IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 2428 v. Baettig,* 2015 BCSC 2125

Date: 20151119
Docket: 100377
Registry: Kelowna

Between:

The Owners, Strata Plan KAS 2428

Petitioner

And

Emma Baettig and
Bank of Montreal

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

On appeal from: An order of the Supreme Court of British Columbia, dated April 27, 2015 (*The Owners, Strata Plan KAS 2428 v. Baettig*, Kelowna, Docket No. 100377).

Reasons for Judgment

Counsel for the Petitioner: M.D. Fischer

No other appearances

Place and Date of Trial/Hearing: Kelowna, B.C.
October 28, 2015

Place and Date of Judgment: Kelowna, B.C.
November 19, 2015

Introduction

[1] The petitioner appeals the April 27, 2015, decision of Master Young (as she then was) (*The Owners, Strata Plan KAS 2428 v. Baettig,* 2015 BCSC 804) on the interpretation of s. 118 of the *Strata Property Act*, S.B.C. 1998, c. 43 [the "*Act*"].

[2] The petitioner argues that s. 118 of the *Act* entitles it to claim actual reasonable legal fees and disbursements incurred in registering and/or enforcing a lien under ss. 116 and 117 of the *Act*.

[3] Master Young held that the petitioner was entitled to claim Scale B party and party costs and not full indemnity for legal fees.

Summary of Decision

[4] For the following reasons, and despite Mr. Fischer's able submissions, the appeal is dismissed.

Standard of Review

[5] An appeal from a Master's order should not be entertained unless the order was clearly wrong (*Abermin Corp. v. Granges Exploration Ltd.* (1990), 45 B.C.L.R. (2d) 188, at 193). That standard also applies to appeals from both interlocutory and final orders (*Chand v. Insurance Corp. of British* Columbia, 2009 BCCA 559).

Background

[6] La Casa Resort is a resort community on the west side of Okanagan Lake, north of Kelowna. It is a 500 unit, bare land strata with commercial and residential units ("La Casa").

[7] The respondent, Baettig, owned one of La Casa's strata units ("Strata Unit") and neglected to pay strata fees owing to the petitioner. The respondent, Bank of Montreal, was a registered mortgagee on the Strata Unit.

[8] Pursuant to s. 116 of the *Act*, the petitioner filed a lien against the Strata Unit's title. It sought to enforce its lien and applied in this action for an order for sale of the Strata Unit. Master Young granted the order for sale on April 20, 2015.

[9] The petitioner was granted leave to make submissions on the issue of costs and whether s. 118 of the *Act* allowed it to claim an indemnity for reasonable legal fees. That hearing took place April 22, 2015, with Master Young reserving her decision until April 27, 2015. She held that the petitioner was entitled to Scale B costs and not an indemnity of its legal costs.

[10] In making her finding, the learned Master followed the decisions in *Strata Plan LMS93 v. Neronovich* (1997), 39 B.C.L.R. (3d) 382 [*Neronovich*] and *Strata Corp. VR 873 v. Crumley* (1982), 40 B.C.L.R. 80 [*Crumley*]. Both *Neronovich* and *Crumley* were decided under s. 37 of the *Condominium Act*, R.S.B.C. 1996, c. 64, the predecessor to s. 118 of the *Act*. In both cases, the actual legal fees incurred by the strata council were disallowed and party and party costs were ordered.

[11] The learned Master also relied on *Canada Trustco v. Gies*, 2001 BCSC 1016 [*Gies*], the first case decided under now s. 118. Scale B costs were also ordered in *Gies*.

[12] Finally, she relied on a more recent decision, *First West Credit Union v. Milligan*, 2012 BCSC 610 [*Milligan*], where Betton J. rejected a similar argument for claiming indemnity for legal fees.

[13] At para. 17, Master Young explained her reasons for rejecting the petitioner's submissions:

> … There is no authority for awarding full indemnity costs under s. 118 and no other authority has been provided to me. In unusual cases, a petitioner might apply for special costs, but would have to meet the criteria for an award of special costs. This petitioner attempted to get special costs as a matter of course without any supporting evidence as if this were the law in B.C. and I find that this is not the law in B.C.

