Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 072 8880 v Sully, 2021 ABQB 901

Date: 20211110
Docket: 1903 03432
Registry: Edmonton

Between:

Condominium Corporation 072 8880

Plaintiff

- and -

Ian Howard Sully, aka Ian Howard Scully

Defendants

Memorandum of Decision
of the
Honourable Madam Justice L.K. Harris

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[1] The Plaintiff is a Condominium Corporation registered pursuant to the *Condominium Property Act*, R.S.A 2000, c. C-22 (the "*Act*") and a condominium plan in relation to a property located at 136D Sandpiper Road, Fort McMurray, Alberta (the "Property").

[2] The Defendants are the registered owners of Unit #601 and a parking unit within the Property (the "Unit").

[3] The Plaintiff has passed bylaws which empower the Plaintiff to raise condominium fees and special assessments from owners of units within the Property, including the Defendants.

[4] The Plaintiff alleges that the Defendants were delinquent in paying certain condominium fees and special assessments for a period of time. The Plaintiff claims interest while those

amounts remained unpaid at the rate of 18% per annum, as well as costs on a solicitor client basis. The Plaintiff brought a motion for summary judgment before a Master of the Court of Queen's Bench. The Master awarded a fixed amount of costs to the Plaintiff. The Plaintiff appeals the Master's decision pursuant to Rule 6.14 of the *Alberta Rules of Court*.

I. Background

[5] On February 14, 2019, the Plaintiff filed a statement of claim against the Defendant Scully alleging non-payment of condominium fees and special assessments, and claiming interest calculated at 18% per annum plus costs on a solicitor-client basis. The statement of claim was amended on June 4, 2019 to add Bruce as a Defendant as she had subsequently been added to title. The Defendants filed a statement of defence on July 5, 2019. The Defendants alleged that they did not learn of the Plaintiff's claim until June 4, 2019. They did not dispute the amount owed for the outstanding condominium fees and special assessments (and that outstanding amount has since been paid) but dispute that they owe the Plaintiff interest or costs.

[6] On October 28, 2019, the Plaintiff brought an application to strike the Defendants' statement of defence and for an award of costs on a solicitor-client basis, alleging that the Defendants had no defence to the claim for interest and costs, and that the only issue to be determined is the amount to be awarded to the Plaintiff. Although the application did not expressly say it is a summary judgment application, it did refer to *Rules* 7.2 and 7.3 as being *Rules* relied upon, which are the summary judgment rules. At the time the application was filed, the Plaintiff alleged that the amount of $5,018.85 remained owing, consisting of $199.79 in interest and $4,819.06 in legal fees, although it noted that additional interest and fees would accrue until the date of payment.

[7] The application was heard by the Master on January 27, 2020. The Master's Order is brief, stating that "the Plaintiff is awarded costs of this action in the amount of $1,271.25", to be paid by the Defendants within 30 days of the date of the Order. The Order makes no mention of granting summary judgment or whether the Plaintiff's application to strike the statement of defence was granted.

[8] The Plaintiff appeals from the decision of the Master. The basis for the Plaintiff's appeal is that the Master made errors in fact and law by fixing the amount of costs payable at $1,271.25 without hearing further evidence or argument with respect to the steps taken in the litigation in order to determine whether the costs as claimed were necessary. The Plaintiff states that (quoting from paragraph 6 of its written submissions):

> "It is the Corporation's submission that it is entitled to an award of costs on a solicitor-and-own-client full indemnity basis, to be assessed at an assessment hearing. This is the remedy that was sought before the learned Master on January 27, 2020, together with judgment for interest owing on unpaid condominium fees."

[9] The chronology of events leading up to the application is as follows:

