QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 23**

Date: **2021 01 26**
Docket: QBG 2822 of 2018
Judicial Centre: Regina

BETWEEN:

WESTFIELD TWINS CONDOMINIUM CORPORATION
PLAINTIFF

- and -

REGINALD MARK WILCHUCK, B2B BANK,
and CANADIAN IMPERIAL BANK OF COMMERCE
DEFENDANTS

Appearing:

Randall M. Sandbeck, Q.C.	for the plaintiff
No one appearing	for the defendant Reginald Wilchuck
James Kroczynski	for the defendant B2B Bank
No one appearing	for the defendant Canadian Imperial Bank of Commerce

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FIAT — ROBERTSON J.
JANUARY 26, 2021

INTRODUCTION

[1] Westfield Twins Condominium Corporation [Westfield] has successfully enforced a condominium lien for arrears by judicial sale of the condominium unit. Westfield now seeks to conclude the action with an assessment of the solicitor-client costs previously ordered and distribution of the sale proceeds.

[2] Both counsel, who are knowledgeable and experienced in this area of practice, believe this is the first time in Saskatchewan that a condominium corporation

has enforced payment of arrears of condominium fees by judicial sale of the condominium unit. As such, the decisions resulting from this action may serve as precedents for future cases.

[3] For the reasons which follow, I assess the solicitor-client costs payable at $19,000. While I concluded Westfield was entitled to full indemnity of solicitor-client costs and that the legal costs claimed were reasonable, the amount awarded is significantly less than the $33,000 claimed. The amount claimed was reduced for two reasons. First, the application of established principles of foreclosure law excludes pre-leave costs, unless awarded at the leave stage. Second, specific costs were awarded in three of the decisions involved in these proceedings. The proceedings represented by those specific cost awards should be excluded from the award of solicitor-client costs.

[4] Westfield shall receive payment from the sale proceeds of $22,085.50, representing the previous cost awards of $3,085.50 and this assessment of solicitor-client costs of $19,000. B2B Bank [B2B] shall receive payment of the remaining balance of sale proceeds for its mortgage on the condominium unit which was sold.

BACKGROUND

[5] The plaintiff, Westfield, is a condominium corporation operating under *The Condominium Property Act, 1993*, SS 1993, c C-26.1. The Westfield condominiums are located in buildings on parcels of land in the city of Regina, Saskatchewan bordered by Westfield Drive, Rae Street, Gordon Road and Lockwood Road.

[6] The defendant, Reginald Mark Wilchuck [Mr. Wilchuck], was the owner of a condominium unit in the Westfield complex, legally described as Unit 6 in Condo Plan 88R68050 [Unit 6].

[7] B2B has a mortgage loan secured against Unit 6. The amount owing as of January 17, 2020 was $109,126.78: affidavit of Brian Jahoor sworn January 31, 2020.

[8] The dispute between Westfield and Mr. Wilchuck generated a great deal of litigation in this Court and the Court of Appeal from 2018 to 2020. This involved four separate, but related, actions involving Westfield and Mr. Wilchuck. (Wilchuk and Wilchuck, though differently spelled in some documents and decisions, is the same person.) A brief chronology of the litigation is summarized below:

2017

October 25 — Mr. Wilchuck commenced application seeking an oppression remedy against Westfield under s. 99.2 of *The Condominium Property Act, 1993*: JC Regina, QBG 2692 of 2017 [1st Wilchuck action]

2018

January 8 — Layh J. dismissed 1st Wilchuck action, concluding at para. 25 that Westfield "did not act in an oppressive manner in assessing the fees" because it had "a statutory right to place liens and initiate collection action against owners who refuse to pay the special assessment of condominium fees levied upon them." and awarding costs of $1,000: *Wilchuk v Westfield Twins Condo Corporation*, JC Regina, QBG 2692 of 2017, reported at 2018 SKQB 2 [*QB#1*]

February 20 — Mr. Wilchuck issued statement of claim against Westfield repeating allegations from 1st Wilchuck action and asserting Westfield unlawfully levied condominium fees and a special assessment: JC Regina, QBG 534 of 2018 [2nd Wilchuck action]

