IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vanguard Mortgage Investment Corporation v. Dietterle,* 2023 BCSC 573

Date: 20230413
Docket: H200340
Registry: Vancouver

2023 BCSC 573 (CanLII)

Between:

Vanguard Mortgage Investment Corporation

Plaintiff

And

Samuel Dietterle
John Doe and Jane Doe, as Tenants

Defendants

Before: The Honourable Justice MacNaughton

Reasons for Judgment on Costs

Counsel for the plaintiff:	J. Schachter
Counsel for defendants:	S.B. Coen
Place and Dates of Hearing:	Vancouver, B.C. November 22, 2022 March 8, 2023
Place and Date of Judgment:	Vancouver, B.C. April 13, 2023

2023 BCSC 573 (CanLII)

Introduction

[1] After a summary trial, in reasons cited as *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 [*Reasons for Judgment*], I allowed Vanguard Mortgage Investment Corporation's application for an order *nisi* and awarded it its costs of the summary trial. Vanguard Mortgage Investment Corporation is now known as Canguard Mortgage Investment Corporation ("Canguard").

[2] The parties appeared before me on November 22, 2022, and March 8, 2023, to speak to costs. These are my reasons.

[3] Canguard seeks special costs in this foreclosure proceeding. It argues that, as a result of Mr. Dietterle's unsuccessful attack on the mortgage itself, a straightforward foreclosure proceeding became a lengthy and complicated process. Although Canguard made two separate offers to settle this proceeding, it does not rely on those offers to seek double costs under Rule 9-1 of the *Supreme Court Civil Rules*. Rather, it submits that those offers should be considered as a factor favouring an order for special costs.

[4] Mr. Dietterle argues that the usual party-and-party costs, in accordance with Appendix B of the *Rules*, should be awarded. He says that the matter was relatively simple, involving one primary issue, with respect to a residential mortgage.

Legal Framework

[5] Section 20 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*], deals with costs in foreclosure proceedings. It provides:

> **20** (1) In this section:
>
> "**foreclosure**", in respect of an agreement for sale, as defined in section 16(1), means a foreclosure as defined in that section;
>
> "**mortgage**" includes an agreement for sale as defined in section 16(1).
>
> (2) In a foreclosure in which costs are awarded, the court may,
>
> (a) despite any covenant or term of a mortgage respecting the payment and calculation or manner of determining costs and

> expenses in, arising out of, or in connection with a foreclosure, and
>
> (b) instead of making an order in accordance with that covenant or term,
>
> order that costs be assessed as party and party costs or as special costs under the Supreme Court Civil Rules, and the court may make no order for costs if it would otherwise make no order but for the covenant or term referred to in this subsection.

2023 BCSC 573 (CanLII)

[6] There is no dispute that s. 20 of the *LEA* applies in this case.

[7] Section 20 of the *LEA* allows a court to award costs on any scale in a foreclosure proceeding despite a covenant in the mortgage requiring a mortgagor to pay solicitor-and-client costs. In this case, the mortgage signed by Mr. Dietterle included the standard provision that required him to pay the mortgagee's solicitor-and-client costs.

[8] The analytical framework under s. 20 of the *LEA* was recently considered by Justice Fitzpatrick in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2022 BCSC 1314 [*Forjay*], a case on which Canguard relies:

> [66] Despite referring to the Rules, an award of special costs under s. 20 does not require that a mortgagee show reprehensible conduct by the party against whom special costs are to be awarded: *CIBC Mtge. Corp. v. Lalji* (1986), 8 B.C.L.R. (2d) 310 (C.A.) at 312–313; *Pacific Playground v. Endeavour Developments*, 2003 BCSC 204 at paras. 21–22. In other words, it grants the court more latitude than *Garcia* in awarding special costs.

[9] Counsel for Mr. Dietterle does not accept Fitzpatrick J.'s statement at para. 66, and says that it was not the law until it had been confirmed by the Court of Appeal. The Court of Appeal decision in *CIBC Mtge. Corp. v. Lalji* (1986), 8 B.C.L.R. (2d) 310 (C.A.) [*Lalji*], formed the basis of Fitzpatrick J.'s statement, which accurately reflects the law.

[10] The principles applied in considering an award of special costs under the *Rules* are well-settled. The court may award special costs when a party has engaged in "reprehensible conduct" deserving of reproof or rebuke. As explained in *Garcia v. Crestbrook Forest Industries Ltd.*, 9 B.C.L.R. (3d) 242 at para. 17, 1994

CanLII 2570 (C.A.), reprehensible conduct encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke. In this case, Canguard does not argue that Mr. Dietterle engaged in reprehensible conduct and does not rely on the *Rules* for its claim for special costs.

2023 BCSC 573 (CanLII)

[11] Rather, Canguard relies on the statutory jurisdiction under s. 20(2) of the *LEA* as the basis for a special costs award. As Fitzpatrick J. explained in *Forjay* at para. 66, citing earlier cases, an award of special costs under s. 20 does not require that a mortgagee show reprehensible conduct. The court is granted more latitude under s. 20 than under the *Rules* and the test set out in *Garcia*.

