In the Court of Appeal of Alberta

Citation: Condominium Corporation No 311443 v Goertz, 2016 ABCA 362

Date: 20161117
Docket: 1501-0259-AC
Registry: Calgary

2016 ABCA 362 (CanLII)

Between:

Condominium Corporation No. 311443

Respondent
(Plaintiff)

- and -

Robin James Goertz

Appellant
(Defendant)

- and –

Condominium First Management Services Ltd.

Respondent
(Third Party to Counterclaim)

- and -

Longley Condominium Services Ltd.

Not a Party to the Appeal

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice C. Dario
Dated the 29th day of September, 2015 and the 13th day of October, 2015
(Docket: 0901 03801)

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Memorandum of Judgment

The Court:

OVERVIEW OF APPEAL

[1] This appeal offers a cautionary tale arising from failure to pay monthly condominium contributions (condo fees) in a timely way, and failure to pay resulting interest and incidental costs at all, based on a stubbornly held but flawed interpretation of provisions of the *Condominium Property Act*, RSA 2000 C-22 as amended (the *CPA*) and provisions of the bylaws of the respondent, Condominium Corporation No 311443 (the condo corp). As a result, the liability of the appellant, Robin James Goertz, originally measured in the range of a few hundred dollars, ballooned to some $80,000 as a result of being ordered to pay solicitor-client costs of the condo corp and the taxable costs of the respondent, Condominium First Management Services Ltd. (the condo manager). Mr. Goertz ultimately seeks to recover the $80,000, paid by him to avoid loss of ownership in each of his four-condo units through foreclosure. He has been self-represented throughout.

STATEMENT OF FACTS

[2] Mr. Goertz purchased four units in a condominium but failed to pay condo fees levied on those units by the condo corp for a period of several months. While he eventually brought the fees into good standing, he failed to pay accrued interest charges for some time. He failed to pay an added cost of $115.50, incurred by the condo corp as a result of having to hire a locksmith so it could enter one of Mr. Goertz's vacant units and turn off a tap that had been left running for two weeks, flooding adjacent areas. When he failed to respond to demand letters seeking payment, the condo corp filed caveats on the titles of all four of his units. On March 12, 2009, the condo corp issued a statement of claim for recovery of the resulting indebtedness and for foreclosure. Mr. Goertz defended that action and responded with a counterclaim, seeking damages, including aggravated damages against both the condo corp and the condo manager for a variety of allegations all arising from the manner of their pursuit of him for the payment of the condo fees and related claims.

[3] The condo corp ultimately sought summary judgment on its action, and Mr. Goertz sought summary judgement on his responding counterclaim. He did not lead evidence challenging the condo corp's evidence that he had not paid the locksmith's charge or its costs of filing the four caveats, but challenged the suggestion that he had not brought overdue interest charges into good standing.

[4] On September 29, 2015, a chambers judge heard these applications together. By way of an extensive set of reasons, she granted summary judgment to the condo corp in various amounts in regard to each of the four units totalling approximately $1500, declared a resulting charge on the

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title of each of those units and made an order for foreclosure on each unit should the sums owing in relation to each unit not be paid by a certain date (the redemption date); she also gave judgment for $115.50 representing the locksmith's charge. She ordered that the action be stayed against any unit in regard to which the related indebtedness was paid by the redemption date, but otherwise ordered the unit to be sold.

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[5] She dismissed Mr. Goertz's claim for summary judgment on his counterclaim. As a part of her grant of summary judgment to each of the condo corp and condo manager, she dismissed the counterclaim in its entirety, removing the necessity of a trial. She denied the condo corp's request to declare Mr. Goertz a vexatious litigant.

[6] On October 13, 2015, in supplementary reasons, issued after hearing arguments from all parties, the chambers judge ordered solicitor and client costs to be paid by Mr. Goertz to the condo corp in the sum of $55,000, and in the further sum of $23,532.43 by way of taxable costs to be paid by him to the condo manger.

