to the subject of enforcement of the order and, in so doing, to consider the matter of the lien available in that regard.

[58] I am of the view that the *National Trust Company* case is of no assistance to the plaintiff. In that case, the lender had a mortgage securing two separate loan arrangements. When the property was sold, it provided the vendor/borrower's solicitor with a discharge statement that neglected to mention the second loan secured by the mortgage. Its mortgage was subsequently discharged but only the first loan was repaid from the sales proceeds, the remainder of the proceeds being remitted to the vendor/borrower. The lender sought to enforce an *unsecured* claim against its borrower. Corbett J. found that the borrower could not rely on the accidental discharge of the mortgage – a discharge that *did* affect the lender's security – to claim that the obligation was also discharged. In so finding, he relied on the principles of unjust enrichment and the decision of the Court of Appeal in *Central Guaranty Trust Co. v. Dixdale Mortgage Investment Corp*., (1994), 24 O.R. (3d) 506 (C.A.) that the fact that a given case may not fall within the established categories of restitutionary recovery does not preclude relief.

[59] While the categories of cases for which restitutionary relief may be sought are certainly not closed, the *principles* applicable are well-established. The requirement to establish enrichment, corresponding deprivation and lack of juristic cause remains. CIBC's existing mortgage provided it with juristic cause to maintain the first priority position it had long enjoyed. YCC 385's ability to prime that position was conditioned upon satisfying the conditions laid down in s. 85 of the *Condominium Act*. It failed to do so. There is no windfall and no lack of juristic cause.

[60] While I have dismissed the restitution claim as advanced by YCC 385 on its merits, I would be remiss in failing to note that YCC 385 did not in fact *plead* unjust enrichment in its

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own Notice of Application. Given the age of this proceeding, it is hardly acceptable to advance substantive arguments for the first time in a factum filed in respect of the final hearing.

(c) What expenses is YCC 385 entitled to deduct from the net proceeds of sale?

[61] CIBC has challenged $4,530.98 in legal bills that were deducted from the proceeds of sale by YCC 385's solicitors as recorded in their report following completion of the sale. YCC 385 claims that the relevant accounts were legitimately charged to the common expenses for the unit pursuant to s. 134(5) of the *Condominium Act*. However, it is conceded that the challenged expenses did not relate directly to the power of sale proceedings. Given my finding that YCC 385's claims under s. 134(5) of the *Condominium Act* did not have priority over the mortgage of CIBC, YCC 385 shall be required to account for such amount when accounting for the net proceeds of sale. No other issues were taken by CIBC with Fine & Deo's report of the net proceeds of sale.

[62] Having regard to my findings in relation to the date of the default giving rise to the lien, it is not necessary for me to deal with CIBC's challenge to the reasonableness of the various expenses that YCC 385 has charged to common expenses pursuant to s. 134(5) of the *Condominium Act*, including the legal fees. The total of such charges exceed the net proceeds of disposition. Obviously, were sufficient of these charges reversed, it is possible that a small surplus might have been generated on the sale that would have resulted in some small payment to CIBC as second priority creditor through that route had I found the lien to be in priority. I did not.

[63] I have made no determinations of the reasonableness of any of the expenses YCC 385 has included for the simple reason that the proceeds of sale have been found to be the priority property of CIBC and there is thus no dispute between CIBC and YCC 385. If my ruling granting CIBC priority is found to have been in error, my ruling in respect of this aspect of the dispute would be (i) to refer the question of legal fees paid to an assessment under s. 9(1) of the *Solicitors Act*, R.S.O. 1990, c. S.15 (granting leave for late assessment); and (ii) directing a reference before the Master to determine the question of the amount of reasonable non-legal expenses that are required to be added pursuant to s. 134(5) of the *Condominium Act*.

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Disposition

[64] Accordingly, I find that CIBC is entitled to the relief claimed in paragraph 1(b), (c) and (f) of CIBC's Notice of Application and find that net proceeds of sale to be paid to CIBC shall include the amounts held in trust by YCC 385's counsel as proceeds of the sale of the unit plus $4,530.98 in expenses deducted from the sales proceeds by Fine & Deo that were not directly related to the process of selling the property.

[65] CIBC has been successful on its application and is entitled to its costs. The Application of YCC 385 (CV-14-512825) has been endorsed as dismissed with costs.

[66] I am of course not privy to any settlement offers that may have been exchanged between the parties that may impact the scale or amount of costs. I would ask CIBC to deliver its written costs submissions (not to exceed five pages excluding outline of costs or Rule 49 offers if any) to YCC 385 within fifteen days of release of these reasons. I would then ask YCC 385 to deliver its own responding submissions subject to the same size limits fifteen days after receipt of CIBC's submissions. YCC 385's counsel shall assemble both sides' submissions and deliver both to me via my assistant. Cases need not be appended if available on line. Time limits may be extended by mutual consent without specific court order from me.

[67] I thank both parties for their thoughtful submissions.

S.F. Dunphy J.

Date: November 24, 2016

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