2008	Scully purchased the Unit.

2011	The Defendants moved out of the Unit to relocate to Airdrie. The Unit was rented to tenants.
Unknown	Exhibit 2 to the Affidavit of Ashley Shouchuk, a legal assistant to counsel for the Plaintiff, is a form titled "Home Owner Information". The form discloses a phone number for Scully and his personal email address (the "nytronut email address"). There is no evidence to indicate when this form was completed or by whom. It does indicate that the Unit is rented, which suggests that the form was completed at some point in or after 2011. Scully attests to the fact that the form was not his and he did not fill it out.
September 2015	There was a change in management at the Property. The Property Manager emailed a request to Scully to complete and submit a Pre-Authorized Debit Agreement ("PAD") authorizing withdrawals from Scully's bank account.
November 26, 2015	The Property Manager emailed Scully again asking for a completed PAD Agreement. Scully provided that form the following day. In the PAD Agreement Scully provided an updated phone number and the nytronut email address. The PAD Agreement provided that Scully authorized the Plaintiff to debit his bank account for regular monthly condominium payments and/or one-time payments from time to time as determined by the Board of the Plaintiff.
January 2016	An error was made by the Plaintiff's Property Manager. A double withdrawal was made from unit owners' accounts for condo fees. The Property Manager subsequently reimbursed Scully.
January 26, 2017	The Property Manager sent an email to Scully at a work email address advising that there were 3 payments of condo fees missing for September – November 2015 for a total of $1,353.60, and giving him 30 days to update his account. The email was rejected by the server with a notice of the rejection being sent back to the Property Manager.
March 6, 2017	Despite the rejection of the previous email, the Property Manager sent another email to Scully to the same defunct address attaching a condo fee statement "which includes your arrears". The Property Manager asked "kindly check your banking records and advise as next month these arrears will begin collecting interest." This email was also rejected by the server with a notice of the rejection being sent back to the Property Manager.
May 22, 2017	An exchange of emails took place between the Property Manager and Scully at his nytronut email address with

	regards to a withdrawal of a special assessment from his account. The Property Manager required an email from Scully authorizing the withdrawal. Scully provided that authorization. There is no mention of any specific amount authorized. There is no mention of the issue of the arrears.
June 23, 2017	The Property Manager emailed Scully at his nytronut email address about a key for the Unit. There is no mention of the issue of the arrears.
August 15 2017	The Property Manager emailed Mr. Scully at his nytronut email address about removing tin foil from his windows. There is no mention of the issue of the arrears.
April 9, 2018	A statement was rendered by the Plaintiff which showed charges and payments for condo fees each month between September 2016 and April 2018. It also appears to show a one-time charge of $1,353.60 on February 28, 2017, a Special Assessment of $1,200 on May 7, 2017 and a payment of $600.00 on May 24, 2017. There appears to be a balance owing of $20.00 as of February 1, 2018 and interest of $352.42 as of April 1, 2018. The email from the Property Manager sending the statement to Scully at the nytronut email address simply states, “please see attached statement, thanks”. There is no specific mention of arrears owing for condominium fees or special assessments.
June 2018	The Defendants moved from Airdrie to Rimbey. They paid Canada Post for one year of mail forwarding.
June 28, 2018	Another statement rendered by the Plaintiff shows largely the same information as the April, 2018 statement, with interest increased to $445.56. The email sending the statement to Scully at the nytronut email address from the Property Manager states, “please see attached statement of your account. If payment arrangements were missed, please let me know so we can update your account, thanks”.
July 19, 2018	The Property Manager emailed Scully at his nytronut email address to advise his smoke detector needed replacing, and provided some options including having the Plaintiff supply and install the smoke detector and then charging the unit owner.
October 17, 2018	Counsel for the Plaintiff wrote a letter addressed to Scully and sent to “400601, 136 Sandpiper Road” and to his address in Airdrie advising that he owed the Plaintiff $3,886.57, comprised of $1,353.60 for the February 28, 2017 special assessment, $600 for the May 24, 2017 special

	assessment, $421.87 for the November 1, 2018 condo fee, plus additional amounts for legal fees and disbursements and interest at 18% per annum. The letter was returned unclaimed.
November 5, 2018	The Property Manager emailed Scully at his nytronut email address with a message, “Please see attached statement, thanks”. There is no indication in the email that there was any amount owing or that the Plaintiff was seeking any payment from Mr. Scully.
February 14, 2019	A statement of claim and a certificate of lis pendens against the Unit were issued.
March 7, 2019	A process server swore an affidavit of attempted service stating that she attempted to serve Scully with the statement of claim at the Unit on March 27, 2019 (given the date the affidavit is sworn the date of attempted service does not make sense. Presumably, it is a typo).
March 21, 2019	A second process server swore an affidavit of attempted service indicating that she attempted to serve Scully at a rural address in Ponoka County that she was provided. That address was incorrect as it was a vacant field.
May 2019	An application for substitutional service was made for an order authorizing service of the statement of claim upon Scully at his address in Rimby, based upon a demographic search on his name obtained by Plaintiff’s counsel.
July 2019	Another error was made by the Property Manager withdrawing duplicate condo fees. Again, the Property Manager reimbursed Scully. There is no evidence that any discussion was had with Scully about the arrears or the Plaintiff’s claim against him.
July 4, 2019	Scully paid the outstanding fees via etransfer to the Plaintiff.
July 4, 2019	The Property Manager sent an email to Scully confirming receipt of the outstanding fees, and stating in part, “the legal fees are still outstanding as they agreed on arrears plus full legal fees with interest waived”.
July 5, 2019	Scully filed his Statement of Defence.
November 2019	A Transfer of Land was registered at Land Titles transferring the Unit into joint tenancy between Scully and Bruce.

