

CANADA / JUDGMENT

Aggoune v. Maple Leaf Property Management

2020 BCSC 1546

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Supreme Court of British Columbia

DECIDED

20 October 2020

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2020 BCSC 1546 Aggoune v. Maple Leaf Property Management

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aggoune v. Maple Leaf Property Management,

2020 BCSC 1546

Date: 20201020

Docket: S1812792

Registry: Vancouver

Between:

Aissa Aggoune

Petitioner

And

Maple Leaf Property Management

Respondent

Before: The Honourable Justice Lindsay M. Lyster

Reasons for Judgment

(via teleconference)

The Petitioner appearing on his own behalf,:

A. Aggoune

Counsel for the Respondent:

D. Penner

Place and Date of Hearing:

Vancouver, B.C.

October 9, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 20, 2020

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Introduction

- [1] The petitioner, Mr. Aissa Aggoune, is a tenant in Regency Park, an apartment building managed by the respondent, Maple Leaf Property Management ("Maple Leaf"). Mr. Aggoune was the lead tenant in proceedings against Maple Leaf at the Residential Tenancy Branch ("RTB").
- [2] In the hearing before the RTB, the tenants raised a number of concerns. The RTB issued its decision on September 21, 2018 (the "Decision"). Success was divided, with the tenants succeeding in establishing their complaints related to ventilation in the building, which resulted in the RTB ordering monetary orders for the benefit of a number of tenants under s. 67 of the Residential Tenancy Act, S.B.C. 2002, c. 78. The RTB dismissed the tenants' complaints with respect to security issues, unsanitary conditions, loss of underground and visitor parking, and construction noise.

- [3] Mr. Aggoune filed a petition for judicial review, which Madam Justice Russell heard on December 18, 2019. Maple Leaf did not attend the hearing. In oral reasons rendered that day, Russell J. set aside the RTB's decision, except for the part dealing with the ventilation issue, and remitted the matter to the RTB for a new hearing (the "Order"). Maple Leaf now applies to set aside the Order.

Background

- [4] Maple Leaf is an Ontario company, named 690723 Ontario Inc., extra-provincially registered in British Columbia, with a registered and records office in Toronto, and an attorney's office in British Columbia. Maple Leaf is in the business of leasing properties and providing property management services. Maple Leaf's parent company, Larco Investments Inc. ("Larco"), owns Regency Park, an apartment building located at 1225 Cardero Street in Vancouver, and Maple Leaf provides property management services for it. Mr. Mansoor Lalji is a director of Larco.
- [5] Mr. Aggoune filed an application for dispute resolution with the RTB on January 10, 2018. On March 26, 2018, the RTB ordered that Mr. Aggoune's application be joined with the claims of 11 other tenants. Both Mr. Aggoune and Maple Leaf submitted documentary evidence to the RTB in advance of the hearing, which was held on April 25, June 28, and August 23, 2018. During the hearing, both parties were ordered to submit and serve reports related to the ventilation issue only. Both parties submitted further documentary evidence, but according to the Decision, only evidence submitted in accordance with the arbitrator's order was considered. On September 21, 2018, the RTB issued its Decision, which allowed Mr. Aggoune's complaint in respect of the ventilation issues, and dismissed the remainder of it.
- [6] On November 29, 2018, Mr. Aggoune filed his petition for judicial review, together with his affidavit, in which he swore that due to late notice from the RTB he did not have sufficient time to produce evidence for the RTB hearing, that eight witnesses were not allowed to testify, and that the RTB relied on evidence that was not provided to him and the other tenants.
- [7] On November 14, 2019, Mr. Aggoune filed an affidavit of service, in which he swore that he served Maple Leaf with the petition and affidavit on September 10, 2019 by leaving a copy of the materials with Peter Milenkov at Regency Park. I will return to the circumstances surrounding the service of the petition later in these reasons.
- [8] The hearing was held before Russell, J. on December 18, 2019. Maple Leaf did not appear. Justice Russell ordered that the RTB's Decision be set aside and remitted to the RTB for a new hearing and that Maple Leaf pay costs.