Grounds of Appeal

[14] The petitioner appeals Master Young's decision, claiming that:

(a) she erred by finding that although the petitioner was entitled to recover actual legal expenses from Ms. Baettig through a separate action, it could not claim such expenses under s. 118 of the *Act*;

(b) she erred by failing to follow *Milligan*, which allowed for recovery of full legal costs where no competing claims existed; and

(c) she misinterpreted and failed to apply the plain meaning of s. 118.

Sections 116, 117 and 118 of the Strata Property Act

[15] Division 6 of the *Act* sets out the process for a strata corporation to recover money owing to it. Section 116 allows a strata corporation to register a lien against the owner's strata lot if the owner fails to pay the strata corporation's strata fees, a special levy or the reimbursement of cost of work. The strata corporation's lien ranks in priority to all other registered charges.

[16] If the strata owner does not pay the amount owing under the certificate of lien, s. 117 of the *Act* allows the strata corporation to apply to the Supreme Court to sell the strata lot.

[17] Section 118 provides for costs, stating:

> 118. The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:
>
> (a) *reasonable legal costs;*
>
> (b) land title and court registry fees;
>
> (c) other reasonable disbursements.
>
> (my emphasis)

Petitioner's Position

[18] The petitioner argues there are three possible interpretations of s. 118:

(a) Interpretation 1 - reasonable legal costs are added to the strata corporation's lien, become part of the lien and are not a separate judgment from the lien amount;

(b) Interpretation 2 - legal costs associated with enforcing a lien under s. 118 are dealt with as court costs pursuant to the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 (*"Rules"*); or

(c) Interpretation 3 - Section 118 of the *Act* creates a separate claim which requires separate proceedings to enforce.

[19] The petitioner submits that Interpretation 1 is the only logical interpretation because it is consistent with the intention of the *Act*. It argues that Interpretation 2 does not reconcile with the *Rules* in a situation where a certificate of lien has been registered but no action has been commenced under the *Rules*. Finally, Interpretation 3 would require a strata corporation to commence a separate action to enforce a claim for legal fees.

[20] The petitioner argues that the intent of s. 118 of the *Act* is to ensure that other strata owners are not burdened with the legal expenses associated with recovering strata fees and special levies from a delinquent owner. If a strata corporation's reasonable legal costs are not protected by s. 118, the costs must be borne by other owners of the strata lots as a common expense, further increasing the financial burden on owners who are already paying their respective share in addition to the unpaid fees. The petitioner submits that this is the evil that s. 118 of the *Act* is intended to remedy, as opposed to a partial indemnity under the *Rules*.

[21] The petitioner asserts that Interpretation 2 cannot be correct because Scale B costs under the *Rules* do not apply unless an action is commenced to enforce a lien.

Therefore, the legislature must have intended that full indemnity for legal fees would apply.

[22] And, Interpretation 3 would be disproportionately inefficient, time consuming and expensive.

Discussion

[23] For the reasons that follow, I have determined that Interpretation 2 is the correct interpretation.

[24] I disagree that costs under the *Rules* would not apply to a situation where a strata corporation registered and obtained a certificate of lien but no action had been commenced to enforce the lien. I find that the *Rules* would apply because the registration of a lien is a proceeding as contemplated by the *Rules*. "Proceeding" is defined by the *Rules* in 1-1:

> **"proceeding"** means an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, …

[25] *Rule* 1-2 provides:

> (2) These Supreme Court Civil Rules govern every proceeding in the Supreme Court…

[26] I find that the registration of a lien against an owner's strata lot under s. 116 is a "cause" or "matter" within the meaning of "proceeding" in *Rule* 1-1 and therefore the *Rules* apply to it. *Rule* 14-1 therefore applies to the registration of a lien, regardless of whether or not an action has been commenced.