[12] The intention of s. 20—or its predecessor, s. 18.2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 —was first described in *Granville Savings v. Hofstetter*, 2 B.C.L.R. (2d) 287, 1986 CanLII 1047 (S.C.) [*Hofstetter*]. It changed the prior common law that mortgage terms requiring mortgagors to pay solicitor-and-client costs were to be enforced except in special circumstances. As a result of s. 18.2, notwithstanding provisions in a mortgage concerning costs, the court retained discretion to depart from those provisions: *Hofstetter* at 290–291; *Lalji* at 311–313.

[13] Although Mr. Dietterle submits that the test for an award for special costs in foreclosure proceedings should be the same as in other civil proceedings, and does not accept Fitzpatrick J.'s finding in *Forjay* to the contrary until the Court of Appeal had spoken on the matter, his submissions in that regard are misguided. As was made clear by Fitzpatrick J., she was following what the Court of Appeal said in *Lalji*. In *Lalji*, Justice Hinkson wrote at 312–313, in relation to s. 18.2 of the old *Law and Equity Act* (now s. 20 of the *LEA*):

> [11] In civil proceedings generally where costs are awarded to a successful party, such costs are awarded on a party-and-party basis. It is only where the successful party has been put to unnecessary legal expense by the unfounded allegations or procedural misconduct of the unsuccessful party, or where the conduct of the unsuccessful party which is the subject matter of the claim shows an extraordinary disregard for the standard to be expected of him, that costs are awarded on the higher scale. <u>The discretion conferred upon the court by s. 18.2 of the Law and Equity Act to award costs on a solicitor-and-client basis rather than on a party-and-party basis is not limited to such conduct by the unsuccessful party. There may be other</u>

> considerations which will lead a chambers judge in foreclosure proceedings to grant or refuse costs on a solicitor-and-client basis. The discretion conferred by the Act is not limited to the considerations which are applied in civil proceedings generally. [Emphasis added.]

See also *First West Credit Union formerly known as Valley First Credit Union v. Gateway Industrial Park Ltd.*, 2018 BCSC 1749 at para. 54.

[14] In *Security Pac. Bank Can. v. Crippen Engr. Ltd.*, 19 B.C.L.R. (2d) 179, 1987 CanLII 2486 (S.C.), Justice MacDonald explained at 182 that s. 18.2 was aimed at the inequity of mortgage lenders “dictating” mortgage terms and solicitors taking advantage of those terms to recover amounts which appeared to be unreasonable in “usual residential foreclosures”.

[15] At para. 79 of *Forjay*, Fitzpatrick J. said the result was to introduce a more holistic view of the circumstances arising in a foreclosure proceeding to determine the appropriate award of costs.

[16] Foreclosure procedures are intended to be summary. In British Columbia, Rule 2-1(2)(g) requires that a foreclosure proceeding start by way of a petition, which is consistent with allowing a relatively speedy and set process for enforcement and the need to meet the goals of commercial certainty and predictability: *Forjay* at para. 82. As a result, foreclosure procedures are streamlined, and the bar generally uses a series of accepted precedents.

[17] Most foreclosures proceed with a determination of the amount due to the foreclosing mortgagee based on valid security. Once that is determined, the remaining equity, if any, will be available to subsequent charge holders or the mortgagor. The mortgagor is given a period of time, depending on the remaining equity, to redeem the mortgage, failing which the mortgaged property will be sold. There may be a dispute about the length of the period of redemption, and a mortgagor may apply to extend the period based on evidence of equity in the property and a reasonable prospect that they or it will be in a position to redeem or refinance. A mortgagor or a subsequent charge holder may contest the foreclosing mortgagee’s claim. There may also be challenges to the amounts due, if any, to

2023 BCSC 573 (CanLII)

subsequent charge holders, and priority claims may arise in respect of subsequent charge holders.

[18] The issue for determination in this case is whether Mr. Dietterle's challenge to the mortgage, on the basis that it was unconscionable at common law, and violated the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, resulted in this dispute being outside what would be a usual foreclosure dispute, warranting special costs.

2023 BCSC 573 (CanLII)

[19] The starting point under s. 20 of the *LEA* for an award of costs in foreclosure proceedings is the party-and-party scale: *Lalji* at 312; *Kokanee v. Family Auto et al & Reamsbottom et al*, 2000 BCSC 1773 at paras. 43–44. However, as set out by Fitzpatrick J. in *Forjay*, British Columbia courts have considered a wide variety of factors in determining whether to award special costs, or a percentage thereof, in foreclosure matters. She wrote:

> [102] … Those factors include:
>
> a) the mortgage provided for the mortgagor's payment of solicitor-client costs incurred by the mortgagee;
>
> b) the mortgagor had substantial equity in the subject property;
>
> c) the transaction at issue was a commercial one with sophisticated business entit[i]es;
>
> d) the proceedings were complex;
>
> e) the conduct of the unsuccessful party delayed or unnecessarily lengthened the proceedings; and
>
> f) party-and-party costs are inadequate to provide a reasonable recovery against actual expenses incurred to enforce the mortgage.
>
> [Citations omitted.]