- [9] The RTB scheduled the new hearing to occur on September 10, 2020. Maple Leaf filed its application to set aside the Order on September 2, 2020. As a result of the application, I am told that the RTB adjourned the hearing, and that the matter is now scheduled to proceed on October 27, 2020, subject to whatever the Court's decision may be on the application to set aside the Order.

Legal Principles

- [10] Supreme Court Civil Rules, R. 22-1(2) and (3) state:

Failure of party to attend

- (2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

- (3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.
- [11] An applicant wishing to have an order set aside under Rule 22-1(3) must satisfy the three-part test in *CMHC v. Bhalia*, 2008 BCSC 1352 at para. 26 [CMHC]:
1. the applicant must not be guilty of any wilful default in respect of the non appearance;
 2. the application to set aside must have been made as soon as reasonably possible; and
 3. the applicant must show that there is a meritorious defence to the action or at least a defence worthy of investigation.
- [12] Even if the applicant fails to establish those three criteria, the court " must still exercise its discretion , the court must still be satisfied on a balance of probabilities that permitting the order to stand would not constitute a miscarriage of justice": CMHC at para. 27.

Analysis

Was Maple Leaf guilty of wilful default?

- [13] Wilful default requires proof of blameworthy behaviour. As Mr. Justice Harvey stated in *Dhillon v. Sehra*, [1996] B.C.J. No. 2397:
- [20] The meaning of "not guilty of wilful delay or default" in Rule 52(5) was settled by a five judge panel of the Court of Appeal in *Anderson v. Toronto Dominion Bank* (1986), 70 B.C.L.R. 267. Hutcheon J.A., writing for the unanimous court, held that the phrase carried with it the sense of a blameworthy action, that the word "guilty" likewise emphasizes that the person

who delayed or defaulted must be one deserving of blame and of the consequent penalty of not being heard on the merits of the application but if satisfactory explanations are given for the delay and the default, then it is open to the court to reconsider whether there is any merit in the defence. The failure may be "purposeful, deliberate or intentional" but, depending on the circumstance, it may not be blameworthy.

- [14] In order to determine if Maple Leaf was guilty of wilful default, it is necessary to consider in some detail the evidence with respect to Mr. Aggoune serving the petition on the company, and the company's knowledge of the matter prior to the December 18, 2019 hearing.
- [15] In his affidavit of service, made November 14, 2019, Mr. Aggoune swore that he served Mr. Milenkov with the petition and his November 29, 2018 affidavit on September 10, 2019, by handing those documents to Mr. Milenkov, and leaving them with him at Regency Park.
- [16] Mr. Aggoune provides some details of his interactions with Mr. Milenkov and other Maple Leaf representatives in his September 14, 2020 affidavit filed in response to this application. Mr. Aggoune says that he received a text message from Mr. Milenkov at 9:49 a.m. on September 10, 2019. A copy of the relevant text messages is attached to Mr. Aggoune's affidavit, and they show that Mr. Aggoune texted Mr. Milenkov and told him he had knocked on the door, and nobody was at the office or picking up the phone. Mr. Milenkov replied, indicating that he was coming to the office, and then that he was now in the office at 9:49 a.m.
- [17] Mr. Aggoune describes Mr. Milenkov as the acting building manager, and says he served the petition on him while he was sitting behind the desk of the building manager at Suite 102, 1225 Cardero Street.
- [18] Mr. Milenkov has not sworn an affidavit in this proceeding, and no longer works for Maple Leaf. Ms. Myra Neighbour, who was the building manager at Regency Park starting in July 2013, did swear an affidavit in support of this application on September 1, 2020. Counsel for Maple Leaf advises me that Ms. Neighbour resigned her employment with Maple Leaf the next day. In her affidavit, Ms. Neighbour says that Mr. Milenkov was the maintenance manager at Regency Park at the time Mr. Aggoune served the petition on him. Ms. Neighbour says that Mr. Milenkov has since left Maple Leaf's employment. She also says that she does not believe Mr. Milenkov provided a copy of documents filed in this proceeding to anyone at Maple Leaf. There is no evidence about whether Maple Leaf sought to obtain an affidavit from Mr. Milenkov for the purposes of this application.
- [19] On September 11, 2019, Mr. Aggoune sent an email to Mr. Hamid Khojesta, at a Larco email address, copied to Ms. Neighbour, with the re line "Confirmation of Service", writing to confirm that he served the petition and affidavit on Mr. Milenkov the previous day. He asked them to acknowledge service of same.

