IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan NW 2089 v. Ruby,* 2019 BCSC 504

Date: 20190313
Docket: S199699
Registry: New Westminster

Between:

The Owners, Strata Plan NW 2089

Petitioner

And

Ron Ruby and
Royal Bank of Canada

Respondents

Before: The Honourable Madam Justice Jackson

On appeal from: an order of the Registrar of the Supreme Court of British Columbia, dated February 7, 2019 (*The Owners, Strata Plan NW 2089 v. Ruby*, 2019 BCSC 143, New Westminster Docket S199699)

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	V. Chahal
Appearing on his own behalf:	R. Ruby
For the Respondent, Royal Bank of Canada:	No appearance
Place and Date of Hearing:	New Westminster, B.C. March 13, 2019
Place and Date of Judgment:	New Westminster, B.C. March 13, 2019

INTRODUCTION

[1] This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication.

[2] This is an application under the British Columbia *Supreme Court Rules* [*Rules*], R. 14-1(29) for a review of Registrar Nielsen's decision, dated November 7, 2018, regarding the assessment of costs.

BACKGROUND

[3] On February 21, 2018, the petitioner (The Owners, Strata Plan NW 2089), commenced a petition seeking numerous orders related to lien charges on a property pursuant to the *Strata Property Act,* S.B.C. 1998, c. 43 [*SPA*]. Among other things, the petitioner sought a declaration that the respondent, Ron Ruby, was in default in payment of his share of common expenses due to the petitioner.

[4] On October 19, 2018, after a contested hearing, Master Vos made several orders, including:

> 1. the Lien charges the Property ranking in priority to the interests therein or claims thereto of the Respondents, Ron Ruby and Royal Bank, with the exception of the interests or claims of The Crown in Right of British Columbia under its judgment with registration number WX2075943;
> 2. the Respondent, Ron Ruby, had made default in payment of common expenses and special levies due to the Petitioner and that all monies secured by the Lien are now due and owing to the Petitioner;
> 3. the amount due and owing to the Petition is $4,532.33 as of May 1, 2018, increasing by further unpaid strata fees, special levies, interest, the Petitioner's reasonable legal costs for the proceedings herein and other amounts that may be payable pursuant to the sections 116 and 118 of the *Strata Property Act*, S.B.C. 1998, c. 43 and amendments thereto (collectively, the "Amount Owing"); and
> 4. judgment be granted against the Respondent, Ron Ruby, in the sum of $4,532.33, together with the Petitioner's reasonable legal costs for these proceedings.

[5] Assessment of the petitioner's legal reasonable costs came before Registrar Nielsen on November 7, 2018, who ordered the parties were free to file further

material in support of their positions. The costs assessment was adjourned generally with the petitioner free to reset the assessment hearing after December 12, 2018.

[6] On January 17, 2019, the parties appeared before Registrar Nielsen to continue the costs assessment hearing. Registrar Nielsen reserved judgment, and on February 7, 2019, decided the petitioner's legal costs claimed were disallowed in their entirety and the respondent was entitled to his costs with respect to the registrar's hearing, which Registrar Nielsen assessed at $750 inclusive of disbursements.

[7] On February 20, 2019, the petitioner filed a notice of appeal from a registrar, arguing that Registrar Nielsen:

- erred in disallowing the petitioner’s legal costs;
- erred in failing to assess the petitioner’s reasonable legal costs for the proceeding contrary to Master Vos’ order;
- had no jurisdiction to decide general entitlement to costs;
- decided the petitioner’s entitlement to costs instead of quantifying or assessing costs ordered;
- made findings of fact contrary to findings made by the court; and
- erred in finding that the decision of the petitioner to hand the matter over to their lawyers before attempting to make email contact was not reasonable.

LEGAL PRINCIPLES

[8] A party who is dissatisfied with a decision of a registrar on an assessment of costs may, within 14 days after the registrar has certified the costs, apply to a court for a review of the assessment: *Rules,* R. 14-1(29).