April 6	Chow J. granted Westfield application to strike statement of claim in 2nd Wilchuck action in its entirety as an abuse of process, finding at para. 13 that "the within action seeks to re-litigate, once again, the very same matters at issue in the previous action adjudicated by Justice Layh.", and ordering costs of $1,500: *Wilchuk v Westfield Twins Condominium Corporation* (6 April 2018) Regina, QBG 534/2018 (Sask QB) [*QB#2*].
October 4	Tochor J. granted Westfield appointment to hear an application for leave to commence action: JC Regina, QBG 2822 of 2018 [foreclosure action]
November 13	Kalmakoff J. (as he then was) granted leave for Westfield to commence the foreclosure action against Mr. Wilchuck, pursuant to s. 3(2) of *The Land Contracts (Actions) Act*, RSS 1978, c L-3 (rep by *The Land Contracts (Actions) Act, 2018*, SS 2018, c L-3.001), seeking judgment against Mr. Wilchuck, foreclosure for the lien of arrears on Unit 6, sale of Unit 6, immediate possession of Unit 6, appointment of a receiver for the rents, issues and profits of Unit 6, and costs on a solicitor-client basis.
December 5	Court of Appeal dismissed Mr. Wilchuck's appeal against the order of Chow J. in the 2nd Wilchuck action: *Wilchuk v Westfield Twins Condominium Corporation* (5 December 2018) Regina, CACV 3242 (Sask CA) [*CA#1*].
December 18	Mr. Wilchuck issued statement of claim against Westfield alleging negligence and fraudulent misrepresentation: JC Regina, QBG 3533 of 2018 [3rd Wilchuck action]
<u>2019</u>	
January 15	Westfield issued its statement of claim in the foreclosure action, identifying arrears of common and/or reserve fund condominium fees as the basis for its claim, which arrears were continuing to accumulate.

February 21	Westfield statement of claim served on Mr. Wilchuck in foreclosure action.
March 22	Mr. Wilchuck served and filed a one-page statement of defence to the foreclosure action.
July 19	Robertson J. issued fiat in foreclosure action dismissing Mr. Wilchuck's application to strike Westfield's statement of claim and granting Westfield's application to strike Mr. Wilchuck's statement of defence, awarding costs of $1,000: *Westfield Twins Condominium Corporation v Wilchuck*, 2019 SKQB 173 [*QB#3*].
September 19	Smith J. declined an application by Mr. Wilchuck to reconsider Robertson J.'s fiat and instead directed the matter to the Court of Appeal.
November 14	Whitmore J.A. dismissed Mr. Wilchuck's application to extend the time to appeal *QB#3*: CACV 3498 (Sask CA) [*CA#2*].
2020	
February 20	Mitchell J. issued judgment striking statement of claim in 3rd Wilchuck action as *res judicata* and an abuse of process and declaring Mr. Wilchuck to be a vexatious litigant: 2020 SKQB 40 [*QB#4*] (appeal to Court of Appeal outstanding).
March 3	Robertson J. granted order *nisi* for foreclosure and dismissed Mr. Wilchuck's application for various relief, including trial of the issue and stay of foreclosure proceedings, with costs to be assessed on a solicitor-client basis: 2020 SKQB 58 [*QB#5*].
July 14	Court of Appeal ordered "that Mr. Wilchuk's appeal [against *QB#5*] be quashed as frivolous and manifestly without merit", awarding costs to Westfield: *Wilchuck v Westfield Twins Condominium Corporation*, 2020 SKCA 85 [*CA#3*].
October 15	Klatt J., in a foreclosure action, granted order abridging time for service and confirming judicial sale of Unit 6, with the issue of costs adjourned to be assessed by Robertson J.

2021

January 7 Robertson J. heard Westfield application on costs and payment of funds from judicial sale.

ISSUES

[9] This application raises two issues:

1. How should the solicitor-client costs awarded to Westfield for the foreclosure action by assessed?

2. What order should be made for payment of proceeds from the judicial sale?

ANALYSIS

[10] It will be helpful, before addressing the issues, to first review: the history of the litigation, in particular the foreclosure action; the costs awarded and claimed; the position of the parties; and the application of foreclosure law. That review should provide a context and frame of reference for discussion of the issues.