[7] Mr. Goertz redeemed each of the units on December 6, 2015, by payment of the approximate total of $80,000. The caveats have not yet been discharged from title pending this appeal; if Mr. Goertz is successful in having the summary judgement obtained against him set aside, the matter will then proceed to trial and the caveats will remain as security on title until conclusion of the trial process.

[8] Mr. Goertz has made an application for the admission of new evidence on this appeal, being a series of cancelled cheques showing that he paid an additional $489.96 by installments over a 5.5-month period. That evidence was before the chambers judge on October 13, 2015 and so no application to lead new evidence was necessary for us to consider those cancelled cheques on this appeal. The chambers judge considered that evidence but concluded that even accepting these payments had been made, Mr. Goertz's full indebtedness had not been discharged as a result. She declined to vary her earlier order for summary judgment and foreclosure.

[9] In making the decision under appeal the chambers judge applied relevant provisions of the *CPA* and the condo corp's bylaws as extracted below. As a result, she accepted certain of Mr. Goertz's arguments reducing the amount of his ultimate liability accordingly.

[10] The chambers judge concluded that while as at the moment of granting summary judgment no monies owed by Mr. Goertz on account of his monthly condo fees, other monies remained owing by him at all relevant times, including sums in relation to the costs of preparing and registering caveats and for the locksmith's fee.

[11] The chambers judge found that the condo manager charged a higher rate of interest on late payment of condo fees than that permitted by the bylaws, an effective rate of 19.56%, rather than the amount specified in the bylaws of prime rate plus 4%. She adjusted her award accordingly.

[12] She reduced Mr. Goertz's ultimate liability by the amounts charged as an administrative expense for each of the demand letters sent to Mr. Goertz. It was not clear that these expenses were

a recoverable cost of the condo corp. They were not s 39 contributions under the *CPA*. Nothing in the condo corp's bylaws authorized the charge.

[13] The chambers judge concluded that the respondents were authorized to enter his unit via the locksmith's services, and that the caveat registrations in respect of the charge for same was permissible pursuant to the condo corp's bylaws as a contractual charge.

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[14] She further found the respondents could not recover the cost of the insurance deductible paid in relation to obtaining repairs resulting from the flood resulting from his unit because the condo corp had not proved that its Board of Directors (the Board) had taken a prerequisite vote in advancing that claim. She concluded that because the Board had not passed an appropriate motion, it could not pursue Mr. Goertz for the amount of that insurance cost.

[15] The chambers judge went on to conclude that the balance of the amounts claimed created charges against the property on which they were filed pursuant to s 39(12) of the *CPA*. She rejected the submission that the caveats were inadequate and unenforceable because they did not specify the total of the claimed debt as of the date they were filed, but rather simply described it as something "under $5000", accepting that it was not possible to insert an exact amount because of the intention that the caveats protect against future interest accruing after the date they were filed.

[16] She also rejected Mr. Goertz's defence that failure to send demand letters in the manner required by the condo corp's bylaws, personal service or via registered mail, rendered those claims unenforceable; they remained due and owing by him.

[17] The chambers judge rejected his claim that no monies were owing in relation to two of the four units and that the entire debt should be attributed to the other two of units, leaving two units free of foreclosure proceedings. She found that he had directed arrears payments made by him to be applied equally to all four units which was done, leaving a balance owing on each unit.

[18] In dismissing the counterclaim the chambers judge found there was no contract between Mr. Goertz and the corp manager. He had no rights to enforce the management agreement it had with the condo corp. He was not a party to the management agreement. He had not established that the condo manager had breached any duty of care to him, such as would support an award based on negligence. Further, she determined that breaches of the bylaws by the respondents could be dealt with in costs, rather than damages; those breaches did not provide a defence to the foreclosure action. Any negligence claim further failed, even if it had otherwise been established, due to Mr. Goertz's failure to prove damages.

[19] The chambers judge went on to hear and reject an application for reconsideration of her decision on October 13, 2015, the same date upon which she heard the parties' submissions as to costs. She found that at all relevant times money was owed by Mr. Goertz to the condo corp. She then ordered solicitor-client costs be paid to the condo corp by Mr. Goertz in the sum of $55,000 inclusive of disbursements, and to the condo manger, by way of taxable costs, in the sum of $23,532.43 inclusive of disbursements.

