QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2015 SKQB 260**

Date: **2015 08 31**
Docket: QBG 217 of 2014
Judicial Centre: Saskatoon

BETWEEN:

HALLMARK PLACE CONDOMINIUM CORPORATION,

Plaintiff
(Applicant)

- and -

DON McKENZIE and McKENZIES CONSOLIDATED LTD.,

Defendants
(Respondents)

Counsel:

Clayton B. Barry — for the plaintiff
Patrick M. McDougall — for the defendants

JUDGMENT — R.S. SMITH J.
August 31, 2015

Introduction

[1] On December 12, 2014, I granted a summary judgment in favour of Hallmark Place Condominium Corporation [Hallmark Place] for payment of arrears

of condominium fees of one of its condominium units, owned by McKenzies Consolidated Ltd. and occupied by the principal of McKenzies Consolidated Ltd., Don McKenzie.

[2] The defendants were ordered to pay Hallmark Place $38,422.76, representing unpaid condominium fees since August 2008 plus interest.

[3] I allowed Hallmark Place to effect immediate registration of the judgment but ordered that no steps were to be taken to enforce the judgment for 60 days. I also adjourned the issue of costs *sine die*. It was my hope that Hallmark Place and the defendants, who are linked together in the same building, could reach an agreement as to costs. That hope was misplaced.

Background

[4] McKenzies Consolidated Ltd. has owned Condominium Unit No. 2706 [Unit] since September 2004. The defendant Don McKenzie has lived in the Unit since that time. The Unit is located on the top floor of the Hallmark Place condominium building, which is located on Sixth Avenue North, Saskatoon.

[5] Hallmark Place is a body corporate constituted pursuant to provisions of *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*CPA*]. Hallmark Place owns the condominium building and is governed by a board of directors which has adopted bylaws respecting the operation of the building. Hallmark Place arranges for a property manager to attend to the day-to-day operation and maintenance of the condominium building.

[6] In the summer of 2005, Mr. McKenzie noticed that water was seeping

into his Unit. Damage was done to floor, walls and ceiling. He initially contacted his insurer, who directed him to contact Hallmark Place, asserting it was the condominium corporation's obligation to pay for the damage.

[7] Mr. McKenzie contacted Hallmark Place and dealt with the property manager at the time, ICR Commercial Real Estate [ICR].

[8] ICR indicated that it would take steps to properly seal the roof of the condominium building, as well as attend to the damage done in the Unit. Suffice it to say, the property manager's efforts to seal the roof were unblemished by success. From 2005 to 2012, seepage from the exterior of the building continued to be an issue. Mr. McKenzie asserts that his Unit was damaged by water no less than five times.

[9] Responsibility for the repair was never an issue. Hallmark Place had insurance to address this type of loss. Disagreement developed over exactly what was to be repaired. Hallmark Place maintained the insurance would be paid in accordance with the dictates of the *CPA*. Sections 65(2) and (3) of the *CPA* provide:

> **Duty to insure**
> **65** …
>
> (2) The corporation shall obtain and maintain insurance on its own behalf and on behalf of the owners with respect to the units, **other than improvements that are made or acquired by owners** with respect to units, the common property, the common facilities and services units:
>
> (a) against major perils in an amount equal to the replacement cost of the insured property; and
>
> (b) against any other perils that are specified in the bylaws of the corporation or directed by the board.

> (3) What constitutes an improvement made or acquired by an owner with respect to a unit is to be determined in accordance with the standard unit description, if any, for that unit or the class of units of which the unit is a member. [Emphasis added]

[10] The defendants were of the position that Hallmark Place was responsible for the entire cost of the repairs to the Unit, even if they did involve some improvements. Hallmark Place relied on s. 65 of the *CPA*. Numerous attempts were made by Hallmark Place to reach an accommodation with the defendants. All efforts proved fruitless.

[11] In 2008, Mr. McKenzie informed the building manager and Hallmark Place that he would not be paying his condominium fees in order to "offset" the cost of repairs done by him. Further efforts were made to reach an agreement. They were unsuccessful.

[12] In August 2009, Hallmark Place filed a lien against the Unit respecting the arrears accumulated to that date.