Previous Decisions

[11] The litigation summarized above involved four separate, but related, actions involving Mr. Wilchuck and Westfield. Mr. Wilchuck (spelled Wilchuk in the earlier actions) initiated three actions against Westfield. Mr. Wilchuck also filed three appeals against decisions of this Court arising from his actions, all of which were dismissed. Westfield initiated the foreclosure action. For ease of reference, I will repeat the listing of the written decisions below:

Date	Regina Court file #	Style of Cause	Judge	Costs award	Reported	Cited as
January 8, 2018	QBG 2692/17	*Wilchuk v Westfield Twins Condo Corporation*	Layh J.	$1,000	2018 SKQB 2	*QB #1*
April 6, 2018	QBG 534/18	*Wilchuk v Westfield Twins Condominium Corporation*	Chow J.	$1,500	Unreported	*QB #2*
December 5, 2018	CACV 3242	*Wilchuck v Westfield Twins Condominium Corporation*	Whitmore J.A. for the court	"with costs"	Unreported	*CA #1*
July 19, 2019	QBG 2822/18	*Westfield Twins Condominium Corporation v Wilchuck*	Robertson J.	$1,000	2019 SKQB 173	*QB #3*
November 14, 2019	CACV 3498	*Wilchuck v Westfield Condominium Corporation*	Whitmore J.A. in Chambers	$500	Unreported	*CA #2*
February 20, 2020	QBG 3533/18	*Wilchuck v Westfield Condominium Corporation*	Mitchell J.	Solicitor-client	2020 SKQB 40	*QB #4*
March 3, 2020	QBG 2822/18	*Westfield Twins Condominium Corporation v Wilchuck*	Robertson J.	Solicitor-client	2020 SKQB 58	*QB #5*
July 14, 2020	CACV 3623	*Wilchuck v Westfield Twins Condominium Corporation*	Barrington-Foote J.A. for the court	"usual way" $1,585.50	Unreported	*CA #3*

[12] The decisions listed above are relevant to the issues. They ruled upon the authority of Westfield to levy and enforce payment of and corresponding duty of Mr. Wilchuck to pay condominium fees and commented upon the conduct of both Westfield and Mr. Wilchuck.

[13] The authority of a condominium corporation to levy and enforce payment of fees and the duty of unit owners to pay those fees was reviewed by Layh J. in *QB#1* at paras 14-21 and by me in *QB#3* at paras 12-16 and *QB#5* at paras 22-30. The judgment of Layh J. in *QB#1* on the liability of Mr. Wilchuck was expressly recognized as *res judicata* by Chow J. in *QB#2* at para 14, me in *QB#3* at para 28, Mitchell J. in *QB#4* at para 47, me in *QB#5* at paras 19 and 31 and by Barrington-Foote J.A. for the Court of Appeal in *CA#3* at para 8.

[14] Layh J. commented favourably on the conduct of Westfield in *QB#1* at para 24:

> [24] Nor were the Board's actions harsh, harmful, in bad faith or an abuse of power. The Corporation acted even-handedly, respected unit owners and acted in their best interests.
>
> Conclusion
>
> [25] The Corporation and the Board did not act in an oppressive manner in assessing the fees. The Corporation has a statutory right to place liens and initiate collection action against owners who refuse to pay the special assessment of condominium fees levied upon them.

[15] The courts, in decisions listed above, commented unfavourably on the conduct of Mr. Wilchuck.

[16] Layh J., in *QB#1* at para 23, described Mr. Wilchuck's expectation of Westfield as "an unreasonable expectation."

[17] Whitmore J.A., in *CA#2* at para 16, referred to Mr. Wilchuck's continued legal manoeuvres:

> [16] … As stated, Mr. Wilchuck has been before the courts on numerous occasions on essentially the same issue. His conduct in bringing these numerous claims indicates that economy of legal expenses is not of any concern to him.

[18] Mitchell J., in *QB#4* at para. 88, after a review of all previous litigation, stated "Mr. Wilchuck is a litigant who will not take 'no' for an answer. Consequently, Mr. Wilchuck's access to this Court must be restricted".

[19] Barrington-Foote J.A., for the Court of Appeal in *Wilchuck CA#*3 at para 8, struck Mr. Wilchuck's appeal "on the basis it is frivolous and manifestly without merit".

Foreclosure Action

[20] It may also be useful to summarize the steps recorded in the court file on the steps taken in the foreclosure action: QBG 2822 of 2018.