RELEVANT EXTRACTS FROM THE *CPA* AND THE CONDO CORP BYLAWS

[20] Relevant sections from the *CPA* are as follows:

> 28(1) A corporation shall have a board of directors that is to be constituted as provided by the bylaws of the corporation.
>
> ...
>
> (7) The powers and duties of a corporation shall, subject to any restriction imposed or direction given in a resolution passed at a general meeting, be exercised and performed by the board of the corporation.
>
> ...
>
> 39(1) In addition to its other powers under this *Act*, the powers of a corporation include the following:
>
> (a) to establish a fund for administrative expenses...
>
> (b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);
>
> (c) to raise amounts so determined by levying contributions on the owners...
>
> (d) to recover from an owner by an action in debt any sum of money spent by the corporation ...in respect of the unit or common property...
>
> ...
>
> 39(6) A corporation shall, on the application of an owner... certify
>
> (a) the amount of any contribution determined as the contribution of the owner;...
>
> (d) the interest owing, if any, on any unpaid balance of a contribution.
>
> (7) A corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner but unpaid by the owner.
>
> (8) On the filing of the caveat under subsection (7), the corporation has a charge against the unit equal to the unpaid contribution.
>
> (9) A charge under subsection (8) has the same priority from the date of filing of the caveat as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

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...

40(1) A corporation may charge interest on any unpaid balance of a contribution owing to it by an owner.

> (2) Notwithstanding (1) the rate of interest charged under subsection (1) is not to be greater than the rate of interest provided for by regulation.

41 If any interest referred to in section 40....is owning by an owner to a corporation, the corporation, in addition to any rights of recovery that it has in law, recover that amount in the same manner as a contribution under section 39 and for that purpose that amount is to be considered as a contribution under section 39.

42 Where a corporation takes any steps to collect any among owing under section 39, the corporation may

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

[21] The bylaws passed by this condo corp include the following:

3 An owner SHALL:

> (a) permit the Corporation and its agents, ...to enter his unit ...for the purpose of ...
>
> (ii) ...repairing either or both the common property or Managed Property including all...plumbing...
>
> (k) pay to the Corporation...when due all contributions levied or assessed against this unit together with interest on any arrears thereof at the Interest Rate calculated from the due date and the Corporation is hereby permitted to charge such interest in accordance with the Act.
>
> (l) pay to the Corporation all legal expense incurred as a result of having to take proceedings to collect any common expenses levied or assessed against his unit, and such legal fees shall be paid on solicitor and his own client indemnification basis;...

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> 5 In addition to the powers of the Corporation set forth in the Act, the Corporation through its Board, MAY and is hereby authorized to :...
>
> > (k) charge interest under the Act on any contribution or common expenses owing to it by an owner ...
>
> 46(g) All payments of whatsoever nature required to be made by each owner and not paid within ten (10) days from the due date for payment shall bear interest at the Interest Rate from the date when due until paid...
>
> 48 Default in payment of assessments and lien for unpaid assessments and payments:
>
> > (a) The Corporation shall and does herby have a lien on and a charge against the estate or interest of any owner for any unpaid contribution...
> >
> > (g) All reasonable costs of the Manager and legal costs and disbursements incurred by the Corporation (including costs on a solicitor and his own client basis) in registering and discharging a Caveat which either the Manager or the Corporation expends...shall constitute a payment due the Corporation.

ISSUES

[22] Mr. Goertz argues that summary judgment should not have been granted against him and that he rather should have been granted summary judgment against the condo corp and condo manager because:

- there was a failure to comply with the *Rules of Court* in making the foreclosure order including setting the redemption period;
- there was no money owed by him to the condo corp when the action which resulted in the granting of the order under appeal was commenced;
- the underlying action against him was invalid as the Board failed to make a prerequisite resolution to commence it, register caveats or seek foreclosure;
- the caveats were invalid because they did not give an exact figure for the indebtedness owed at the time they were filed;
- the locksmith's fees were not properly recoverable;
- the judgment is invalid as it does not give an exact figure of the amount owing;
- the condo corp should have attributed all of his indebtedness to two of his four units, leaving two free of the foreclosure order;

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- he was entitled to the damages claimed in his counterclaim;
- the small amount of his indebtedness should have resulted in dismissal of the summary judgment application against him as being a disproportionate result; and,
- he should have been awarded costs rather than being required to pay costs.