II. Positions of the Parties

[10] The Plaintiff's position is that the Master erred in fact and law in ordering payment of costs in the amount of $1,271.25. It says that the law is clear as to the ability of a condominium corporation to raise operating funds, and to collect interest on arrears owed in addition to all outstanding costs incurred. Bylaws are in essence a contract between a Condominium Corporation and an owner, in this case, the Bylaws of the Plaintiff attached as Exhibit 1 to the Affidavit of Brandon Parsons, (the "*Bylaws*") permit collection of interest at the rate of 18% per annum and costs on a solicitor client basis.

[11] The Plaintiff states that numerous attempts were made to contact Scully to make arrangements for him to pay the arrears. When he failed to respond to requests for payment, the Plaintiff had no choice but to commence an action. Scully's conduct during the civil action has caused delay and increased the costs he ultimately is responsible for paying. That conduct included scheduling two assessments before an Assessment Officer which were not the proper procedure and one of which required the attendance of Plaintiff's counsel. The Plaintiff describes the Defendants' conduct as, "nothing short of obstructive". To not grant the Plaintiff's application would in effect encourage delinquent property owners, which is not good policy.

[12] Further, the Plaintiff states that there is no dispute that arrears were owed, that interest is calculated at 18% per annum, or that the scale of costs is to be on a solicitor-client basis. The only dispute is whether all of the costs claimed by the Plaintiff related to steps that were necessary. The error of the Master, says the Plaintiff, was in assessing costs on some other scale and fixing the amount without explaining the basis for doing so. The Plaintiff states that had the Master wished to set the actual amount of costs owed, then it was incumbent upon him to perform a review of the Plaintiff's accounts, line by line, to determine whether each step was reasonable, and explain why he was exercising his discretion in the way he did. The Plaintiff states that they did not request the Master to perform such an assessment as this is not a reasonable or efficient use of the Court's time, and that such an assessment ought to be performed by an Assessment Officer. An assessment would also protect the confidentiality of the accounts, which should not be aired in open Chambers.

[13] As a result, the Plaintiff argues that the Master's Order must be overturned. The Plaintiff wishes to have a hearing into its application *de novo*, such that I consider the application afresh without deference to the Master's decision. The Plaintiff seeks an order declaring that the Defendants owe interest for the total amount of arrears owed, calculated at 18% per annum, plus costs on a solicitor-client basis, to be assessed at a later assessment by an Assessment Officer.

[14] In response, the Defendants argue that the manner in which the Plaintiff proceeded was entirely unnecessary. At all times, the Plaintiff had Mr. Scully's correct contact information. All the Plaintiff needed to do was to call him to inquire as to why he had not paid. The Defendants had a long history of paying condo fees without issue, and in fact, had signed the PAD Agreement and then also provided an email authorization to withdraw funds, including a special assessment, from their account. There was a history of errors on the part of the Property Manager which were confusing and required significant effort on the part of the Defendants to clear up. The Court ought not to award sloppy accounting. As soon as the existence of the statement of claim came to their attention, they paid the arrears owed. They object to paying the interest on the basis that the Plaintiff had waived the interest charge, and object to paying the

costs claimed on the basis that the steps taken by the Plaintiff in furtherance of the statement of claim were unnecessary.

[15] The Defendants argue that the Master did consider all relevant evidence presented by the parties and exercised his discretion to reject the Plaintiff's claim for solicitor-client costs. The assessment of costs is fully within the discretion of the Court, and the Master's decision in that regard is entitled to deference, notwithstanding the fact that this is an appeal de novo. It simply is not efficient to have a decision from the Master followed by a costs assessment and the amounts involved in this case show exactly why costs are within the discretion of the Court.