Date	Order
October 4, 2018	Tochor J.: granting appointment for application for leave to commence action
November 5, 2018	Adjourned by consent
November 13, 2018	Kalmakoff J.: granting leave to commence action
January 15, 2019	Statement of claim issued
March 22, 2019	Statement of defence filed
April 2, 2019	B2B Bank noted for default
July 4, 2019	Robertson J.: applications to strike statements of defence and claim heard – decision reserved
July 19, 2019	Robertson J.: *QB#3* decision dismissing application to strike statement of claim and striking statement of defence in entirety
September 19, 2019	Smith J.: application to reconsider striking of defence – matter directed to Court of Appeal

November 13, 2019	Court of Appeal hearing of application for extension of time to appeal *QB#3* - decision reserved
November 14, 2019	Whitmore J.A.: *CA#2* refusing extension of time to appeal against *QB#3*
February 4, 2020	Robertson J.: application for order *nisi* for sale by real estate listing heard – decision reserved
March 3, 2020	Robertson J.: *QB#5* decision granting order *nisi*
July 7, 2020	Court of Appeal hearing of appeal of *QB#5* – decision reserved
July 14, 2020	Barrington-Foote J.A. for Court of Appeal: *CA#3* dismissing Mr. Wilchuck's appeal against *QB#5*
October 15, 2020	Klatt J.: granting order confirming judicial sale and adjourning issue of costs to local registrar to set a date before Robertson J.
January 7, 2021	Robertson J.: hearing on costs – decision reserved.

Costs Claimed by Westfield

[21] Westfield asks that its costs of the foreclosure action be assessed at $33,000, representing actual costs to October 28, 2020 of $32,586.94 and recognizing it has since incurred additional costs. Westfield argues that this was a unique action which merits full or substantial indemnity of costs on a solicitor-client basis.

[22] Westfield filed invoices from its law firm to support its claim for costs, attached as exhibits to affidavits of its President, Darren Bird, sworn on September 30 and December 17, 2020.

[23] The invoices are detailed accounts of services provided on the foreclosure action. The dates of the invoices and amounts stated on the invoices are set out below:

Invoice Date	Amount (fee, taxes and disbursements)
September 6, 2019	$9,506.33 (including $3,129.75 in pre-leave costs)
March 6, 2020	$9,465.92
October 28, 2020	$13,614.69
Total	$32,586.94

[24] As stated above, Kalmakoff J. granted leave to commence the foreclosure action on November 13, 2018. This decision did not address the question of pre-leave costs.

[25] Westfield's lawyer, Mr. Sandbeck, Q.C., also filed, at my request, a letter dated January 8, 2021 stating its pre-leave costs at $2,732 with disbursements of $397.75 for a total of $3,129.75. Mr. Sandbeck confirmed that this amount was included in the invoice of September 6, 2019, as set out above.

B2B Bank's Position

[26] B2B has a mortgage registered against Unit 6. Its share of the sale proceeds will be reduced by the award of costs to Westfield.

[27] B2B opposes Westfield's application, arguing that the assessment of costs should be consistent with well-established principles of foreclosure practice, including: denying pre-leave costs, unless awarded at the leave stage, relying on *Royal Bank v Millsap*, 2006 SKQB 464 at para 13, 296 Sask R 144; and limiting solicitor-client costs to the standard foreclosure costs of $4,500. relying on *CIBC Mortgages Inc. v Greyeyes*, 2017 SKQB 313.

[28] B2B also points out that Westfield was awarded specific costs at some stages of the foreclosure action and should not now be permitted to seek more than what

was awarded then, since those cost awards are *res judicata*. B2B also argued that Westfield was under no obligation to pursue judicial sale and could have simply relied on registration of its lien, avoiding the cost of litigation.

Westfield Response

[29] Westfield, in response, points out that B2B was not involved in the foreclosure action. It did not appear and did not oppose Westfield's action, being noted for default of any defence. Usually, the mortgagee (commercial lender) steps in and pays the condominium fee arrears and proceeds with its own foreclosure action. (I made the same observation in *QB#5* at para 28; see also *Royal Bank of Canada v Partridge*, 2018 SKQB 216 at para 10.) In this case, B2B stood by and took no part in the foreclosure action, but will now benefit by receiving a portion of the sale proceeds.