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STANDARD OF REVIEW

[23] Interpretation of provisions of the *CPA* is a question of law for which the standard of review is correctness. Findings of fact based on evidence led or on inferences drawn from that evidence attract the standard of deference; the standard of review is one of palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at para 21, [2002] 2 SCR 235. Application of those findings of fact to the interpretation of the *CPA* is a question of mixed fact and law; the standard of review to be applied is one of palpable and overriding error: *Housen* para 37.

[24] The standard of review to be applied to a costs award is one of deference. The Supreme Court of Canada confirmed in *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 at para 27, [2004] 1 SCR 303, that "a court should set aside a costs award on appeal only if the trial judge has made an error in principle or the costs award is plainly wrong": see also *Indutech Canada Ltd. v Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at para 12, 362 DLR (4th) 303.

ANALYSIS

What is the test for granting summary judgment?

[25] The chambers judge correctly set out the test for summary judgment and summary dismissal, as provided in Rule 7.3(1) of the *Rules of Court*, Alta Reg 124/2010 [*Rules of Court*] which permits such relief to be granted where there is no defence to a claim or part of a claim, no merit to a claim or part of a claim or where the only real issue is the amount to be awarded. She relied on the interpretation of this rule as set out by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7 at para 49, [2014] 1 SCR 87 [*Hryniak*]:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

This Court applied the principles in *Hryniak* in *Windsor v Canadian Pacific Railway Ltd,* 2014 ABCA 108 at para 13, 371 DLR (4th) 339, stating: "The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to the parties can be made on the existing record".

[26] The chambers judge then concluded that she could grant summary judgment relating to the claim and summary dismissal of the counterclaim because she could make the necessary findings

of fact, noting that there were no credibility issues, and that to do so would be clearly proportionate, more expeditious and less expensive to do so than proceeding to a full trial.

Was an application for a redemption order before the Court when the order was made; could the foreclosure orders be made in the absence of affidavits of value and certificates of title?

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[27] Mr. Goertz argues that the foreclosure order should be set aside because an application for a redemption order was not before the Court when the order under appeal was made, nor were affidavits of value, certified copies of title, or a complete accounting for the period April 1, 2008 to September 20, 2012 as required by Rule 9.30 and Rule 9.31 of the *Rules of Court*. Those Rules provide:

> 9.30 Unless the Court otherwise orders, an affidavit of value must be filed before an application is filed for:
>
> (a) a redemption order, ...
>
> (c) a foreclosure order
>
> 9.31 Before an application for a redemption order, ..., a foreclosure order.. the plaintiff must file:
>
> > (a) a certified copy of all the current titles to the secured land,...

[28] The chambers judge correctly noted that the relief sought in the statement of claim references all aspects of foreclosure, including a shortened redemption period. The application before her was for summary judgment; all the relief sought in that pleading was before her. She expressly dispensed with affidavits of value for each of the units. Rule 9.30 expressly permits a Court to dispense with the filing of an affidavit of value before the making of a redemption or foreclosure order. The chambers judge found that certified certificates of title had been previously filed.

[29] Therefore, there is no merit to the argument that no application for a redemption order was before the Court, or that the resulting order was invalid due to the absence of affidavits of value and certificates of title.

Were monies owed by Mr. Goertz to the condo corp when the action which resulted in the order under appeal was commenced?

[30] Mr. Goertz argues that his additional payments in the total sum of $489.96 completely satisfied his debt at the time the caveats were filed and that the statement of claim subsequently issued by the condo corp was invalid and could not therefore form the basis for an application for summary judgment.