[13] In March 2012, a new property manager began attending to the needs of Hallmark Place. Its principal indicated his willingness to work towards a solution with Mr. McKenzie. He also advised Mr. McKenzie that the *CPA* specifically prohibited any unitholder withholding fees by way of an offset for a claim.

[14] Much time was spent by the parties to see if a resolution was available. Success proved elusive. Sometime in early 2014, Hallmark Place hired McDougall Gauley to act on its behalf in dealing with its claim against the defendants. A statement of claim was issued against the defendants in February 2014. The defendants reply was to issue a counterclaim in April 2014 for water damage suffered between 2005 and 2009. As is always the case, formal litigation did nothing to

improve the relationship between the parties.

[15] Further effort and time was spent by Hallmark Place and its lawyers with a view to reaching a resolution with the defendants. Again, no progress was enjoyed.

[16] Finally, in the fall of 2014, Hallmark Place came to the conclusion that Mr. McKenzie was absolutely implacable. They brought an application for summary judgment for the outstanding condominium fees which, as previously noted, I granted. The issue is now simply one of costs.

[17] Hallmark Place says that it has paid McDougall Gauley $25,401.21 in dealing with the defendants. Hallmark Place is seeking 100% recovery of those costs plus solicitor-client costs of this application.

Analysis

[18] Hallmark Place invokes the *CPA* and the bylaws governing Hallmark Place as grounding its claim to see full solicitor-client cost recovery.

[19] Section 63 of the *CPA* provides:

> **Lien for arrears**
> **63**(1) A corporation may register an interest based on a lien against the title of a unit for the amount of a contribution to the common expenses fund or the reserve fund levied on the owner that has not been paid.
>
> (2) On the registration of an interest pursuant to subsection (1):
>
> (a) the corporation has a lien against the title for an amount that is equal to:

(i) the amount of the unpaid contribution; and

(ii) any costs incurred in preparing and registering the interest and in preparing and registering a discharge of the interest; and

(b) the lien may be enforced in the same manner as a mortgage.

(3) A corporation that registers an interest pursuant to subsection (1) shall discharge the interest on payment of the amount of the lien.

(4) The corporation may require the owner to pay the costs incurred in preparing and registering the interest and in preparing and registering a discharge of the interest.

[20] Hallmark Place bylaws address the issue more precisely. Section 43 provides:

VIOLATION OF BY-LAWS

43. Any infraction or violation of or default under these by-laws or any rules and regulations established pursuant to these by-laws on the part of an owner, his servants, agents, licensees, invitees or tenants may be corrected, remedied or cured by the Corporation **and any costs or expenses incurred or expended by the Corporation in correcting, remedying or curing such infraction, violation or default shall be charged to such owner and shall be added to and become part of the assessment** of such owner for the month next following the date when such costs or expenses are expended or incurred (but not necessarily paid) by the Corporation and shall become due and payable on the date of payment of such monthly assessment and shall bear interest at the rate of 12 percent per annum until paid.

The Corporation may recover from an owner by an action for debt in any court of competent jurisdiction any sum of money which the Corporation is required to expend as a result of any act or omission by the owner, his servants, agents, licensees, invites or tenants, which violates these By-laws or any rules or regulations established pursuant

> to these By-laws and there shall be added to any judgment, all costs of such action including costs as between solicitor and client. Nothing herein shall be deemed to limit any right of any owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise of his remedies. [Emphasis added]

[21] Hallmark Place further observes that this Court has jurisdiction over the debate by reason of Rule 11-1 of *The Queen's Bench Rules*.

[22] For the Court's guidance, Hallmark Place also provides the Ontario court decision addressing a condominium corporation's right to recover costs against a nonconforming unitholder. See *Toronto Common Element Condominium Corp. No. 1508 v Stasyna*, 2012 ONSC 1504, 18 RPR (5th) 15 [*Stasyna*].

