

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF GRANDE PRAIRIE

BETWEEN:

THE OWNERS: CONDOMINIUM PLAN NO. 902 0678 (HAYWOOD COURT
CONDOMINIUM CORPORATION)

Plaintiff
Applicant

and

ALBERT DEE MECHAM
MARK ARCAND

Defendants
Respondents

P R O C E E D I N G
E X C E R P T

Grande Prairie, Alberta
January 19, 2010

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TABLE OF CONTENTS

Description	Page
January 19, 2010 Afternoon Session	1
Reasons for Judgment	1
Certificate of Record	6
Certificate of Transcript	7

1 Proceedings taken in the Court of Queen's Bench in Alberta, Courthouse, Grande Prairie,
2 Alberta

3 _____
4 January 19, 2010 Afternoon Session

5
6 The Honourable Court of Queen's Bench
7 Madam Justice Streckf of Alberta

8
9 B. Anderson For Haywood Court Condominium
10 Corporation

11 C.C. Osualdini For Marc Arcand
12 J. Bressler Court Clerk

13 _____
14

15 **Reasons for Judgment**

16

17 THE COURT: So, we are here dealing with an application by
18 Haywood Court Condominium Corporation seeking relief against Marc Arcand. The
19 background to this application it arises out of some damage that occurred to unit 56 in
20 the Haywood Court Condominium complex. That premise was formerly owned by Alex
21 Mecham. The premises was apparently abandoned in 2004, and sustained water
22 damage. The property was subsequently vandalized in November of 2005, and sustained
23 further damage.

24

25 In 2006, the Condo Corporation obtained an order from Justice Coutu on August 21st of
26 2006, and it provided that Mr. Mecham owed the Condo Corporation moneys and if he
27 failed to redeem then the property could be sold. The corporation was permitted in
28 paragraph 8 of that order to undertake some mould remediation. A further order was
29 granted as a result of when the mortgagee came forward and advised that they wished to
30 redeem the property and pursuant to that the title ultimately transferred into the name of
31 Marc Arcand.

32

33 Arrangements were made by Mr. Arcand to have some remediation work performed on
34 the property and that is ultimately what has led to this dispute. Arcand's position is that
35 the remediation was sufficient. The Condominium Corporation took issue and there was
36 lengthy debate back and forth, the exchange of various different expert reports, and
37 ultimately in a report prepared by Arcand's expert in 2008, it is essentially
38 acknowledged that the remediation had not been properly performed. The remediation
39 has now been completed and the Condo Corporation acknowledges that the remediation
40 is satisfactory.

41

1 The issue that is now before the court is to deal with is the claims for costs that have
2 been brought by the Condo Corporation. The Condo Corporation provided at the outset
3 of this application a breakdown of those costs. The first amount in the breakdown was
4 \$3,560.51 which were costs which counsel advised related to the foreclosure action and
5 the proceedings taken in relation either leading up to Justice Coutu's order or in relation
6 to the acquisition of title by Mr. Arcand.

7
8 I do not see that those costs relate to the remediation issues that were put before the
9 court in the notice of motion and therefore those costs, while the plaintiff may be
10 entitled to them on some basis, I do not see that they are really properly dealt with in
11 this motion or have not been pointed to that evidence.

12
13 The plaintiff or the applicant also seeks legal costs on a solicitor and client basis of
14 approximately \$31,000; financing charges of \$4,014.13; disbursements of \$64.61; and
15 payments that were made to D.T. Technical Services in relation to the inspections
16 conducted in the amount of \$4,069.63.

17
18 The Condo Corp claims that it is entitled to these amounts pursuant to the wording of
19 paragraph 8 or paragraph 9 of Justice Coutu's order. Dealing first with paragraph 9 of
20 the order, paragraph 9 states that the costs of this action are awarded to the applicant on
21 a solicitor and her own client indemnity basis as provided for in the bylaws and the Act.

22
23 To the extent that the costs in question are costs that have arisen subsequently I am not
24 of the view that that particular paragraph of Justice Coutu's order was intended to
25 provide on a prospective basis that any steps taken in this action would be covered on a
26 solicitor-client basis and therefore I do not see that that paragraph justifies a claim for
27 solicitor and client costs by the Condo Corporation.

28
29 Paragraph 8 provides that, and I quote:

30
31 The corporation is permitted to undertake mould remediation in
32 the unit however the new purchaser will first be given an
33 opportunity to do so. Should the purchaser not have completed
34 the mould remediation within 45 days from taking title and
35 provide to the corporation an inspection certificate indicating that
36 mould remediation has been successful and completed in
37 accordance with the recommendations of the D.F. Technical
38 Services Inc. report, appended as Exhibit 'A' to the supplementary
39 affidavit of Lorna Dell, Aaron Chap (phonetic), sworn August
40 17th, 2006, then the corporation may undertake the work and bill
41 back the entire cost associated with that to the purchaser so as to

1 be completely indemnified.

2
3 Now, there was dispute between the parties as to what this paragraph contemplates in
4 this context. The Condo Corporation takes the position that the purchaser did not
5 complete the mould remediation in a satisfactory way and that it was ultimately
6 confirmed in the November 2008 report nor did the purchaser provide the corporation
7 with the inspection certificate contemplated and that the certificate provided by Terrick
8 Interiors (phonetic) did not comply with the requirements of that section and therefore
9 the Corporation's position is that the costs incurred by the Corporation in providing
10 expert reports and seeking to enforce or compel Arcand to take steps should be covered
11 on the basis that the paragraph provided that the corporation could undertake work and
12 bill the entire cost associated to that purchaser so as to be completely indemnified and
13 that on a purposive reading of this clause that was intended to provide for and include
14 solicitor and client costs. Arcand's counsel takes the position that that is not the proper
15 interpretation of that particular provision.