[27] While Interpretation 1 may be consistent with Ontario jurisprudence under the *Condominium Act*, S.O. 1998, c. 19, which has similar wording, I find that this interpretation is not the law in British Columbia. Section 85(1) of that Ontario Act provides:

> Lien upon default
>
> 85(1) If an owner defaults in the obligation to contribute to the common expenses, the corporation has a lien against the owner's unit and its

> appurtenant common interest for the unpaid amount together with all interest owing and all *reasonable legal costs* and reasonable expenses incurred by the corporation in connection with the collection or attempted collection of the unpaid amount.
>
> (my emphasis)

[28] Although the petitioner argues that the words "reasonable legal costs" were interpreted to mean "actual legal expenses" in *Oxford Condominium Corp. No. 16 v. Collins,* [2000] O.J. No. 4260 (Ont. S.C.J.) at para. 15, *York Condominium Corp. No. 482 v. Christiansen,* [2003] O.J. No. 1371 (Ont. S.C.J.) and *Simcoe Condominium Corp. No. 27 v. Citifinancial Mortgage Corp.,* [2004] O.J. No. 326 (Ont. S.C.J.), these cases actually dealt with the assessment of legal fees. They do not specifically address the interpretation of the phrase "reasonable legal costs", as the petitioner suggests.

[29] In any event, Ontario jurisprudence is not binding on this Court and should not be preferred over the more explicit direction of the British Columbia courts on the point as discussed below.

[30] The term "reasonable legal costs" is ambiguous and has not been given a distinct definition by British Columbia courts. Other legislation with similar wording has been interpreted in British Columbia to mean legal costs on a solicitor and client basis. *Canadian National Railway Company v. A.B.C. Recycling Ltd.*, 2005 BCSC 647, was one such case. It involved the recovery of legal fees associated with CN Rail incurring costs for environmental remediation. In dealing with the issue, Kirkpatrick J. stated:

> [167] I turn to consider ABC's argument that "legal costs" in this context is a term of art which implies party-and-party-costs. I acknowledge that there are a number of decisions that have interpreted references to "legal costs" to mean party-and-party costs. However, CN argued that Canadian authority interpreting the term "legal costs" is not relevant in the interpretation of the term in the case at bar. CN submitted that the decisions in which legal costs have been interpreted to mean tariff legal costs have arisen in situations where the legislature has granted a general power to award costs "in the context of legal proceedings." …
>
> [168] I agree with CN's submission in this regard. The task at hand is the interpretation of the meaning of "legal costs" in the context of this ***Act***. The

> fact that in other contexts the courts have concluded that references to "legal costs" in other statutes meant party-and-party costs is not dispositive of the issue before me. In my view, there is a distinction to be drawn between a statutory provision that confers on the court or an administrative tribunal the power to award costs in a proceeding, and a provision such as s. 27(2)(c) of the ***Act***, which includes legal costs as part of a larger list of items for which a party may receive compensation. Section 27(2)(c) is not primarily addressed to an award of legal costs or the power to award costs. It is concerned with reimbursement for costs of remediation.
>
> …
>
> [180] I also agree with CN's submission that interpreting the term "legal costs" in s. 27(2)(c) to mean party-and-party costs would render the section superfluous. In an action by a private party to enforce a statutory right, such as the one in the case at bar, that party will normally be entitled, where successful, to recover party-and-party costs as a matter of course. To find that the reference to "legal costs" in the ***Act*** only contemplated party-and-party costs would, in my view, render the section completely redundant. This runs contrary to the principle that the legislature is presumed not to speak gratuitously.
>
> [184] As with remediation costs generally, legal costs recoverable under the ***Act*** are those legal costs that are objectively reasonable in the circumstances of the case. CN is entitled to an award of its reasonable legal costs actually incurred.

[31] The trial decision was overturned on appeal (2006 BCCA 429) because CN Rail was not entitled to any award of costs against A.B.C. Recycling under the relevant legislative scheme. This was because the wording of the legislation did not give CN standing.

[32] Section 37(8) (later s. 37(9)) of the *Condominium Act* was the predecessor to s. 118 of the *Act*. It provided:

> 37(8) A strata corporation may add the land title fee and the legal and administrative costs of filing under subsection (1) or (5) and the legal costs of a proceeding under subsection (3) to the amount owing by the owner to the strata corporation.