[23] Paragraph 82 of the *Stasyna* decision is apropos to this debate. It provides:

> **82** Moreover, whatever rights the Corporation thinks it may have reserved for itself in the Declaration relative to costs, the fundamental fact is that Article V of TCECC No. 1508's Declaration does *not* displace this court's discretion to award costs. Our Court of Appeal clearly determined in *Bossé v. Mastercraft Group Inc.* (1996), 123 D.L.R. (4th) 161 (C.A.), leave to appeal to the S.C.C. refused, [1995] S.C.C.A. No. 205, that a contractual right to recover legal fees is subject to judicial discretion. The Court observed at para. 65:
>
> > The costs of and incidental to a proceeding or a step in a proceeding are, subject to the provisions of a statute or the rules of court, in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid: *Courts of Justice Act*, R.S.O. 1990 c. C-43, s. 131(1); rule 57.01 of the *Rules of Civil Procedure*. As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot

> exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for so doing – where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which render the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances. See, generally, *Orkin on Costs*, 2nd ed. 1993, p.2-111; *Collins v. Forest Hill Investment Corporation*, [1967] 2 O.R. 351 (Cty. Ct.), *Ontario Potato Distributing Inc. v. Confederation Life Insurance Co.* (1991), 25 A.C.W.S. (3d) 809 (Ont. Ct. Gen. Div.), *Cabot Trust v. D'Agostino* (1992) 11 O.R. (3d) 144 (Gen. Div.), *C.D.I.C. v. Canadian Commercial Bank* (1989), 68 Alta. L.R. (2d) 194 (C.A.), p. 203-4. [Emphasis Added]

[24] Hallmark Place complains that the defendants were in breach of their statutory duty and knew it and continued to be in breach over an extended period of time. Section 54(3)(b) of the *CPA* reads:

> (3) An owner is not exempt from the obligation to contribute to the common expenses or reserve fund expenses even if:
>
> …
>
> (b) the owner is making a claim against the corporation; or
>
> …

[25] Hallmark Place maintains that it operates as a gross injustice to other unitholders not to reimburse it 100 percent of the monies it expended in recovery of the defendants' condominium fees. The fact that they could not lawfully set off their condominium fees against their as-yet unproven claim was brought to the defendants attention. Nonetheless, they remained obstinate in their refusal to comply with the statutory duty and the moral duty they had to their neighbours to help sustain the operation of Hallmark Place. Hallmark Place asserts that the conduct of the

defendants is scandalous, outrageous and reprehensible and, thus, rises to the level where complete solicitor-client costs are warranted.

[26] The defendants assert the plaintiff prolonged the litigation due to an unwillingness to reach settlement. Further, and just as critically, the plaintiff failed to address the water seepage issue in a timely and effective manner and the payments were withheld as an act of desperation.

[27] Further, the defendants complain that a good portion of the McDougall Gauley fees do not relate directly to the collection of condominium fees *per se*, but address time expended by McDougall Gauley to deal with the still extant counterclaim.

[28] Finally, the defendants invoke the doctrine of proportionality and maintain an award of costs in the amount of $25,401.21 to collect a debt of $38,422.76 is not reasonable as it is an affront to the concept of proportionality.

[29] In Saskatchewan, the courts have recently benefitted from a decision dealing with solicitor-client costs in *Hope v Gourlay*, 2015 SKCA 27, 384 DLR (4th) 235 [*Hope*]. At paragraph 47, Chief Justice Richards, writing on behalf of the Court, highlights the principles governing awards of solicitor-client costs which are reflective of principles articulated in an older case, *Siemens v Bawolin*, 2002 SKCA 84, [2002] 11 WWR 246. The principles governing the award of solicitor-client costs are:

> 1. solicitor and client costs are awarded in rare and exceptional cases only;
>
> 2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is

> described variously as scandalous, outrageous or reprehensible;
>
> 3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
>
> 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.

[30] The *CPA* is clear that owners may not withhold condominium fees even if they are engaged in litigation with the condominium corporation. In short, Hallmark Place posits that as the defendants had no lawful defence, their conduct in adhering to a completely meritless defence was, *ipso facto*, scandalous, outrageous and reprehensible. The defendants laying off onto the other unit owners operates as an injustice to such owners and should trigger, in the Court, an appetite to order the defendants to pay complete indemnification of the condominium corporation's costs.