III. Decision

A. Standard of Review

[16] ***Bahcheli v. Yorkton Securities Inc***., 2012 ABCA 166 provides that under *Rule* 6.14(3), the standard of review that I am to exercise is one of correctness on issues of fact and law. The parties are entitled under the *Rules* to file additional evidence on such an appeal, and a Judge hearing such an appeal is entitled to conduct a de novo analysis of the issues, reviewing all relevant and material evidence, submissions and the record in order to reach a decision. Deference to the Master's decision is not required: ***Fraser v. Jeffries***, 2019 ABQB 145 (CanLii).

[17] As noted previously, the Order of the Master is brief and does not provide much in the way of an explanation as to why he arrived at the decision he did. There is nothing within the Order that addresses a summary judgment application or the application to strike the statement of defence. I conclude that the Plaintiff was bringing a summary judgment application by virtue of the reference to the applicable *Rules* in the application. I also conclude that by virtue of having awarded costs against the Defendants the Master granted the summary judgment application, at least in part.

[18] I have reviewed the Record of proceedings before the Master and note that similarly, it does not provide much explanation as to why he reached the decision he did except that there was some discussion about an offer made to resolve the action and that being the basis for the order for costs.

[19] In accordance with ***Bahcheli,*** *supra,* and ***Fraser,*** *supra*, I will therefore conduct a de novo analysis of the Plaintiff's summary judgment application and request that the statement of defence be struck.

B. The Application for Summary Judgment

[20] In ***Weir-Jones Technical Services Inc. v Purolator Courier Ltd***, 2019 ABCA 49, the Alberta Court of Appeal applied the decision of the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 to Rule 7.3.

[21] At para 47, the Court described the proper approach to summary judgment applications as follows:

> Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or

> preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

[22] At para 25, it was observed that it is appropriate, where possible, for a summary judgment judge to make findings of fact on the record before the Court. At para 33, the Court noted that factual elements of the case must be proven on a balance of probabilities and at para 36, the Court noted that the mere presence of some conflicting evidence does not preclude summary judgment.

[23] The key issue is whether it can be said that there is no genuine issue requiring a trial such that the Court is able to reach a fair and just determination on the merits.

[24] ***Hryniak v. Mauldin,*** *supra*, states:

> 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.

[25] As this was an application for summary judgment, all of the relief sought in the statement of claim was before the Master, and is before me, to consider**: *Condominium Corporation No. 311443 v. Goertz***, 2016 ABCA 362 (CanLii) ("***Goertz***"), at para. 28.

[26] If I determine that there is no genuine issue for trial, the issues to be determined in a summary way are:

(a) Whether the Plaintiff's claim for interest is proven on a balance of probabilities;

(b) Whether the Plaintiff is entitled to costs;

(c) If the Plaintiff is entitled to costs, on what scale?

(d) If Plaintiff is entitled to costs, am I able to assess those costs or should that issue be referred to for an assessment pursuant to the Rules of Court?

C. The Plaintiff's Entitlement to Interest

[27] I find that the Record before me permits me to reach a determination on the merits of the Plaintiff's claim for interest at 18% per annum, and that there is no genuine issue for trial here.

[28] There is no question that the Plaintiff is entitled to interest on arrears, calculated at 18% per annum, on outstanding fees owed by the Defendants, pursuant to ss. 40 – 42 of the *Act* and s. 3(j) of the *Bylaws*. Unlike the provisions relating to legal expenses, there is no condition that interest be "required". Interest is simply assessed "at the Interest Rate calculated from the due date".

[29] The plain wording of s.3(j) of the *Bylaws* therefore requires payment of interest on arrears calculated from the due date of the arrears up to the date they are paid. Section 76 of the *Condominium Property Regulation*, Alta Reg 168/2000 limits the rate of interest that may be charged to 18% per annum.

[30] Scully argues that the claim for interest was waived by the Plaintiff, and therefore he is not liable to pay interest. He points to an email from the Property Manager on July 4, 2019 stating in part, "the legal fees are still outstanding as they agreed on arrears plus full legal fees

with interest waived". There is no other evidence regarding a waiver of interest other than a statement to that effect made by Scully in his Affidavit sworn on November 26, 2019.

[31] Counsel for the Plaintiff argues that the "agreement" to waive interest was part of settlement discussions between his client and the Defendants, which did not result in resolution.

[32] The test for a waiver is described by Major J. in ***Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co***, 1994 CanLII 100 (SCC), [1994] 2 SCR 490 at 500, 115 DLR (4th) 478:

> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

[33] The test for waiver is a stringent one. It requires a full knowledge of rights and an unequivocal and conscious intention to abandon them: ***Jacobi v. Jacobi***, 2017 ABCA 307 (CanLii) at para 21.