[33] In both *Crumley* and *Neronovich*, the "legal costs of a proceeding" was interpreted to mean party and party costs. The petitioner seeks to distinguish *Neronovich* on the basis that it was decided under s. 37(8) of the *Condominium Act*, a section that has since been replaced by s. 118 of the *Act*. In *Neronovich*, counsel

for the strata corporation also conceded tariff costs should receive their priority and there was no complete argument on the point.

[34] The petitioner argues that the wording of s. 118 referring to “reasonable legal costs” is different that the wording under s. 37(8) of the *Condominium Act.* It argues that this is a signal from the legislature that strata corporations ought to recover more than party and party costs.

[35] *Gies* is the leading case on costs payable to a strata corporation under s. 118 of the *Act.* The court said the following at para. 10:

> 10. … I note that the ***Act*** provides for recovery of "legal costs" but not legal fees. Further, recovery is limited to those legal costs associated with "registering the lien under section 116" and "enforcing the lien under section 117" (***Act***, section 118). If a lawyer had been employed to register and enforce the lien the Strata Corporation would be limited to recovery of its taxable costs pursuant to the ***Rules of Court***. It can be in no better position having chosen to employ a management company. Presumably, it would be entitled to its taxable costs if it attended to registration and enforcement itself.

[36] The petitioner seeks to distinguish *Gies* on the basis that the court accepted the reasoning in *Crumley* even though it was decided under the *Condominium Act*. Further, the petitioner argues that *Gies* dealt with an altogether different issue, namely, the recovery of a strata management corporation’s fees for registering a lien. The issue in *Gies* was whether a strata manager’s invoice for steps taken as agent for the strata corporation could be included in the legal costs or as reasonable disbursements.

[37] Betton J. addressed the same argument in *Milligan*:

> [60] The phrase "reasonable legal costs", standing alone is ambiguous. It could mean, as the applicant submits, party and party costs as under [*Gies*]. It could also mean, as the respondent submits, all legal costs subject to a review of reasonableness under s. 70 of the *Legal Profession Act*. It is therefore necessary to look beyond the plain words of the provision to determine its meaning.
>
> [61] It is clear that under the *Condominium Act* costs were party and party costs at scale. Although the wording of the provision has changed, there has been no evidence presented to me to indicate the intention of the legislature to change the law in that respect. Counsel for the respondent made reference

to *Hansard* from July 1998 when the Act was introduced to the legislature. Although there are references to the use of plain language in the Act, nothing specifically reveals the goals of the legislatures as to costs.

[62] It is not readily apparent from the difference in language between s. 37 of the *Condominium Act* and s. 118 of the *Strata Property Act* that the legislature intended to change the recovery from party and party costs to full indemnity. Such an intention in the context of utilization of plain language drafting would have been, in my view, much more clearly articulated as in the examples noted above in the petitioner's argument regarding *A.B.C. Recycling*.

[63] This is not the ordinary case of the legislature modifying the wording of a statute to change its legal effect. Rather, the evidence is that the legislature made a conscious effort to convert British Columbia's legislation to conform with plain language principles during the mid-1990s. (See, for example, the *Statute Revision Act*, R.S.B.C. 1996, c. 440, and Janet E. Erasmus', "Cleaning up our acts: B.C. statute revision makes room for plain language changes", (1997) 38 Clarity 3, attached to these Reasons as Annexure 1.)

[64] I refer as well to the comments of Preston J. in [*Gies*] noted above regarding the *language* of the Act being "legal *costs" not "legal fees*".

[65] Examining the internal logic does not, in my view, favour one interpretation over the other. Obviously the goal of the legislation is to give priority to expenses for maintenance and improvement of the common property which serves to benefit all, including previously registered charge holders. In respect of legal costs, it is logical that those receive a similar priority. Conversely not extending that priority to actual legal costs does not prevent the Strata from full recovery of its costs from the owner, they simply do not have priority over previously registered charges. A balance is struck between the interests of strata owners and third party charge holders by limiting the priority costs to party and party costs.

[66] Any successful party to litigation who is the beneficiary of an order as to costs might say that should be full indemnity. That is, however, an exceptional circumstance in this province.

[67] The respondent points out that there is little available to the strata pursuant to the tariffs for party and party costs for registration of a lien, and that unless enforcement steps are taken under s. 117, recovery of legal costs will be very limited.