[9] The standard for an appeal of a registrar's decision was addressed by Justice Preston in the *Peoples Trust Company v. Longlea Estates Ltd.*, *John Carter Maitland, Judith Evered and Edward G. Wong,* 2005 BCSC 1332. At para. 32, Preston J. cited Justice Kirkpatrick's decision in *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1994), 1 B.C.L.R. (3d) 232 (S.C.)*,* stating:

> In *Canadian Imperial Bank of Commerce v. Barley Mow Inn, supra,* Madam Justice Kirkpatrick considered that question in the context of an appeal from a master sitting as a registrar. The appeal dealt with the passing of the accounts of a receiver. Both counsel agreed that the matter should proceed by re-hearing. Kirkpatrick J. reviewed the authorities beginning with *Frost v. Frost* (1940), 56 B.C.R. 30 (C.A.), which held that a registrar's decision should not be overruled except on the basis that the registrar had erred in principle, a test equivalent to the "clearly wrong" test…

[10] At para. 39, Preston J. continued:

> I am satisfied that the law governing the scope of review on appeal from a registrar's decision in this province is settled. Unless it can be shown that the registrar erred in principle – that is, that he or she was clearly wrong – the decision will stand…

[11] Therefore, unless the petitioner can establish Registrar Nielsen erred in principle and that his decision was clearly wrong, this Court should not interfere with the decision.

ANALYSIS

Position of the Parties

[12] The petitioner argues Registrar Nielsen erred in principle by engaging in a consideration of whether it was reasonable for the petitioner to turn the matter of the respondent's unpaid common expenses over to its lawyers after mailing notices to the respondent but not emailing him. The petitioner argues that issue relates to the entitlement of costs, not to the quantum of the costs to be assessed after referral by a master. The petitioner argues the merits of involving lawyers and engaging in litigation goes beyond the matters the registrar was properly to take into account in assessing the quantum costs once costs in favour of the petitioner had been ordered.

[13] At the hearing, the petitioner referred to paras. 45 and 50 of Registrar Nielsen's reasons as evidence of that error in principle:

> [45] In all the circumstances, the decision by the petitioner to hand the matter over to their lawyers before attempting to make email contact was not reasonable. Those circumstances include the respondent's unique situation of being absent from his strata unit for extended periods of time by reason of his employment; the petitioner's knowledge in this regard; the respondent's past dealings with the petitioner regarding special levies and access to his unit, via email; and, the petitioner's failure to contact the respondent via email prior to putting the matter into the hands of their lawyers. In my view, the legal costs which flow from that decision were likewise unreasonable in their entirety.
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> …
>
> [50] In my view, this entire proceeding could have been avoided had the petitioner sent a single email to the respondent, demanding payment of the special levy, as it had in the past, before handing the matter over to their lawyers and incurring legal costs. The respondent was not a "delinquent owner" in the context of *Baettig*, *supra*. Upon receipt of the first email demanding payment of the special levy the respondent promptly acknowledged his liability and agreed to pay. He did not agree to pay legal fees which he felt were needlessly incurred. Regretfully, he was not permitted to pay the special levy unless it was accompanied by full payment of the legal fees claimed. The escalating claim for legal fees became a club to cow the respondent into submission.

[14] Further, the petitioner submits Registrar Nielsen erred by ordering costs payable to the respondent for the assessment-of-costs process. Relying on Justice Gropper's decision in *Bains v. Bains*, 2012 BCSC 65 at para. 32, in which she held that an award of special costs includes special costs for the assessment of those costs, the petitioner argues that when Master Vos made an order in the petitioner's favour for reasonable legal costs that order included costs of the assessment of those costs. The petitioner submits Registrar Nielsen was bound by Master Vos' order awarding costs to the petitioner, and that awarding the respondent costs for the registrar's hearing was inconsistent with Master Vos' order. The petitioner argues that the role of the registrar on such a referral is to bring their expertise to bear in valuing the legal work, and determining whether the quantum claimed is reasonable for the work undertaken.

[15] For his part, the respondent says the assessment was appropriate, and that an assessment of zero can be an assessment. The respondent also makes allegations that the petitioner's efforts to collect were badgering and bordered on bad faith and that the actions of the petitioner and its legal representation bordered on criminal activity. The respondent says he indicated a willingness to pay the strata assessment, but not the legal costs. When he and the petitioner disagreed on whether those legal costs were properly payable, he make repeated suggestions that the petitioner take him to court. In his view Registrar Nielsen was persuaded, based on the additional evidence he provided, that there should be no costs awarded against him.

Discussion

[16] Section 118 of the *SPA* deals with costs of registering a lien against an owner's strata lot, and states:

> The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:
>
> (a) reasonable legal costs;
>
> (b) land title and court registry fees;
>
> (c) other reasonable disbursements.

[17] The meaning of "reasonable legal costs" in s. 118 of the *SPA* was addressed by the British Columbia Court of Appeal in *The Owners, Strata Plan KAS 2428 v. Baettig,* 2017 BCCA 377 [*Baettig*]. Writing for the Court, Justice Fitch noted at para. 34:

> … In my view, and for the reasons that follow, interpreting s. 118(a) of the *SPA* to permit a strata corporation to add the actual reasonable legal costs it incurs in registering and enforcing a lien to the amount owing under the lien accords with the words of the provision, its legislative history, its evident purpose and its statutory context.