- [20] On October 7, 2019, Mr. Aggoune sent an email to Ms. Neighbour, copied to Mr. Khojesta and Dali Janic, a Senior Property Manager with Maple Leaf with a Larco email address, forwarding the September 11, 2019 email to them. In the October 7 email, he referred to a conversation with Ms. Neighbour the previous Wednesday, and said that he had not received a response to his September 11, 2019 email. He requested confirmation of receipt of his current email and the documents served on Mr. Milenkov on September 10.
- [21] Mr. Aggoune says that on October 11, 2019, he went to the building manager's office at Regency Park and spoke with Ms. Neighbour and Mr. Milenkov. He recorded this conversation, and included a transcript of part of that conversation in his affidavit. In it, Ms. Neighbour confirms receipt of the documents and the October 7, 2019 email and says that she forwarded everything to head office.
- [22] Mr. Aggoune says that on October 15, 2019, he called Maple Leaf's head office and spoke to Cynthia Spooner, a Senior Property Manager for Maple Leaf with a Larco email address, who confirmed reception of the Ministry of the Attorney General's response to petition. Mr. Aggoune also recorded this conversation, and included a transcript of a portion of it in his affidavit. It indicates that Ms. Spooner said she had received a larger package of about 100 pages, but she did not confirm that she had received the petition and affidavit. Following this conversation, Mr. Aggoune sent a follow-up email to Ms. Spooner, forwarding a copy of his September 11, 2019 email and asking her to confirm that the landlord had received the documents he had served on Mr. Milenkov.
- [23] On November 1, 2019, Mr. Aggoune again emailed Ms. Spooner. After discussing some issues related to the stove in his apartment, he wrote "[a]dditionally, we have sent written communications to you in regards to repairs needed and confirmation of service for the Supreme Court hearing coming up and have not received a response from Mr. Lalji nor from yourself, do you or Mr. Lalji intend to attend the hearing?"
- [24] Ms. Spooner replied that same day, saying only "please proceed as you feel necessary."
- [25] Mr. Aggoune also attached exhibits to his affidavit which indicate that he had served evidence packages for RTB proceedings by giving the materials to Mr. Milenkov or Ms. Neighbour in the building managers office at 1225 Cardero Street on previous occasions.
- [26] Ms. Neighbour did not swear an affidavit in response to Mr. Aggoune's affidavit of September 14, 2020. Ms. Spooner did on September 22, 2020. In it, she states that she started her position as a Senior Property Manager with Maple Leaf on or around August 27, 2019, and that since that time she has had several interactions with Mr. Aggoune by phone and email. She says that Mr. Aggoune frequently makes complaints about issues in his suite, and shows up at the building manager's offices unannounced to leave documents related to those issues.

