

CANADA / JUDGMENT

The Owners, Strata Plan KAS 2428 v. Baettig

2015 BCSC 804

COURT

Supreme Court of British Columbia

DECIDED

27 April 2015

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2015 BCSC 804 The Owners, Strata Plan KAS 2428 v. Baettig IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: The Owners, Strata Plan KAS 2428 v. Baettig, 2015 BCSC 804 Date: 20150427 Docket: H100377 Registry: Kelowna Between: The Owners, Strata Plan KAS 2428 Petitioner And Emma Baettig and Bank of Montreal Respondents

- and - Docket: S90204 Registry: Kelowna Between: The Owners, Strata Plan KAS 2428 Petitioner And 0697133 B.C. Ltd., Second City Capital Corporation and Gordon Hayman Respondents Before: Master Young Oral Reasons for Judgment In Chambers Counsel for the Petitioners: M.D. Fischer T.C. Fitzpatrick For the Respondents: No appearance Place and Date of Trial/Hearing: Kelowna, B.C. April 22, 2015 Place and Date of Judgment: Kelowna, B.C. April 27, 2015

- [1] THE COURT: This is a decision reserved on two matters: Owners, Strata Plan KAS 2428 v. Emma Baettig and Bank of Montreal, and it is in Action 100377; and Owners, Strata Plan KAS 2428 v. 0697133 B.C. Ltd., Second City Capital Corporation and Gordon Hayman, and that is at 90204.
- [2] In these two strata lien actions, I was asked to approve sales, which I did, but I was surprised to see that in each application counsel for the petitioners sought full indemnity costs. It had been my belief that in this province the usual practice is to award costs at Scale B unless there were unusual circumstances. This led me to a review of the first orders enforcing the lien which I made in December. They were silent as to costs other than to make a declaration setting out the amounts to redeem and including the statement that this amount will increase as further unpaid strata fees, special levies, interest, and other amounts that may become payable under ss. 116 and 118 of the Strata Property Act, together with "the petitioner's full indemnity cost of this proceeding as assessed by the registrar."
- [3] I issued a judgment on December 17, 2014, in the balance of the order, in both actions, but no order for costs was made. The full indemnity wording in the declaration was not drawn to my attention in the first hearing. As Chief Justice McEachern said in *Canada Trust Co. and Sundist Holdings (1981)*, 29 B.C.L.R. 1 (S.C.): I cannot leave this application without

expressing again my very real concern about chambers practice. The chambers judge must rely almost entirely upon the statements of counsel as the volume of the applications does not permit the judge to read all the material. I often ask counsel if they have any information that might persuade me not to make the order which is being sought. Counsel should always disclose any such information whether the formal question is addressed to them or not.

- [4] The December 17, 2014 judgment is a final order and so costs should have been ordered at that time. The declaratory judgment does leave room to reopen the issue of costs, though, and so at this time prior to the entry of the approval of sale order, I will address the issue of the scale of costs. The statutory authority is under the Strata Property Act, s. 118, which says: 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.
- [5] In the case of *Strata Plan LMS93 v. Neronovich* (1997), 39 B.C.L.R. (3d) 382, Master Joyce, as he then was, heard an application to enforce a claim under the Condominium Act, the predecessor to the present Strata Property Act. In that case, one of the prayers for relief under the petition was a declaration that: the amount due and owing to the strata corporation is \$6,010.40 as at June 1, 1994 "accruing by the sum of \$120.47 on the first day of each and every month thereafter, to the last day of redemption herein, together with a monthly late payment charge in the sum of \$50.00, a monthly special assessment in the [amount] of \$40.10, and the legal cost of the petitioner in these proceedings to be taxed on a solicitor and own client basis (collectively, the "Redemption Amount")"
- [6] I have been shown the petition in the cases before me and those petitions also seek an order for reasonable legal costs of the petitioner to rank and priority of other lien charges. Interestingly, Master Joyce granted an order at the hearing of the petition and then subsequently, as a result of certain authorities coming to his attention, directed that the order not be entered and further submissions as to costs be made. I find myself in a similar situation. He considered s. 37 of the Condominium Act which read:
- (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.
- [7] Master Joyce considered the decision of Madam Justice Huddart in *Strata Corp. Vr. 873 v. Crumley* (1982), 40 B.C.L.R. 80, where she considered the issue of legal costs under s. 37 of the Condominium Act. Master Joyce said at paragraph 14: The strata corporation argued that it was entitled to indemnification for costs because of the provisions of s. 127(1) [of the Condominium Act]. At p. 83 the learned judge dealt with the argument as follows: When Mr.

Crumley failed to pay a monthly assessment as required by s. 128(8) or (10) which form part of the by-laws of the strata corporation, he violated the by-laws and became liable to the additional charge[s] provided in s. 127(1). The section provides the remedy and I do not think it requires any order of this court to permit the strata corporation to take advantage of it. (emphasis added) Then at paragraph 15: The learned judge said further: ... I have concluded that this case is not analogous to a mortgage in which two parties contract for an indemnification for costs. The provision for indemnification for 'costs incurred' is included in the by-laws of the corporation. The owner purchased the condominium fully aware of the by-laws. There is no provision in them for an accounting or for an opportunity for the owner to challenge the reasonableness of the bill. The bill is rendered to the strata corporation. If the strata corporation considers it to be unreasonable, it can challenge the bill. However, that conclusion does not mean that the strata corporation may add the amount of its costs incurred to the amount owing pursuant to s. 37. In my view, that section allows the strata corporation to add the land title fee, the amount of its legal bill and of any administrative expenses for the filing of Forms B and C - but it allows only the taxable costs on a party-and-party basis of the proceeding. (emphasis added)