16
17 In considering this section, and also in looking at this order in the context of the overall
18 action as a whole, I am satisfied that what was contemplated was that the Corporation
19 was not to be out of pocket on this matter. I also accept that what happened was
20 beyond what was originally contemplated in that the parties ended up more in a legal
21 dispute as to who should do something rather than an issue of the actual costs for
22 remediation, which was certainly something that was, I do not think, contemplated by
23 Justice Coutu when she granted the order.

24
25 Now, while solicitor and client costs are usually exceptional I have considered that the
26 *Condominium Property Act* contemplates that the condominium's full reasonable costs
27 can be recovered pursuant to section 39 when the corporation is bringing an action to
28 recover any sum of money spent by the corporation pursuant to a bylaw, or as required by
29 a municipal authority, or other public authority in respect to the unit or common
30 property that is leased to that owner under the section.

31
32 I do not accept the argument that the section 8 constitutes a requirement by the court
33 that this remediation take place, but what I am of the view that when you look at this
34 section overall what you see is a failure initially by the previous owner to deal properly
35 with the interior areas of the condominium which they had a duty to maintain and
36 therefore what this is is further steps that are ongoing and arise out of that initial breach.
37 When looking at the legislation as a whole and in context that it is not unreasonable that
38 this action would fall within the scope of section 39(1)(d) and therefore be covered by
39 section 42 which provides that where a corporation takes any steps to collect any
40 amount owing under section 39 the corporation may (a) recover from the person against
41 whom the steps were taken all reasonable costs including legal expenses and interest

1 incurred by the corporation in collecting the amount owing.

2

3 So, therefore reading that paragraph and in the context of paragraph 8, I am of the view
4 that the corporation should be entitled to recover the following amounts. First of all
5 they should be entitled to recover the costs that they incurred in the payments that were
6 made to D.T. Technical Services in relation to the remediation in the amount of
7 \$4,069.63. Those costs I think would be specifically covered by the wording in
8 paragraph 8 being work undertaken by the corporation in the face of Arcand's failure to
9 provide the required inspection certificate.

10

11 With respect then to the legal fees as well the condo corporation should be entitled to
12 recover their legal fees on a solicitor-client basis. Those are subject to taxation as
13 would any solicitor-client count be subject to taxation, so as to determine that they are,
14 in fact, appropriate and reasonable in the circumstances.

15

16 With respect to the claim for interest the claim for interest is apparently brought
17 pursuant to section 42 of the *Condominium Property Act* which provides that when a
18 corporation takes any steps to collect any amount owing under section 39 the
19 corporation may recover all reasonable costs including and interest is one of the items.

20

21 Section 40(1) of the *Condominium Property Act* provides that a corporation may charge
22 interest on any unpaid balance of a contribution owing to it by an owner and subsection
23 (2) provides that notwithstanding subsection (1) the rate of interest charged under
24 subsection (1) is not to be greater than the rate of interest provided by regulation.

25

26 Ms. Anderson, is it that the regulation that you had advised set a maximum of 18
27 percent?

28

29 MS. ANDERSON: Yes, My Lady, and would you like me for
30 your record to point to it? I'm sorry I didn't identify it ahead of time.

31

32 THE COURT: I just wanted to confirm that was the --

33

34 MS. ANDERSON: Yes.

35

36 THE COURT: -- that number.

37

38 MS. ANDERSON: And I will point to you --

39

40 THE COURT: Mm-mm.

41

1 MS. ANDERSON: I'll point you to the direct section. The rate
2 of interest is covered in the regulations section 76.

3
4 THE COURT: Mm-mm.

5
6 MS. ANDERSON: The rate of interest that may be charged by a
7 corporation under section 40 of the Act on any unpaid balance of a contribution owing
8 to the corporation by an owner shall not be greater than 18 percent per annum.

9
10 THE COURT: Okay. Okay. I also had referenced to the
11 provisions in the bylaw and originally counsel had indicated that the bylaw section 40.5
12 provides for interest on all assessed contributions at the rate of 2 percent per annum, but
13 counsel had indicated that this was subject to the maximum of 18 percent.

14
15 In reviewing those sections in the bylaw and section 40 this in my view does not qualify
16 as a contribution and therefore it is not covered either by section 40.5 which talks about
17 interest at 2 percent or by section 18. So, what then takes us to is - I do not think
18 section 40 which sets out the maximum of 18 percent is necessarily the appropriate
19 interest rate to be charged.

20
21 I think we are left with section 42 which says the corporation can recover all reasonable
22 costs including interest and therefore interest could only be at either the borrowing cost
23 of the Condominium Corporation if it had, in fact, a borrowing cost or interest under the
24 *Judgment Interest Act*. So, interest on this point is limited to that - to those amounts
25 and they are not entitled to interest at the 18 percent which was claimed.

26
27 So, with respect to - there was items for disbursements in the amount of 64.61 and those
28 items again would be entitled to be claimed if they fall within reasonable costs incurred
29 by the corporation in dealing with this matter.

30
31 So, is there anything else that needs to be addressed?

32
33 MS. ANDERSON: No thank you, My Lady.

34
35 THE COURT: Okay. Thank you.

36
37 _____
38 EXCERPT CONCLUDED
39 _____
40
41

1 **Certificate of Record**

2

3 I, Jaime Bressler, certify that this recording is a record made of evidence in the
4 proceedings in the Court of Queen's Bench, held in courtroom 202, at Grande Prairie,
5 Alberta, on this 19th day of January, 2010, and I was the court official in charge of the
6 sound-recording machine.

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1 **Certificate of Transcript**

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I, Janet Miller, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a true and faithful transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

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Order No. 1265-10-1	
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