[31] The chambers judge found that the caveats were filed September 9, 2008 and that the $489.06 was not paid until between October 1, 2008 and March 1, 2009, by installment; as a result of this alone, as of the date the caveats were filed, he was in arrears to the condo corp. Further, on September 9, 2008, the condo corp properly added its costs of $220 for each of the four caveats to his indebtedness; these sums have never been paid by him, so that even when the $489.06 was eventually received and applied, he was still indebted to the condo corp. There was no evidence before the chambers judge to the effect that at any time commencing September 9, 2008, to the date of granting of summary judgment did Mr. Goertz pay all monies he owed to the condo corp.

[32] Mr. Goertz attempts to rely on a statement made by the chambers judge in relation to his evidence of having made these installment payments, to the effect that even if he was in a position of overpayment she was not revoking or changing the foreclosure orders. In her supplemental reasons on October 13, 2015, she clarified the effect of any overpayment, stating that "the claimed overpayment was not sufficient to pay off the accrued interest and the $200 caveat registration fee."

Was a resolution by the Board required before it could commence this action, register caveats or seek foreclosure?

[33] No evidence was led to show the Board passed a formal motion authorizing the sending of the demand letters, registering the caveats or issuing the statement of claim in the underlying action. The chambers judge concluded that such a formal motion was not a necessary prerequisite.

[34] She interpreted s 41 of the *CPA* as deeming an obligation to pay interest to be a contribution under s 39 of the *CPA*. Thus, the same rights of recovery arise in relation to interest as in relation to condo fees. If this was not the case, the Board would have to pass resolutions monthly as accumulated interest grew to pursue recovery of them. This is not a practical or fair expectation and cannot be what the Legislature intended in enacting these provisions. As such, a caveat could be filed to support a claim for interest arrears in accordance with s 37(7) of the *CPA* without the need for formal resolution.

[35] Mr. Goertz has identified no provision in the *CPA* or bylaws which would require a formal resolution of the Board in these circumstances. Nothing in s 39(7), which expressly authorizes a condo corporation to file a caveat against the certificate of title on an owner's unit, requires a prerequisite Board resolution.

Were the caveats invalid as they did not refer to the exact amount of the indebtedness secured?

[36] Each of the caveats filed in September 2008 described the debt owning in relation to the unit caveated to be in an amount under $5000. No specifics of the amount owed were provided because interest continued to accrue. The chambers judge found that approach "did not defeat the registration". Nothing in the *CPA* or the *Land Titles Act,* RSA 2000, c L-4 requires that a specific amount be identified in the caveat or that any such amount be accurate as of the date the caveat is filed. This is because the purpose of a caveat is not to create a right of recovery in a certain amount but rather it is to give third parties notice of a claim to some entitlement, the value of which is to be separately determined. Further, s 39(8) of the *CPA* does not say that any caveat filed must disclose

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the exact amount of arrears owed. Rather, the filing of a caveat creates a charge against the unit in question equal to the amount of arrears, whatever they may be.

[37] The condo corp filed a second set of caveats against each of the four titles in February 2009. The chambers judge found that step was unnecessary and duplicative. No claim was advanced or awarded for costs incurred to file that second round of caveats. No parties' interests were affected as a result of their filing. Their filing did not affect the validity of prior steps taken by the condo corp nor did it provide a defence to Mr. Goertz to the action for summary judgment.

Was the locksmith's charge properly recoverable?

[38] The chambers judge found this charge was recoverable in debt and gave judgment for it. The bylaws expressly provide in s 3(a) that "in the event the Corporation must gain access ...the cost of such locksmith shall be borne by the unit owner". The chambers judge correctly concluded that circumstances in which access is justified include the emergency nature of the flood experienced here. She held that the caveat registration in respect of this amount was permissible pursuant to the bylaws as a contractual charge.

Was the decision unreasonable because it did not include an express dollar amount of the indebtedness?