- [8] Master Joyce in *Neronovich* said at paragraph 29: The additional charges which the learned judge referred to were the actual legal costs and the remedy to which she referred, in my view, was s. 127(2). The learned judge concluded that the owner was not obliged to pay the actual legal costs in order to "redeem", although he would be responsible for them and liable to an action in debt if they were levied by the strata corporation. Counsel for the petitioner suggests that this case is distinguishable in that here the strata corporation has "levied" the additional amounts which it seeks to recover. In my view, however, the ratio of *Crumley* is that in respect of legal costs s. 37 may be used only to recover party/party costs and that to recover any other legal costs the strata corporation must resort to s. 127(2).
- [9] In fixing the scale of costs, Master Joyce goes on to say at paragraph 33: There is a further aspect to the matter of costs which has to be considered. While I have concluded that the amount for which the strata corporation has a charge against the owner's lands and the amount required to "redeem" includes the costs of this proceeding on a party/party basis only it would be within the court's discretion to award special costs of the proceeding if appropriate. However, I do not consider that the circumstances would warrant such an order on the authorities. The strata corporation will have its costs of this proceeding at scale 3. That does not, of course, prevent the strata corporation from ultimately recovering its actual legal costs [in] an action as permitted by s. 127(2). That is the end of the quote from Master Joyce.
- [10] In *Canada Trust Co. v. Gies*, at 2001 BCSC 1016, Justice Preston dealt with the issue of costs under Strata Property Act s. 118 which is the equivalent of s. 37(8) of the Condominium Act. He followed Justice Huddart in the *Crumley* decision when she said legal costs of the proceeding: ... meant taxable party and party costs of proceedings taken by a strata corporation to obtain judgment against an owner for arrears of monthly assessments.

- [11] In *The Owners, Strata Plan LMS4012 v. Rangi*, 2007 BCSC 972, Master Caldwell notes at paragraph 4: In the so called strata corporation foreclosure the general rule has been for costs to be awarded at Scale 3.
- [12] He said the question before him under the new tariff is, should costs be awarded at Scale A, which is the usual costs for foreclosure, or Scale B. He decided Scale B was appropriate because the actual costs of the process of enforcing the lien on the strata corporation was borne by a relatively small amount of individuals.
- [13] In *First West Credit Union v. Milligan*, 2012 BCSC 610, Mr. Fischer attempted to distinguish this line of authorities and to distinguish the Condominium Act from the Strata Property Act lien provision. Mr. Justice Betton rejected the argument. He followed the Gies decision and at paragraph 45 ordered that unless costs specifically related to the registration of the lien under s. 117 or enforcement of the lien, there was no basis to include them in the lien amount. He ordered costs on a party and party basis following the Gies decision.
- [14] I was referred to some obiter at paragraph 65 of the Milligan decision. It does not help the petitioner here. I believe paragraph 65 means that if the strata corporation does have bylaws that enable it to collect its full legal fees incurred to correct an owner's breach of the bylaw, then the strata corporation can collect those fees in a separate judgment, but it is not to be rolled into the legal costs referred to in the lien section of the Act.
- [15] As explained by Master Joyce in *Neronovich* at paragraph 28: There are other provisions of the Act which enable the strata corporation to impose other levies and where so imposed the owner is liable to pay them. If the owner does not pay them he is in breach of the bylaws and the strata corporation may have the power under s. 127(2) [of the Condominium Act] to recover those levies by "an action for debts". The fact that other amounts may be recoverable by the strata corporation under other sections of the Act does not mean that the summary procedures of s. 37 [of the Condominium Act] are available for them. I have concluded that s. 37 is not applicable to them. In my view, that is the very conclusion which Huddard J. came to in *Crumley* when she said: When Mr. Crumley failed to pay a monthly assessment as required by s. 128(8) or (10) ... he violated the by-laws and became liable to the additional charges provided in s. 127(1). The section provides the remedy and I do not think it requires any order of this court to permit the strata corporation to advantage of it.
- [16] So that is all of the background, longwinded as it is, and here is my decision.
- [17] I find that Scale B costs are recoverable by the petitioner in both cases before me. Whether or not there is a shortfall is not material to my decision. 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 it is not the law in B.C.

- [18] For that reason, I am awarding Scale B costs in both actions and no costs to the petitioner for the last two court appearances, and because that was a lot of case reference, Madam Registrar, I am going to order a transcript.
- [19] THE CLERK: Yes.
- [20] THE COURT: Okay. Okay, thank you.
- [21] MS. FITZPATRICK: I just want to ask -- one last item. The closing date is fairly soon. It was actually 10 days, not 21 days, with the ability to extend that for another 10 days, and I am just looking to dispense with the need for Ms. Nelligan's signature on behalf of Second City Capital Corporation given that tight timeframe.
- [22] THE COURT: Oh, on the sale order?
- [23] MS. FITZPATRICK: On 697133, yes.
- [24] THE COURT: Okay, is she consenting to dispense with her signature, because that should have been brought up when she was on the phone and she did not --
- [25] MS. FITZPATRICK: No, and I did not anticipate this to go for another week in court.
- [26] THE COURT: Well, I think you need to ask her if she is agreeable. So I am not going to grant that order now, but I think you can expedite the entry of the order if you can get her signature and then electronically file the order, and then, when you electronically file, say that it is a rush and I think you will get about a one or two-day turnaround, if it is electronically filed. That is what I have been advised by our registrar. Okay.
- [27] MS. FITZPATRICK: Okay.
- [28] THE COURT: I know that she did not want to appear today, but I think you have to get her approval to dispense with her signature. "Master B.M. Young"

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