- [27] Ms. Spooner says that she does not believe that Mr. Milenkov ever provided a copy of the petition to anyone at Maple Leaf, and that had Maple Leaf been served with notice of this proceeding, it would have appeared at the hearing and opposed the relief sought.
- [28] In respect of the October 15, 2019 telephone conversation, Ms. Spooner says that Mr. Aggoune knew that she had not received the petition, and that he said he would forward the documents to her, but he never did. She says she did not respond to his email of that same date because she had not received a copy of the documents.
- [29] In respect of her November 1, 2019 email, Ms. Spooner says that her comment has been taken out of context, and refers to a number of other emails relating to the stove issue that was also mentioned in Mr. Aggoune's email to which she was replying.
- [30] Mr. Aggoune's last affidavit in this proceeding was sworn on September 28, 2020. He provided evidence from the Ministry of the Attorney General confirming that they sent their response to petition and affidavit to Maple Leaf at Suite 102, 1225 Cardero Street by courier on October 9, 2019.
- [31] Maple Leaf denies that it was served with the petition and also denies that it had notice of the petition.
- [32] The parties did not provide full argument on the question of whether Maple Leaf was properly served.
- [33] Rule 4-3(1)(b) sets out that a petition must be personally served in accordance with Rule 4-3(2). It provides, in relevant part:
- (2) Unless the court otherwise orders, personal service of a document is to be effected as follows:
 - (b) on a corporation,
 - (i) by leaving a copy of the document with the president, chair, mayor or other chief officer of the corporation,
 - (iii) by leaving a copy of the document with the manager, cashier, superintendent, treasurer, secretary, clerk or agent of the corporation or of any branch or agency of the corporation in British Columbia, or
 - (iv) in the manner provided by the Business Corporations Act or any enactment relating to the service of court documents,
- and, for the purpose of this paragraph, if the chief place of business of the corporation is outside British Columbia, every person who, within British Columbia, transacts or carries on any of the business of, or any business for, that corporation is deemed to be an agent of the corporation;
- [34] Section 9(2) of the Business Corporations Act, S.B.C 2002, c. 57 provides the following with respect to service on an extraprovincial company, such as Maple Leaf:

- (2) Without limiting any other enactment, a record may be served on an extraprovincial company
- (a) by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for the head office of the extraprovincial company in the corporate register if that head office is in British Columbia, or
- (b) by serving any attorney for the extraprovincial company or, without limiting this, by delivering the record to the delivery address, or by mailing it by registered mail to the mailing address, shown for any attorney for the extraprovincial company in the corporate register.
- [35] Mr. Aggoune left the petition with Mr. Milenkov. Was that sufficient to effect service? Clearly, service was not effected in a manner contemplated by s. 9(2) of the Business Corporations Act. But service may also be effected by leaving a copy of a document with an "agent" of a corporation. Maple Leaf is an extraprovincially registered company. The Extraprovincial Company Summary for Maple Leaf indicates that its "head office" is in Toronto. From this, I take it that its chief place of business is in Ontario, which means that Rule 4-1(2)(b) applies to provide "that every person who, within British Columbia, transacts or carries on any of the business of, or any business for, that corporation is deemed to be an agent of the corporation".
- [36] In *Na v. Renfrew Security Bank*, 2003 BCSC 1204 at paras. 25-27, the court discussed the meaning of agent in Rule 11(2)(b) of the former rules, that contained the same wording as the current Rule 4-1(2)(b):
- [25] Where a corporation has its chief place of business outside of British Columbia, it is not sufficient service to leave a copy of a document with the Chair of that corporation even if the Chair can be found in British Columbia. Rather, it is necessary to establish that the individual being served is an agent of the corporation and that the person transacts or carries on any of the business of the corporation within the Province.
- [26] To be an "agent" within the meaning of the Rule, the agent must be transacting or carrying on any of the business of or for the corporation at the time of service and an isolated transaction is not sufficient to establish the carrying on of the business or for the corporation: *Central Trust Co. of China v. Dolphin Steamship Co. Ltd.* (1950), 1950 CanLII 225 (BC CA), 2 W.W.R. 516 (B.C.C.A.) where Robertson, J.A. in the majority stated that the practice in British Columbia was similar to Ontario:

... it must be shown that the business done has continued for a substantial period of time; that the business was done at a fixed place; and that the business done within the jurisdiction was not merely the transmission by an agent ... to a principal outside, but the actual transacting within the jurisdiction of some of the business of the company. (at p. 522).