[30] Westfield argued that if it had not pursued enforcement through judicial sale, the unit owners would have been prejudiced, since they would bear the burden of higher fees to make up for Mr. Wilchuck's default. That would be contrary to the purpose of the legislation in requiring all unit owners to share the costs of maintaining the condominium property. Further, as a matter of policy, condominium corporations should not be deterred from taking enforcement action against defaulting unit owners for fear of the inevitable costs it will incur. Westfield asked what costs would be awarded if there was no mortgage?

Court's Discretion over Costs

[31] Both Westfield and B2B agree that while the court has discretion over award and assessment of costs, that discretion must be exercised in a principled manner. I agree.

[32] *The Queen's Bench Rules*, in Rule 11-1, states the discretion of the Court over costs and lists of relevant factors to consider:

> **Discretion of Court**
>
> **11-1**(1) Subject to the express provisions of any enactment and notwithstanding any other rule, the Court has discretion respecting the costs of and incidental to a proceeding or a step in a proceeding, and may make any direction or order respecting costs that it considers appropriate.
>
> **...**
>
> (4) In exercising its discretion as to costs, the Court may consider:
>
> (a) the result of the proceeding;
>
> (b) the amounts claimed and the amounts recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the proceedings;
>
> (e) the apportionment of liability;
>
> (f) any written offer to settle or any written offer to contribute;
>
> (g) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding;
>
> (h) a party's denial of or refusal to admit anything that should have been admitted;
>
> (i) whether any step in the proceeding was improper, vexatious or unnecessary;
>
> (j) whether any step in the proceeding was taken through negligence, mistake or excessive caution;
>
> (k) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated his or her defence from that of another party; and
>
> (l) any other matter it considers relevant.
>
> …

Assessment of Costs

[33] The decision to award solicitor-client costs was made by me in *QB#5*, at the order *nisi* stage of proceedings. In *QB#5* at paras 34-40, I gave reasons for awarding

costs on a solicitor-client basis. In awarding costs on this basis, I had express regard for the direction of Kalmakoff J. (as he then was) in *Canterbury Lofts Condominium Corporation v Dureau*, 2016 SKQB 410 at para 48 [*Canterbury Lofts*] that "costs in foreclosure proceedings are generally not assessed until the *order nisi* stage of proceedings."

[34] This assessment of costs was expressly contemplated in para. 40 of *QB#5* and para. 14 of the order *nisi*:

> Costs
>
> 14. The plaintiff shall be entitled to costs of and incidental to this application, to be assessed on a solicitor-client basis.

[35] Since the appeal of *QB#5* was quashed, it is not subject to further review. The issue then is not whether solicitor-costs should be awarded, but rather in what amount? That requires an assessment of costs claimed.

[36] B2B raised four objections to Westfield's claim for full or substantial indemnity: 1) the legal costs claimed are excessive; 2) pre-leave costs should be excluded; 3) the claim exceeds the standard foreclosure costs of $4,500; and 3) the claim includes applications for which costs were already awarded. I will address each of these objections. Before doing so, however, I wish to address an issue raised by counsel, namely the application of foreclosure law to this case.

Application of Foreclosure Law

[37] B2B argued that this application should be determined applying settled foreclosure law and principles. This position finds support in *Canterbury Lofts* at para 28, where Kalmakoff J. stated that "despite the obvious differences between condominium corporations and mortgage lenders, I am satisfied that … regular

principles relating to foreclosure proceedings should apply to condominium corporations enforcing liens registered under ss. 63(2)(b) via foreclosure". And in *QB#5* at paras 24 and 25, I found that the remedies and procedures provided for commercial foreclosure proceedings applied to enforcement action under *The Condominium Property Act, 1993*.

> [24] Westfield filed a lien against the condominium unit and now seeks to realize on that lien by obtaining judgment against the defendant and by taking and selling the real property. The *CPA, 1993* [*The Condominium Property Act, 1993*, SS 1993, c C-26.1] does not prescribe the enforcement process. It does not need to, since the Legislature has already provided remedies and procedures in *The Land Titles Act, 2000*, SS 2000, c L-5.1 and *The Land Contracts (Actions) Act, 2018* [SS 2018, c L-3.0001].
>
> [25] This Court has also provided procedural direction in *The Queen's Bench Rules*, in particular Division 5 and 6 of Part 10, for foreclosure proceedings. Inasmuch as the Rules do not expressly refer to arrears of condominium fees, Rule 1-7(2) expressly provides that "These rules may be applied by analogy to any matter arising that is not dealt with by these rules." Since "the lien may be enforced in the same manner as a mortgage", the lien claimant may follow that process.