[18] At para. 61 of *Baettig,* the Court continued:

> As noted earlier, s. 118 entitles strata corporations to add certain costs incurred in registering and enforcing a lien to the amount owing under the lien, including "reasonable legal costs". The costs added to the amount owing

> under the lien pursuant to s. 118 gain priority against other charges previously registered against the strata lot.

[19] In his order, Master Vos made declarations with respect to the lien, including:

> … the amount due and owing to the Petitioner is $4,532.33 as of May 1, 2018, increasing by further unpaid strata fees, special levies, interest the Petitioner's reasonable legal costs for the proceedings herein and other amounts ...[emphasis added]

[20] Master Vos ordered that judgment be granted against the respondent in the sum of $4,532.33 together with the petitioner's reasonable legal costs for these proceedings.

[21] The policy reasons for reasonable legal costs referred to in s. 118 of the *SPA* encompassing the actual legal costs was also addressed by the court in *Baettig* at para. 62:

> …Consistent with the philosophy underlying the *SPA*, the objectives of Part 6 include: (1) keeping the strata corporation whole as to the reasonable costs it incurs; and (2) protecting compliant owners from the financial burden of taking recovery steps against delinquent owners who are unable to pay or otherwise refuse to pay their fair share in strata fees.

[22] At paras. 65-66 of *Baettig*, Fitch J. went on to state:

> Sections 116–118 of the *SPA* are remedial. They shift the burden of costs associated with collecting strata arrears to the delinquent owners who have failed to meet their obligations. Accordingly, the provision must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.
>
> In my view, it is consistent with the remedial objective of ss. 116–118 and with the purposes of the *SPA* as a whole to interpret s. 118 as providing a strata corporation with the means to recover costs reasonably incurred in registering and enforcing a lien against a delinquent strata owner. If actual reasonable legal costs are not included in s. 118(a), legal fees not covered by the tariff must be borne by non‑delinquent strata owners by way of increased common fees. This would further increase the financial burden on owners who are paying their share. In my view, this interpretation would be inconsistent with the philosophy and scheme of the *SPA*.

[23] The assessment of costs ordered by Master Vos was to be considered in light of the interpretation of the Court of Appeal in *Baettig* and the assessment of costs by Registrar Nielsen was to be undertaken in a manner that was harmonious with the

remedial nature of the provision. Specifically, "reasonable legal costs" is to be given a fair, large, and liberal construction and interpreted as best ensures the attainment of its objects.

[24] In my view, the question of whether it was reasonable for the petitioner to involve legal counsel is a matter that goes to the entitlement of costs, which was decided by Master Vos when he made his order. Master Vos had the jurisdiction, which he exercised, to make the decision with respect to entitlement to costs and awarded costs to the petitioner. In assessing the reasonable legal costs under s. 118 of the *SPA*, Registrar Nielsen was to consider the reasonableness of the quantum claimed for the legal work undertaken, not whether he viewed the petitioner's choice of involving legal counsel as being reasonable.

[25] I note with approval the decision of Justice Blok in *MacLean Law v. Miolla*, 2016 BCSC 1647 at para. 41, citing *Davis & Company v. Jiwan,* 2008 BCCA 494 at para. 18:

> [41] On the matter of the actual assessment of the amount or amounts of the bills, the courts recognize that registrars have expertise and experience in the valuation of legal work and accordingly a registrar's assessment of amount will not be interfered with in the absence of an error in principle …

[26] In applying that expertise and experience to the assessment of the reasonableness of the cost amounts claimed for the various steps taken in the litigation, the registrar should not re-engage in issues that go to entitlement of costs. In my view, Registrar Nielsen erred in principle when he did so, negating Master Vos' award of costs as he did so. Accordingly, I am satisfied that the decision of Registrar Nielsen should be set aside.

[27] I find the petitioner was successful in its appeal before me. I make the following orders:

1. the February 7, 2019, decision of Registrar Nielsen is set aside;

2. the matter is referred back to a registrar of the Supreme Court to have the petitioner's reasonable legal costs assessed; and

3. the petitioner is entitled to its costs for this appeal.

[28] The petitioner seeks reasonable legal costs for this appeal, rather than tariff costs. I am convinced by the petitioner's argument that this is consistent with the intent and scheme of the legislation, as well as the Court of Appeal's decision in *Baettig*, and I so order.

"Jackson J."