- [37] Maple Leaf provides property management services in BC, which has been an ongoing business since at least July 2013 when Ms. Neighbour started as the building manager. It has employees and an office at Suite 102, 1225 Cardero Street. Mr. Aggoune as a tenant knew Mr. Milenkov and reached out to him when no one was at Maple Leaf's office. When Mr. Milenkov was served, he was in the business office sitting behind the building manager's desk. Mr. Milenkov is variously described by the parties as a maintenance manager or acting building manager. Whatever his title, I find Mr. Milenkov came within the definition of agent in Rule 4-1(2)(b) and leaving the petition with him sufficed to effect personal service on Maple Leaf.
- [38] Regardless of whether service of the petition on Mr. Milenkov constituted service on Maple Leaf, it is clear that Maple Leaf had actual knowledge of the petition. There is no dispute that Mr. Aggoune gave the petition to Mr. Milenkov. It is also clear that Mr. Aggoune emailed Mr. Khojesta, Ms. Neighbour and Ms. Spooner on several occasions, seeking confirmation that Maple Leaf had received the petition. He also spoke with Mr. Milenkov, Ms. Neighbour and Ms. Spooner about the petition, seeking to confirm that it had been received. Maple Leaf received a copy of the Ministry of the Attorney General's response to the petition. In the last email exchange on the matter, on November 1, 2019, Mr. Aggoune explicitly asked Ms. Spooner whether she or Mr. Lalji would be attending the hearing of the petition, to which she replied that he should proceed as he felt necessary.
- [39] Maple Leaf received the petition. Mr. Aggoune followed up with Ms. Neighbour, the building manager, and Ms. Spooner, a Senior Property Manager repeatedly to confirm service. He told Ms. Spooner there was a hearing, and he asked her if she or Mr. Lalji would attend. Regardless of whether service was effected consistent with the Rules, Maple Leaf knew, or at a bare minimum ought to have known, that Mr. Aggoune had filed a petition with the court with respect to the RTB's Decision.
- [40] Maple Leaf's essential argument on this point is that Mr. Aggoune made so many complaints and sent them so much paperwork that they could not be expected to know what petition he was referring to. There is no merit in this argument. They knew he had filed a petition, and received a copy of the Ministry of the Attorney General's response to petition, and a reasonable corporation in Maple Leaf's position would have taken steps to inform itself of the details of that petition, respond and attend the hearing, regardless of whether it had been served in technical compliance with the Rules. Its conduct in failing to do so was deliberate and blameworthy.
- [41] I find Maple Leaf was guilty of wilful default in failing to appear at the hearing of the petition.

Did Maple Leaf act as soon as reasonably possible to set aside the Order?

- [42] In CMHC, Justice Martinson explained what is meant by the requirement that a party seeking to set aside a decision act as soon as reasonably possible:

- [43] It is appropriate to consider all the surrounding circumstances in assessing whether the matter was brought on as soon as reasonably possible: *Practicar Systems Inc. v. Saukarookoff*, 2007 BCSC 733. As described in *Schindler v. Johnstone* at ¶ 48:

What amounts to "as soon as reasonably possible" must be assessed in light of the circumstances of the case. One important circumstance is the nature of the order which the applicant seeks to have reconsidered. The need for an applicant to act as soon as reasonably possible is, in part, a reflection of the need for finality in court orders. People need to be able to arrange their affairs in reliance upon court orders. That need is more acute when the order in question may, to the applicant's knowledge, result in irrevocable steps, such as the sale of real property, being taken in reliance on it.

[Emphasis in original.]