[68] At the same time in its argument, at paragraph 82, the respondent says:

> The Strata Corporation will often refrain from commencing a section 117 proceeding in circumstances such as this where a foreclosure proceeding is already underway to avoid a multiplicity of proceedings. In situations where there a mortgagee (*sic*) is foreclosing on a strata lot where there is a registered lien, it is generally possible with a simple letter to make arrangements with the other lawyer to respect the priority of the strata lien, and ensure that the Strata Corporation will be paid out of the proceeds of sale.

> This limits the amount of legal expenses incurred by the Strata Corporation and promotes early resolution.
>
> [69] Indeed that appears to have been what would have occurred in this case, with the exception of the issue before me.
>
> [70] When viewing the legislative context, the objective of providing priority to the lien and associated costs is clear. There is nothing that has been presented that satisfies me that there was a perceived deficiency in the practices and consequences of the interpretation of the predecessor *Condominium Act* where party and party costs were recovered. The respondent suggests that the failure to interpret the legislation as it urges, will render the scheme ineffective and meaningless. There is no satisfactory evidence before me to support that that has been, or will be, the situation, or that the legislature was seeking to remedy such a problem when the Act was implemented.
>
> [71] The Ontario cases cited to me had different factual circumstances and interpreted legislation that was worded differently from the B.C. *Act*. I therefore do not consider them persuasive in answering the questions before me.
>
> [72] Accordingly, and separate from my conclusions regarding [*Gies*] being an authority I should follow, when I apply the principles of statutory interpretation set out above I would reach the same conclusion as Preston J.
>
> [73] In the result, the strata is entitled to its costs on a party and party basis in relation to its registration of the lien.

[38] The petitioner argues that *Milligan* should be limited to its facts, where a mortgagee is in a short-fall foreclosure and is responsible to the strata corporation to pay Scale B legal fees in priority to its mortgage. In *Milligan*, the mortgagee foreclosed on a strata lot. The strata corporation had registered a lien on the strata lot but had not commenced any enforcement proceedings to collect amounts owing on the lien. There were insufficient funds on the sale of the strata lot to cover the payment of the strata arrears, the strata corporation's legal fees and the mortgage.

[39] The petitioner argues that *Milligan* only applies as between competing claimants. It balanced the concerns of full recovery of legal expenses and competing priorities of the mortgagee and the strata corporation. In such circumstances, although the strata corporation could recover its full legal expenses against the defaulting strata owner, it could not recover more than party and party costs as against the registered mortgagee.

[40] The petitioner asserts *Milligan* is distinguishable on its facts and where, as here, there is no evidence of a shortfall on the sale of a strata lot, "reasonable legal fees" should be interpreted to mean "legal costs on a solicitor and client basis".

[41] I disagree.

[42] If the petitioner's argument was correct, costs claimable by a strata corporation under s. 118 would differ depending on whether or not competing claims existed. Such an anomaly is, in my view, inconsistent with the intent of s. 118 as interpreted by *Gies* and *Milligan.*

[43] In my view, Betton J. did not intend to create the situation promoted by the petitioner. Rather, he intended to make it clear that *reasonable legal costs* in s. 118 of the *Act* mean party and party costs.

[44] The dominant approach to judicial comity generally requires a trial judge to follow the previous decisions emanating from the same court, as articulated in the case of *Re Hansard Spruce Mills,* [1954] 4 D.L.R. 590 (B.C.S.C.) at 592:

> But, as I said in the *Cairney* case, I think the power, or rather the proper discretionary duty of a trial Judge, is more limited. The Court of Appeal, by overriding itself in *Bell v. Klein*, has settled the law. But I have no power to override a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.
>
> Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:
>
> (a) Subsequent decisions have affected the validity of the impugned judgment;
>
> (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
>
> (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.
>
> If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[45] Accordingly, I am bound by judicial comity to follow Betton, J., and I do.

[46] Regardless, I am not persuaded that Master Young's decision was clearly wrong.

[47] Relief the petitioner seeks will require an amendment to the *Act*.

Decision

[48] The appeal is dismissed. There will be no order as to costs.

"G.P. Weatherill J."