[34] In reviewing the email of July 4, 2019, I cannot conclude from its contents that there was an unequivocal waiver by the Plaintiff of the claim for interest. Rather, it appears that there were some settlement discussions between the parties from the words, "as they agreed on". Settlement discussions are of course privileged and thus I conclude that I am not able to rely upon this email as evidence of a waiver of the claim of interest.

[35] Without evidence of an unequivocal waiver of its claim for interest by the Plaintiff, I find the Plaintiff has proven on a balance of probabilities that it is entitled to interest on the arrears, calculated from the due date until the date of payment of the arrears, being July 4, 2019. I therefore grant the Plaintiff summary judgement against the Defendants on the issue of interest.

D. The Plaintiff's Entitlement to Costs

[36] Having granted summary judgment to the Plaintiff, the next step is whether the Plaintiff is thus entitled to costs of the action, and on what scale. This question requires in part an interpretation of the relevant provisions of the *Act* and the *Bylaws*, and an inquiry into how that affects (or doesn't) the Court's discretion to award costs.

[37] Section 42(a) of the *Act* provides that the Plaintiff is entitled to recover "all reasonable costs, including legal expenses" (emphasis added).

[38] The *Bylaws* also provide for what must be paid by the Defendants and when, and what the Plaintiff is entitled to do in the event of non-payment. Section 3 of the *Bylaws* specifically outlines the duties of the owners and tenants. According to section 3(j) and (k), the Defendants SHALL:

> (j) pay to the Corporation (or if requested to the manager) when due all contributions levied or assessed against his 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 Section 40 of the *Act*;

> (k) pay to the Corporation all legal expenses incurred as a result of having to take proceedings to collect any common expenses levied or assessed against his unit, and such legal expenses shall be paid on solicitor and his own client indemnification basis (emphasis added)

[39] Section 43 of the *Bylaws* provides that in the event of a violation of the *Bylaws* which has not been corrected or remedied within 10 days of receiving written notification from the Corporation to do so, that may be corrected by the Corporation and the costs or expenses incurred or expended by the Corporation shall be charged to the Owner. The Corporation may recover from an Owner in an action for debt any sum of money which the Corporation is required to spend as a result of any act or omission by the Owner and for which 10 days' prior notice has been given by the Corporation. Section 43(c) sets out the procedure the Corporation must follow regarding delivery of notice to the Owner of the alleged breach, which must specify the nature and the particulars of the breach.

[40] The Plaintiff points to the decision in ***Goertz***, saying that it is directly on point with this case. In ***Goertz***, the Court of Appeal upheld a decision of a chambers judge granting summary judgment to a Plaintiff, a condominium corporation, against an owner for non-payment of condo fees, including judgment for costs on a solicitor-client basis. The Plaintiff argues that ***Goertz*** is binding on this Court for the proposition that the provisions of the *Act* and the *Bylaws* entitle the Plaintiff to solicitor-client costs:

> 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. [***Goertz,*** *supra*, at para. 50, emphasis added]

[41] In ***Goertz***, the Bylaws in question were similar to the *Bylaws* here in that they required an owner to pay all legal expenses incurred as a result of having to take proceedings to collect, and that such expenses will be paid on a solicitor-client basis. However, as noted by the Court, the owner in ***Goertz*** had adduced no evidence to place the amount of costs incurred into question. ***Goertz*** offers no analysis of when costs are "reasonable" (as required by s.42(a) of the *Act*) or when costs are "required" (as required by the *Bylaws*). ***Goertz*** offers no analysis of the requirements of notice upon an owner as described in s. 43 of the *Bylaws*. As such, ***Goertz*** is distinguishable from this case on this issue.

[42] Here, there is ample evidence to question the amount of costs claimed by the Plaintiff. The Defendants have placed the question of whether the Plaintiff's solicitor-client costs were reasonable or required directly in issue. Therefore, an analysis is necessary to determine whether the actions undertaken by the Plaintiff were reasonable or required such that the Defendants are liable to pay their costs on a solicitor-client basis.