- [43] The burden lies on Maple Leaf to establish that it acted as soon as reasonably possible after learning of the Order: CMHC at paras. 44-45.
- [44] I therefore take up the chronology of events following the December 18, 2019 judicial review hearing and Order.
- [45] On December 20, 2019, Mr. Aggoune sent an email to the RTB providing them with a copy of the Order. On December 23, 2019, he forwarded a copy of that email and the Order to Mr. Lalji, asking for confirmation of receipt. He told Mr. Lalji he would forward him his bill of costs in January.
- [46] On February 3, 2020, Mr. Aggoune sent an email to Ms. Spooner, copied to Mr. Lalji, following up on documents he said he had served them 13 days previously, including the Order and bill of costs. He said he had received no response, and asked if they were agreeable to the bill of costs.
- [47] On April 4, 2020, Supreme Court Scheduling sent an email to Mr. Aggoune and Mr. Lalji advising that due to the suspension of regular court operations caused by COVID-19, the costs hearing that had been scheduled for April 23, 2020 had been adjourned generally.
- [48] Ms. Neighbour was on medical leave of absence from sometime in June 2020 until September 1, 2020. She swore her affidavit in support of this application to set aside the Order that same day. This application was filed on September 2, 2020.
- [49] Meanwhile, the new hearing before the RTB had been scheduled to be held September 10, 2020. I am told that that hearing was adjourned to October 27, 2020, pending the Court's decision on this application.
- [50] Mr. Lalji swore an affidavit in response to Mr. Aggoune's September 14 affidavit on September 15, 2020. In it, he says he is a director of Larco Investments Ltd. He explains that 690723 Ontario Inc. is a subsidiary of Larco, and operates as Maple Leaf. Larco owns Regency Park and Maple Leaf manages it.

- [51] In his affidavit, Mr. Lalji denies that Mr. Aggoune served him with the bill of costs. He says that he is not involved in the day to day operations of the individual properties owned by Larco and managed by Maple Leaf. He says he was aware in a very general way that Regency Park had a "difficult tenant", and that Mr. Aggoune attempted to contact him by email on numerous occasions. He says, however, that he never responded to Mr. Aggoune.
- [52] Ms. Spooner's and Ms. Neighbour's affidavits do not speak to the period of time between the December 18, 2019 Order and this application being filed.
- [53] I am not satisfied that Maple Leaf acted as soon as reasonably possible to set aside the Order. Mr. Aggoune acted promptly to advise Maple Leaf of the Court's Order, and emailed Mr. Lalji a copy of the Order. While Mr. Lalji denies that Mr. Aggoune served him with the bill of costs, and I have no direct evidence that he did so, the emails filed by Mr. Aggoune demonstrate that, at a minimum, he emailed both Mr. Lalji and Ms. Spooner about the bill of costs.
- [54] Counsel for Maple Leaf submitted, in essence, that Mr. Lalji did not pay attention to Mr. Aggoune's emails. But that does not explain why Mr. Lalji would have ignored the email from Supreme Court Scheduling notifying the parties that the costs hearing scheduled for April 23, 2020 had been adjourned.
- [55] It is notable that Maple Leaf provided no evidence as to when it learned of the Order. I find that it learned of it, or ought to have done so, on December 23, 2019, when Mr. Aggoune emailed Mr. Lalji and forwarded him a copy of the Order. Both Mr. Lalji and Ms. Spooner were clearly advised of the Order on February 3, 2020. So even if Mr. Lalji paid no attention to Mr. Aggoune's emails, Ms. Spooner knew about the Order at least by February 3, 2020.
- [56] Maple Leaf had ample opportunity to apply to set aside the Order long before it did. Its timing in doing so, less than two weeks before the new hearing before the RTB was scheduled to occur, suggests that it may have filed this application for tactical reasons, to delay that RTB hearing or distract Mr. Aggoune from preparing for it. It was unfair to Mr. Aggoune and the other tenants for Maple Leaf to delay in filing its application to set aside the Order, given that the new RTB hearing is dependent upon the finality of that Order.
- [57] I find that Maple Leaf did not act as soon as reasonably possible to set aside the Order.