[38] Westfield argued in response to B2B that different policy considerations apply to enforcement of fees by condominium corporations than to commercial foreclosures. I agree. To repeat what Kalmakoff J. wrote in *Canterbury Lofts* at para 28, there are "obvious differences between condominium corporations and mortgage lenders".

[39] First, it should be recognized that the award of solicitor-client costs in commercial foreclosure proceedings is premised on the borrower's contractual obligation: see *Rozdilsky v Kokanee Mortgage M.I.C. Ltd*., 2020 SKCA 1 at para 9; and *Canterbury Lofts* at para 46. While, again, the decision to award solicitor-client costs in this case was made in *QB#5*, the reason for doing so was not based on contract, but

on the exceptional circumstances of the case and with regard to the particular relationship and obligation of unit owners to the condominium corporation.

[40] Second, this Court has, in numerous decisions, recognized and supported the legislative policy which protects debtors against commercial lenders seeking to realize on their security by foreclosure action: see, for example, *CIBC Mortgages Inc. v Taylor*, 2018 SKQB 118 at para 20, [2018] 9 WWR 340; and *CIBC Mortgages Inc. v Dubois*, 2003 SKQB 472 at para 7, 240 Sask R 50. Kalmakoff J., in *Canterbury Lofts* at para 40, found the same policy applicable to condominium enforcement for payment of arrears of condominium fees.

> [40] *Dubois* [*CIBC Mortgage Corp. v Dubois*, 2003 SKQB 472, 240 Sask R 50], of course, dealt with a situation where a mortgage lender was seeking to foreclose against a borrower, but in my view Justice Klebuc's comments in that case apply with no less force to a situation such as this one, *i.e.*, where the mortgagor is a person in arrears of payment of common fund and reserve fund fees, and the mortgagee is a condominium corporation seeking to enforce its lien pursuant to s. 63 of the *CPA* [*The Condominium Property Act, 1993*, SS 1993, c C-26.1].

[41] But, as stated above, Kalmakoff J. in *Canterbury Lofts* at para 28 expressly recognized that there were "obvious differences between condominium corporations and mortgage lenders", adding at para. 42:

> [42] A lien-holding condominium corporation's situation is different from that of a mortgage lender for a number of reasons, including the purpose of the levy and collection of common and reserve fund fees, and the collective duty that unit holders in a condominium owe to one another in relation to those fees. It is arguably even different from that of a judgment creditor. But those differences do not change the fact that our Legislature has chosen to impose a regime that recognizes and protects the interest of the individual in the ownership of real property. …

[42] Smith J. expressed similar sentiments in *Hallmark Place Condominium Corporation v McKenzie*, 2015 SKQB 260 at paras 30-36, 482 Sask R 309, in awarding substantial indemnity of solicitor-client costs in favour of the condominium corporation.

[43] While the procedure is the same as for a mortgage lender, the policy considerations are different where, as here, a condominium corporation seeks to enforce payment of arrears of condominium fees. That is a relevant consideration informing the exercise of the court's discretion.

[44] The court continues to exercise a supervisory jurisdiction. Judicial sale remains an equitable remedy. But the legislative concern with an imbalance of bargaining power between large financial institutions lending to individuals and then foreclosing on their homes is surely different when condominium corporations apply the same process to enforce payment of fees owed by unit owners.

[45] While not in any way diminishing the value of commercial lending, which supports our economy, commercial lenders do so to make a profit for their shareholders. Condominium corporations, in contrast, levy fees to pay for upkeep and repair of the property which is communally owned by the unit owners. If one unit owner fails to pay their share, then either the burden falls upon the other unit owners or maintenance and repairs are deferred, which ultimately reduces the enjoyment and value of the condominium property.