[43] The Plaintiff says written notice of the arrears owing was delivered by email by the property manager on January 26, 2017, and again on March 6, 2017. The problem, however, is that the email address that the Property Manager used to contact Scully was not in service and was not the email address that the Homeowner Information Form provided nor the email address

the Property manager had generally been using to communicate with Scully. Compounding the problem was the fact that the Property Manager had Mr. Scully's proper and updated email address and a phone number for him from the PAD Agreement of November 26, 2015. Although the Property Manager points to the Homeowner Information Form and says that if it had incorrect contact information for Scully, the onus was on him to update it, I note that this was the Plaintiff's form, completed by the Plaintiff. The Plaintiff had been given Scully's correct email and phone number in the PAD form. Any discrepancy between the PAD form and the Homeowner Information Form cannot be laid at the feet of the Defendants.

[44] Despite having Scully's nitronut email address, as evident from communications with him as far back as 2015, the Property Manager chose not to send her notice of arrears to that address.

[45] There is no evidence that steps were taken in January 2017 to send written notice to either the nitronut email address or to call Mr. Sully to speak with him about the arrears. Accordingly, the Plaintiff cannot rely upon the January 26, 2017 email or the March 6, 2017 email to constitute written notice under the *Bylaws.*

[46] On May 22, 2017, Scully provided authorization for the withdrawal of the special assessment of $1,200. Inexplicably, only half of the assessment was withdrawn. There is no evidence that the Property Manager brought up the issue of the outstanding condo fees with Mr. Scully at that time, or that any steps were taken to withdraw the entire amount from his account as authorized by the PAD or Scully's email authorization.

[47] The Property Manager sent further emails to Scully at his correct email address with statements in April and June 2018. However, I find that this does not comply with the requirement for written notice from the Plaintiff of arrears owing. There is no explanation that funds are due and owing, no explanation as to how interest is calculated and no specification of the nature and particulars of the breach as required by section 43(c) of the *Bylaws*.

[48] Had the Property Owner provided proper notice in accordance with the *Bylaws* to Scully by way of email to his nitronut email address or by calling his updated telephone number, providing the basis for the calculation of interest and the consequences of non-payment, then it is likely, on a balance of probabilities, that Mr. Scully would have immediately paid what was owed. This would have avoided all of the subsequent proceedings.

[49] I also find that according to the PAD, the Plaintiff could likely have simply withdrawn the amounts owed. The PAD gave it authority to do so, and this was confirmed by Mr. Scully by email in 2017. This also would have avoided all subsequent proceedings.

[50] It isn't until the letter of October 17, 2018 signed by Plaintiff's counsel that particulars of the amounts owed are provided once again. However, despite the fact that the Plaintiff had Scully's correct email and phone number, and that the Plaintiff had in fact been in communication with Scully via email, the letter was not sent to him at the nitronut email address. Counsel attempted to send the letter to the Unit, although the wrong address was used and there is no evidence that it was received by Scully as a result, and despite the fact that the Plaintiff knew it was rented according to its own form. It was also sent to the Airdrie address. There is no evidence that explains why Canada Post did not forward the letter to the Defendants at their Rimby address, despite the fact that they had paid for a year of mail forwarding service.

[51] Accordingly, this letter does not provide the notice to Scully as required under the Bylaws as he did not receive it, despite the fact that the Plaintiff had methods of communicating with Scully effectively.

[52] The Statement of Claim was then issued and process servers were retained to serve it upon Scully. There is no evidence that the process servers were provided with Scully's email address or his phone number, which likely would have assisted matters greatly and likely would have eliminated the need to obtain an order for substitutional service.

[53] The Plaintiff was likely not required to spend the money it did, nor was it reasonable to do so in having its counsel draft and send a letter to the wrong address pursuing Scully, or any of the costs incurred to draft, issue or serve the Statement of Claim or take the further steps it did. This claim could likely have been avoided entirely had the Plaintiff contacted Scully at the correct email address or phone number and provided proper particulars of the claim pursuant to the *Bylaws*.

[54] I do not agree with the Plaintiff's complaint that Scully's actions delayed the conclusion of the matter and drove up costs. If there was evidence that the Plaintiff had simply telephoned Scully at the correct phone number, or had sent a proper notice of arrears to him with a demand to pay to his nitronut email address, which then was left un-responded to by Scully, then my conclusion on this point would likely have been different. Instead, the Plaintiff insisted on solicitor client costs when it did not have the evidence to support the conclusion that it had complied with the *Bylaws*. In the face of such absence of evidence, Scully's actions were reasonable.

[55] There is also authority for the proposition that I am not bound by the provisions regarding the payment of solicitor-client costs.