[39] The chambers judge, in para 2 of the formal order for judgment declared that certain sums were due and payable by Mr. Goertz. While express amounts are given for two of the five sums awarded, she incorporated by reference certain evidence before her as a means of calculating the other three sums. She ordered the payment of interest, as calculated in "Scenario C as outlined in the Affidavit of Hui Yan, filed 15 August, 2014". She awarded interest on the sums owed pursuant to the *Judgment Interest Act* RSA 2000, c. J-1, as amended, for a set period without having performed the mathematical calculation to arrive at an express figure owed. She allowed the fee for discharging the four caveats, presumably upon completion of foreclosure, without specifying the exact amounts of those fees. Clearly, she assumed that the parties could calculate the resulting amounts should Mr. Goertz decide to pay the amounts needed to redeem his units within the redemption period, as indeed has occurred.

[40] This approach is not uncommon in the drafting of judgments. It avoids the risk of error in relation to certain charges or calculations, presuming that the parties will work together to agree on the exact amounts produced by the "formula" established by the trial judge for their calculation. Mr. Goertz has not argued that any necessary calculations could not be performed, or that he cannot determine the exact sums he needed to tender to avoid foreclosure, or provided authority suggesting this approach is prohibited. The case upon which he relies in his factum, *Owner: Condominium Plan 7510189(Owners of) v Jones*, 1997 ABCA 53, 206 AR 382 stands as a proposition that a costs award may not be collected until it is set by taxation or otherwise, not for the proposition that a judgment must set out exact amounts owed under each award rather than a formula or means for calculating that sum.

[41] Mr. Goertz alternately argues that he did not owe anything to the condo corp until the Court determined the amount payable by order. He refers to no case or statutory authority to support this

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argument. The logical extension of this proposition would mean that no debt could be collected and no bill would have to be paid until the creditor sued and obtained judgment against the debtor, a proposition which is utterly without legal merit.

Should the condo corp have attributed all of his indebtedness to two of his four units, leaving two free of the foreclosure order?

[42] As noted, the chambers judge rejected Mr. Goertz's claim that no monies should be considered owing as against two of his four units, because the condo corp could have chosen to attribute his entire debt to two of the units, leaving the remaining two free of foreclosure proceedings. She found that he had directed arrears payments made by him to be applied equally to all four units, which was done. Thus, there was a balance owing on each unit. Mr. Goertz did not lead evidence to suggest otherwise.

[43] Mr. Goertz argues that the chambers judge had authority to reallocate the indebtedness on his units. He bases this argument on s 67(2)(c) of the *CPA* which allows the Court to direct how matters are to be carried out if the Court is satisfied improper conduct has taken place. He cites *934859 Alberta Ltd. v Condominium Corporation No. 031 2180*, 2006 ABQB 589, 406 AR 210 as an example of improper conduct. There, Master Laycock found that in the circumstances of that case that condo board had unfairly disregarded the interests of all main floor unit owners in the condominium in question in setting condo fees. The chambers judge made no similar finding of improper conduct in this case. Mr. Goertz has not argued that the amount of the condo fees set on his four units were unfair in relation to the fees charged other unit holders.

Did Mr. Goertz establish a claim to damages, including punitive damages?

[44] The chambers judge allowed summary dismissal of Mr. Goertz's counterclaim on the basis that the evidence disclosed that he had suffered no damages as a result of any breach of contract or act of negligence of either the condo corp or condo manager. She dismissed his claim that he suffered damages because he was sued by the condo corp at a time when he no longer owed it any money. For the reasons given above, she concluded that he did owe the condo corp money at that time. She dismissed his argument for punitive damages as a result of the condo manager's attempt to charge excessive interest on his arrears of condo fees and its failure to properly serve him with the demand letters, sending them to the municipal addresses of the condo units rather than to him by registered mail at the address he had given them, or by serving him personally.

[45] Mr. Goertz also argues that the actions of the property manager amounted to acts of dishonesty, supporting an award of punitive damages against it. As seen in *Whiten v Pilot Insurance Co*, 2002SCC 18, [2002] 1 SCR 595 at para 94, punitive damages are the exception rather than the rule, and are generally imposed where there has been "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour". The chambers judge found he had not established these underlying circumstances. It would be highly unusual, indeed, to see an award of punitive damages to a party who has been unable to establish any other damages.