[46] As explained in *QB#1, #3 and #5,* the condominium corporation has a right to levy fees and the unit owner has a duty to pay. The legislation seeks to ensure that all unit owners pay their share. When a condominium corporation takes

enforcement action to compel payment, the common good is the purpose, not recovery of a secured loan made by voluntary agreement.

[47] Layh J. in *QB#1* at para 22 compared condominium fees and municipal taxes. As I wrote in *QB#3* at para 13, "*The Condominium Property Act, 1993* establishes condominiums as a form of communal ownership with democratic governance of the corporation by its member-owners."

[48] So while the procedure is the same, the court must remain mindful of the different policy considerations at play. While those may influence decisions on how to apply practices and principles of foreclosure law, the established practices and principles will provide the starting point for consideration in any action to enforce payment of condominium fees by judicial sale of the condominium unit.

[49] With this in mind, I will now address the specific objections.

Are the costs claimed excessive?

[50] B2B referred to *Royal Bank of Canada v Hollmann*, 2017 SKQB 299 at para 12 [*Hollmann*] in which Barrington-Foote J. (as he then was) commented critically on the "limited assistance" which statement of accounts offer in the assessment of costs. I agree with those comments. Regardless, I have reviewed the three accounts (invoices) and find them in order. More importantly, there is more to consider in deciding whether the costs claimed are reasonable or excessive, namely the conduct of the action itself. In that regard, I have not only the court record, but also my personal involvement in hearing two of the previous applications on the foreclosure action.

[51] On the foreclosure action, Westfield appeared represented by counsel in Queen's Bench Chambers on seven occasions and in the Court of Appeal on two

occasions. Mr. Wilchuck was present at four of the Queen's Bench hearings and both of the Court of Appeal hearings. B2B only appeared once, represented by Mr. Kroczynski on the hearing of this application. Four written decisions resulted: two from Queen's Bench; and two from the Court of Appeal. None of this would typically occur in a commercial foreclosure action, where court appearances are usually brief and decisions made orally in Chambers.

[52] From my review of the accounts and the steps involved in the foreclosure action, I am satisfied the amount billed by the law firm and claimed by Westfield is reasonable and not excessive.

Pre-leave costs

[53] It is settled law that pre-leave cost will not normally be ordered against a mortgagor: *Affinity Credit Union v Rawlyk*, 2014 SKCA 34, 433 Sask R 233. Generally, the decision to award pre-leave costs must be made at the leave stage. (see: *Bridgewater Bank v Haines*, 2012 SKQB 357, 403 Sask R 316, a decision of Danyliuk J.; *Canterbury Lofts* at para 48; and *Bridgewater Bank v Butz*, 2020 SKQB 71, a decision of Layh J.)

[54] In this case, there was no application for nor award of costs on granting leave. Given the novel nature of this action, it may not have been in anyone's mind at that hearing. Even so, I see no good reason to depart from the practice of determining awards of pre-leave costs at the leave stage. And, as stated above, I see value in certainty and consistency in following established practice, provided it is not inconsistent with the different policy considerations.

[55] In declining to award pre-leave costs, I note that there was little argument on reasons to depart from the practice. It may be, in a future case, another judge may be persuaded to do so.

[56] The exclusion of pre-leave costs reduces the total invoiced amount from $32,586.94 to $29,457.19 ($32,586.94 - $3,129.75 = $29,457.19).

Standard foreclosure costs of $4,500

[57] This Court has recognized a standard foreclosure cost amount for decades. Counsel agree the current standard amount is $4,500. This standard has advantages for the parties, counsel and the court. First, it promotes efficiency in foreclosure practice. Most foreclosure actions are conducted by law firms that specialize in this work and do it on a volume basis. Second, parties know in advance, or at least have a good idea, what costs will be awarded. Third, the court avoids the task of scrutinizing individual accounts in every case.

[58] In *Hollmann*, Barrington-Foote J., at paras. 9-10, while recognizing the standard foreclosure costs, stated they should not "be awarded as a matter of course. The discretion to award costs must always be exercised in a principled manner, and on the facts." The point is that the court may depart from the standard where the facts support awarding more or less in costs. In my view, this is such a case.

[59] The circumstances of this foreclosure action were not only unique, in that it appears to have been the first enforcement action by a condominium corporation to proceed to judicial sale of the condominium unit, but more importantly went beyond the norm of most foreclosure actions in the opposition of the defaulting owner who raised obstacles that increased the cost of pursuing the action. Much more was required of the law firm representing Westfield than would be the case in an ordinary commercial foreclosure action. That is obvious from the history of the litigation and, in particular, the foreclosure action, as recounted above.