[56] The parties have rightfully pointed out that an award of costs is within the Court's discretion. Such discretion must be exercised judicially and in line with the factors listed in *Rule* 10.33: ***Weatherford Canada Partnership v. Artemis Kautschuk and Kunstoff-Technik GmbH***, 2019 ABCA 92 (CanLii).

[57] Costs are generally assessed on the basis of Schedule C unless there is an exception. One exception can be a contractual provision providing for legal fees on a solicitor-client basis: ***Vallieres v. Vozniak*** 2014 ABCA 384. However, a contractual provision relating to costs does not oust the Court's jurisdiction: ***ATB v.1401057 Alberta Ltd. (Katch 22)***, 2013 ABQB 748 ("***ATB***"). In ***ATB***, the Court listed a number of principles which ought to be taken into account when deciding whether to give effect to a contractual clause providing for payment of solicitor-client costs, including that a Court "may" hold a party to its promise, that legal services which increase the likelihood of the purpose stipulated under the contract will be achieved is a legal service that the Defendants are required to pay, that the Defendants are not responsible for payment of legal fees that are unnecessary or not related to the stipulated purpose, and that the Court is required to ensure that those who are required to pay legal fees are treated reasonably.

[58] For the same reasons as set out above, I find that ***ATB*** permits me to decline to grant an award of solicitor-client costs following summary judgment against the Defendants, notwithstanding the provisions of the *Act* and the *Bylaws*.

[59] Therefore, I conclude the Plaintiff has not established that it may rely upon s.42(a) of the *Act* or s.3(k) of the *Bylaws* to claim solicitor client costs of this action. The Plaintiff's

application for an order declaring that it is entitled to solicitor-client costs and that an assessment be conducted is denied. Similarly, I decline to strike the statement of defence.

E. Assessment of Costs

[60] I must now decide whether the parties are entitled to any costs of this appeal and of the application before the Master below given the mixed success.

[61] The Plaintiff referred me to no authority which supports its position that a chambers judge cannot assess the amount of costs claimed following an application and instead must refer the matter to an Assessment Officer. Clearly, *Rule* 10.30 grants this Court authority to make a costs award in respect of an application. The Court may in its discretion order that the assessment of costs be done by an Assessment Officer, but that is not a requirement. The assessment of costs remains within the Court's discretion.

[62] Further, the entirety of the relief claimed in the amended statement of claim is before me on an application for summary judgment: ***Goertz,*** *supra,* at para. 28. The amended statement of claim claims at paragraph 17 a declaration and judgment against the Defendants in the amount owing in respect of "related costs and such other amounts as may accumulate under the terms of the Plaintiff's Bylaws and the Act to the date of final disposition of this action." Similarly, the application for summary judgment filed October 28, 2019 claims at paragraph 2, "Costs of this action on a solicitor and his own client full indemnity basis". There is no request that the issue of the amount of costs be determined by an Assessment Officer.

[63] Therefore, it is open to this Court to assess not only whether costs are owed by one party to another, but also the amount of those costs.

[64] Because there has been mixed success in this appeal I direct that each party bear their own costs with respect to the application before the Master as well as with respect to the application before this Court. My direction in this regard is based upon the factors enumerated in *Rule* 10.33. Specifically, I have considered the result of the appeal and degree of success of each party (mixed), the amount claimed (comparatively, very small), the importance of the issues (this was a decision based upon the peculiar facts of this case and so will likely have less importance to issues at large) the complexity of the action (not particularly complex), and the conduct of the parties that tended to shorten or lengthen the action (this factor has been thoroughly outlined in the reasons above).

IV. Conclusion

[65] The Plaintiff's application for summary judgment is granted in part. The Defendant is liable to pay interest on the arrears owed from the date those arrears were owed to the date of payment, at a rate of 18% per annum.

[66] The Plaintiff's application for costs on a solicitor-client basis and application to strike the statement of defence is dismissed. Each party shall bear their own costs of the application before the Master below and this appeal.

[67] As the issue of a discharge of the lis pendens was not relief sought before me in a cross application by the Defendants I decline to make any such order, however, and I direct the parties to consider whether it ought to discharged by agreement once interest is paid by the Defendants.

Heard on the 14th day of October, 2021.
Dated at the City of Edmonton, Alberta this 10th day of November, 2021.

L.K. Harris
J.C.Q.B.A.

Appearances:

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