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[46] Similarly, the chambers judge rejected his argument for enhanced costs or for a costs award based on the time he has presumably taken from other pursuits to defend this matter, which he calls costs for "Loss of Opportunity". The chambers judge found that he was obliged to pay costs, rather than entitled to receive them.

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[47] Her decision dismissing the counterclaim resulted from her conclusion that Mr. Goertz had not established he had suffered any damages as a result of the actions of either the condo corp or condo manager, let alone any punitive damages which are discretionary. That decision is entitled to deference and is supported by the fact that, even today, Mr. Goertz has not established any financial loss as a result of the commencement and pursuit of the within litigation against him.

Was summary judgement a disproportionate result due to the quantum of Mr. Goertz's indebtedness?

[48] Mr. Goertz argues that as proportionality is a consideration on a summary judgment application, the very small quantum of any indebtedness on his part should have resulted in dismissal of the application for summary judgment. That argument ignores the consequence of such a decision. If the summary judgment application was dismissed the action would then proceed to trial, with all the attendant cost and delay, notwithstanding the chambers judge having concluded that he had no defence to the action.

[49] Proportionality as a consideration in summary judgment does not act as a bar to recovery of claims, even for small amounts of money. Rather, it is a consideration in deciding whether a fair and just determination of claims can be made on the existing record. The chambers judge concluded that it could. Mr. Goertz has not convinced us that the decision was unreasonable or incorrect given that he led no evidence to demonstrate that he had paid the caveat registration costs or locksmith's costs at any time, or any evidence that challenged the conclusion that at all relevant times he owed money to the condo corp.

Should the costs awards be reduced or set aside and costs awarded to Mr. Goertz?

[50] The award of full indemnity costs was supported by the provisions of s 42(a) of the *CPA* and by para 48(a) of the bylaws which provide a right of "recovery by the Corporation of its legal fees and disbursements on a solicitor and his own client basis from [any] defaulting owner". Mr. Goetz has advanced no argument that the sums awarded in costs are not a proper reflection of the actual legal fees incurred in obtaining summary judgment by the condo corp or condo manager. He has not convinced us that there is any reason to interfere with the discretionary costs decision of the chambers judge.

CONCLUSION

[51] Mr. Goertz has not established that the case management judge made any reviewable error, or indeed, any error at all.

[52] Mr. Goetz appears to have expected that the condo corp and condo manager would take no action when he failed to respond to the demand letters for the payments of his arrears in condo fees

and, in particular, not to apply for orders of foreclosure on his four units as a result of his default in payment of arrears. The condo corp was not obliged to ignore his defaults or await the sale or remortgaging of his units as a means to secure repayment.

[53] While it seems almost surreal that an owner would allow foreclosure to issue against each of four condominium units rather than paying small sums owing, that does not support the conclusion that the chambers judge erred in any way in making the order under appeal. As she stated in her decision:

> At some point, enough is enough. The reason the Condominium Corporation is given these extreme enforcement tools is to ensure that all members are motivated to pay their allocated portion of contributions in a timely manner so that other unit holders are not left having to cover these expenses. ... The Condominium Corporation can use its available tools to enforce compliance, provided it is operating within the limits as described by the [Condominium Property] *Act* and its own bylaws...

[54] The appeal is dismissed with costs of the appeal being awarded to the condo corp on a full indemnity, or solicitor-client basis and costs being awarded to the condo manager on the same basis as costs were awarded by the chambers judge in the decision under appeal.

Appeal heard on October 11, 2016

Memorandum filed at Calgary, Alberta
this 17th day of November, 2016

McDonald J.A.

Bielby J.A.

Wakeling J.A.

2016 ABCA 362 (CanLII)

Appearances:

F. McLean
for the Respondents Condominium Corporation No. 0311443 and Longley Condominium Services Ltd.

Appellant Robin James Goertz in Person

B.D. Comfort
for the Respondent Condominium First Management Services Ltd.

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