[31] Interestingly, in *Hope*, Chief Justice Richards observed that although the plaintiffs in that case did advance a meritless claim, that does not, in and of itself, result in a complete indemnification for the successful party. Chief Justice Richards noted at paragraph 49:

> **49** … it does not follow that a defendant is entitled to solicitor-client costs simply because a claim is proven to be meritless or because a claim is struck for being scandalous, frivolous or vexatious. Normally, solicitor-client costs are awarded because of behaviour related to the prosecution or defence of a claim. In this case, there has been no suggestion of any sort that the Hopes have acted scandalously, outrageously or reprehensibly in the conduct of this litigation. …

[32] In the instant case, the defendants' conduct cannot be said to be

outrageous in conduct of the litigation. There is no question that the defendants stuck obstinately to their meritless position but did not otherwise engage in reprehensible conduct.

[33] Notwithstanding the guidance in *Hope*, I observe that perhaps a condominium corporation is a different circumstance than a normally constituted lawsuit.

[34] There is, by the very nature of a condominium, a duty owed by each co-owner to the other. If one owner defaults on his obligation to the condominium corporation, the other co-owners are prejudiced. The concern for co-owners has been noted in the common law. *Halsbury's Laws of Canada, Condominiums*, 1st ed (Markham, ON: LexisNexis, 2011) at para HCD-112, states:

> … Solicitor-client costs may be awarded to a corporation where an owner contravenes the corporation's rules and fails to follow a compliance request, since it is unfair and inequitable to force other condominium owners to subsidize the corporation's enforcement proceedings against a non-compliant owner. …

[35] I respectfully posit that the concept of complete indemnification in the context of enforcing condominium bylaws occupies a different conceptual space than the discussion of solicitor-client costs in *Hope*.

[36] In my view, in the face of an owner defaulting on a *CPA* statutory duty or a bylaw obligation in a condominium corporation context, the condominium corporation should, *prima facie*, be entitled to a complete indemnity. Of course, that is a rebuttable presumption which will turn on the facts in each case.

[37] Here, there is no question that a portion of the McDougall Gauley legal work would have been in relation to the counterclaim by the defendants for the real damage suffered by the defendants in their Unit. In my view, that fact, peculiar to this debate, is sufficient for the Court to depart from a complete indemnification.

[38] Further, as noted, the defendants also invoke proportionality as a principle that operates in their favour in addressing the plaintiff's claim for costs. Mark Orkin, *The Law of Costs*, loose-leaf (Rel 53, August 2015) 2d ed, vol 1 (Toronto: Canada Law Book, 2015) at para 202.5.3.1, writes:

> … Proportionality [has] always been a principle in making cost determinations: was the time spent and the amount claimed proportional to the nature and complexity of the motion. …

[39] In *Houweling Nurseries Oxnard, Inc. v Saskatoon Boiler Mfg. Co.*, 2011 SKQB 304, [2011] 10 WWR 626, the Court was grappling with the issue of how much of the plaintiff's experts' costs should be recovered. The Court noted at paragraph 17:

> [17] On this disbursement, I find myself being sensitive to the issue of proportionality and to the economic value brought to the issue and the juridical weight accorded to the spectrum of evidence provided by the engineers. Additionally, I must consider what quantum is equitable for the unsuccessful party to be responsible for respecting the engineers' fees.

[40] From an "above the forest" perspective, it is fair to observe that an expenditure of $25,401.21 to recover $38,422.76 has some badges of being an affront to proportionality.

[41] As is so often the case, there is no perfect answer; only the requirement of an answer within the legal principles applicable to the debate. On balance,

I conclude that the plaintiff should recover costs of 80 percent of the $25,401.21, which I round to $20,300.00, but which shall also include any costs expended by Hallmark Place with respect to this application for indemnification costs.

[42] I also order the following:

1. Hallmark Place is at liberty to immediately register the judgment granted herein anywhere it chooses.

2. Judgment interest shall accrue from the date hereof.

3. Hallmark Place is precluded from taking any steps to enforce this judgment (other than registration) until November 30, 2015.

4. If the defendants have not paid the judgment or part of the judgment remains outstanding as at November 30, 2015, Hallmark Place is at liberty to proceed to enforce the judgment or any part of it that remains owing, as it sees fit.

"R.S. Smith" J.
R.S. Smith