[60] As stated above, I have found the legal costs charged to be reasonable and not excessive. I am also satisfied that the facts of this case warrant a full or substantial indemnity of solicitor-client costs.

Prior cost awards

[61] B2B argued that those applications for which a specific cost amount was awarded should be removed from the assessment of solicitor-client costs. This would include the application resulting in *QB#3*, in which costs of $1,000 was awarded, and the appeals resulting in *CA#2*, in which costs of $500 were awarded, and *CA#3*, in which costs were awarded "in the usual way". Costs for *CA#3* were assessed on September 9, 2020 at $1,585.50. So the total of the three cost awards is $3,085.50. This amount is claimed as a separate item in the distribution of costs.

[62] Since I was the judge who made the award in *QB#3*, I can say it was not my intent to remove any part of the foreclosure action from my later award in *QB# 5* of solicitor-client costs at the order *nisi* stage. But that is the effect. I agree with B2B that where a specific amount of costs was awarded, that award should not be revisited in the assessment of solicitor-client costs. In other words, that part of the proceedings should be removed from the assessment of solicitor-client costs and the costs for that part limited to what was awarded. That would apply to the $1,000 award in *QB#3*, $500 in *CA#2* and $1,585.50 in *CA#3*, for a total of $3,085.50.

[63] While the materials filed do not isolate the legal costs associated with the application resulting in *QB#3* and appeals resulting in *CA#2* and *CA#3*, I think it is safe to assume the actual costs incurred by Westfield were higher than the amounts awarded. Some further deduction then should be made from the $33,000 claimed ($29,457.19, after deduction of pre-leave costs).

[64] Westfield appeared by counsel in the foreclosure action on eight occasions, six times in Queen's Bench and twice in the Court of Appeal. There would also be work outside preparation for an appearance in court. While it is a rough estimate, if one divides the eight appearances into the claim of $29,457.19 (the amount after deduction of pre-leave costs), the result is $3,682. Taking that as an estimate of the actual costs incurred for each appearance and multiplying by the three excluded appearances, the total is $11,046. If one deducts $11,046 from $29,457, the result is $18,411. I would increase this amount to $19,000, recognizing that the original $33,000 claim would not adequately cover the necessary cost of this application. (The last invoice was dated October 28, 2020, at which point the total legal costs invoiced totalled $32,586.94.)

Payment of Proceeds of Judicial Sale

[65] The order confirming sale states that Unit 6 was sold for $81,000. The supplementary affidavit of Darren Bird sworn December 17, 2020 states at para. 4 that, after adjustments and payments of distributions, the remaining net sale proceeds of $51,998.27 were paid into court.

[66] Westfield, in its application, asked for an order that the sale proceeds from the judicial sale be paid out of court to Westfield, care of its lawyers Olive Waller Zinkhan & Waller LLP, in the amount of $3,085.50 to satisfy the previous cost awards and $33,000 in solicitor-client costs, with the balance remaining to B2B Bank, care of its lawyers Duchin Bayda & Kroczynski.

[67] There was no challenge to the accounting of the sale proceeds or priority of payment. This issue then turned on the determination of the first question; what costs should be awarded to Westfield?

[68] For the reasons stated above, Westfield shall be entitled to payment of $3,085.50 to satisfy its cost awards and an additional $19,000 as substantial indemnity for the solicitor-client costs awarded for the proceedings not covered by the specific awards. The total payable to Westfield then is $22,085. The balance of the sale proceeds are payable to B2B.

[69] Finally, I wish to thank counsel for their assistance.

ORDER

[70] It is ordered that:

1. Westfield be awarded its costs of this action assessed at the amount of $19,000;

2. Westfield be paid $22,085 from the sale proceeds of the judicial sale of Unit 6, representing prior cost awards of $3,085.50 and this award of $19,000 in solicitor-client costs, care of its law firm, Olive Waller Zinkhan & Waller LLP;

3. B2B be paid the balance of the sale proceeds, care of its law firm, Duchin Bayda & Kroczynski.

J.
D.N. ROBERTSON