Is there a meritorious defence or a defence worthy of investigation?

- [58] In CMHC at para. 28, Martinson J. summarizes the principles relevant to the determination of whether a party has a meritorious defence or a defence worthy of investigation. The applicant must cite facts disclosing such a defence, but need not demonstrate that it will succeed. The affidavit material must be sufficiently detailed to enable the court to determine if there is such a defence, but it is not necessary for the applicant to swear to all of the evidence he believes might support a defence.

- [59] Justice Russell set aside the RTB's decision, with the exception of the part of the decision relating to the ventilation issue, and remitted the matter to the RTB for a rehearing. She also ordered costs against Maple Leaf. From the transcript of the court's proceedings on the judicial review, it is clear that she set aside the RTB's decision on the basis that it was procedurally unfair, and in particular, on the basis that the RTB gave Mr. Aggoune an unfairly short period of notice to provide evidence in the hearing.
- [60] Maple Leaf submits that Mr. Aggoune's evidence on this point was misleading and untrue, and that he had ample opportunity to provide his evidence for the RTB hearing.
- [61] It is difficult for the Court, on this application, to assess whether Maple Leaf may have a meritorious defence or at least one worthy of investigation. The parties have not filed the complete record of the proceedings before the RTB, or the affidavit filed by the Ministry of the Attorney General on the judicial review which provided the complete record of proceedings. I am therefore unable to assess whether Mr. Aggoune had a fair opportunity to present his evidence, and in particular whether he was prejudiced by being given an unfairly short notice to provide his evidence.
- [62] Given the relatively low standard an applicant such as Maple Leaf must establish on this branch of the test to set aside a judgment, I accept that it may have a meritorious defence, or at least one worthy of investigation.

Conclusion

- [63] Having found that Maple Leaf was guilty of wilful default in failing to respond to the petition, and did not act as soon as reasonably possible in applying to set aside the Order, but may have a meritorious defence, I must still exercise my discretion and determine if, on a balance of probabilities, it would be a miscarriage of justice to allow the Order to stand: CMHC at paras. 27, 52-54.
- [64] In my view, the possibility that Maple Leaf may have a meritorious defence cannot overcome its wilful default in failing to respond to the petition despite clearly being aware of it. Mr. Aggoune unquestionably left a copy of the petition with Mr. Milenkov and repeatedly followed up with his superiors at Maple Leaf to confirm service and asked if they would be attending the hearing. Similarly, after the judicial review hearing, Mr. Aggoune repeatedly communicated with Mr. Lalji and Ms. Spooner to advise them of the Order and to seek to deal with his draft bill of costs. Maple Leaf has not explained its delay in bringing this application. Ms. Neighbour being on medical leave since sometime in June 2020 does not assist them, given both that six months passed between the Order being made and Ms. Neighbour's leave, and the fact that other, more senior, company officials were aware of the Order.

- [65] If Maple Leaf wished to pursue a defence to the petition it had ample opportunity, both before and after the December 18, 2019 hearing. It would constitute a miscarriage of justice to allow Maple Leaf now to set aside that Order, on the eve of the new hearing before the RTB. The public interest in ensuring that the Court's processes are respected and the finality of its orders upheld outweighs providing Maple Leaf with the opportunity to belatedly seek to uphold the fairness of the RTB's original hearing processes.
- [66] For these reasons, I decline to set aside the Order.
- [67] In submissions before me, Mr. Aggoune sought what he termed punitive damages and punitive costs. I explained to Mr. Aggoune that I do not have jurisdiction to order damages in a proceeding of this kind, but I do have jurisdiction to order costs.
- [68] In my view, this application was misconceived and ought not to have been brought. There were significant gaps in the affidavit evidence filed by Maple Leaf, perhaps most obviously the lack of any evidence as to when they learned of the Order or why they failed to file this application until September 2, 2020. Mr. Aggoune is entitled to his costs of this application forthwith in any event of the cause.

"Lyster J."

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