[20] Justice Fitzpatrick did not purport to set out an exhaustive list of factors, as is clear from her use of inclusive language.

2023 BCSC 573 (CanLII)

Analysis

a) Does the mortgage provide for payment of solicitor-and-client costs?

[21] Applying those factors to this case, the Canguard mortgage was subject to the prescribed standard mortgage terms set out in Schedule B of the *Land Title Act (Board of Directors) Regulation*, B.C. Reg. 332/2010. Section 8(6) of Schedule B provides for Mr. Dietterle's payment of the lender's legal fees and disbursements on a solicitor-and-client basis for enforcing the mortgage. Pursuant to this term, Canguard is entitled to its solicitor-and-client costs incurred in enforcing the mortgage.

[22] This factor weighs in favour of special costs in this case.

b) Did Mr. Dietterle have substantial equity in his property?

[23] Mr. Dietterle has considerable equity in his property. At the summary trial, Canguard tendered an appraisal by WesTech Appraisal Services Ltd., which appraised Mr. Dietterle's property at $3.1 million as at February 25, 2022: *Reasons for Judgment* at para. 39. As of August 30, 2022, the amount required to redeem the mortgage was $1,372,443.11. As outlined in the *Reasons for Judgment*, Mr. Dietterle could have potentially been in a net positive position of approximately $600,000 had he sold the subject property in February 2022: para. 39. The Canguard mortgage financing allowed the property to increase in value: para. 39.

[24] At the hearing on March 8, 2023, I was told that Mr. Dietterle's property has now been sold and the proceeds are being held in Canguard's solicitor's trust account. He had equity in the property.

[25] This factor weighs in favour of special costs in this case.

c) Was the transaction a commercial one with sophisticated business entities?

[26] Although I would not describe Mr. Dietterle as a "sophisticated" entity, he was familiar with mortgage financing and used mortgage financing to take equity out of his properties to fund other endeavours. He was represented by a licensed

mortgage broker and received independent legal advice prior to entering into the mortgage with Canguard. Further, Mr. Dietterle sought the financing to fund business losses he experienced when he entered into transactions with an unscrupulous neighbour.

[27] This factor is neutral with respect to special costs in this case.

d) and e) Were the proceedings complex, and did the conduct of Mr. Dietterle delay or unnecessarily lengthen the proceedings?

[28] These foreclosure proceedings were not the "usual" foreclosure proceedings and, as a result of ultimately unsuccessful positions taken by Mr. Dietterle, he had the use of Canguard's mortgage funds for more than 26 months after he made his last mortgage payment. Mr. Dietterle should not be able to reap the contractual benefits of Canguard's financing without the bearing the contractual burden of paying his debt: *Valley Mortgage and Investment Company Ltd. v. The Lakers Golf Club Ltd.*, 2005 BCCA 28 at para. 5, citing *Saskatchewan Trust Co. v. Kalanj*, 39 B.C.L.R. (2d) 385, 1989 CanLII 2816 (S.C.) [*Kalanj*].

[29] This could have been a straightforward foreclosure procedure, with the possibility of Mr. Dietterle seeking an extended redemption period due to his personal circumstances and the equity in his property.

[30] The allegations of unconscionability raised by Mr. Dietterle were unsuccessful. In support of them, he tendered a report by Leslie Mandy ("Mandy Report") that, in the *Reasons for Judgment*, I determined was inadmissible because:

a) she was unqualified to opine on the fairness of the Canguard Mortgage (paras. 48–49);

b) she did not produce her entire file in breach of the *Rules* (para. 55);

c) her analysis of the foreclosure data was unreliable (paras. 57–60);

d) she conflated the role of the lender and a broker in a mortgage transaction and implied obligations on a lender without a proper basis (para. 66);

2023 BCSC 573 (CanLII)

e) she opined on the ultimate issue and purported to give legal opinions she was unqualified to give (paras. 71, 74–76); and

f) she advocated on behalf of Mr. Dietterle (paras. 79–81).

[31] Canguard incurred costs to rebut the Mandy Report and obtained an order that Ms. Mandy attend for cross-examination in advance of the summary trial.

[32] It is also of note that Ms. Mandy admitted that she sent drafts of her report to Mr. Dietterle's counsel that were never disclosed, contrary to the *Rules*: *Reasons for Judgment* at paras. 52–55.

[33] Mr. Dietterle is responsible for the delay and costs incurred by Canguard.

[34] In *Kalanj*—a case involving a residential mortgage—as a result of the mortgagors' conduct, the order *nisi* hearing was adjourned three times while they attempted to obtain refinancing. Canguard submits that the mortgagors' conduct in *Kalnaj* resulted in a delay of six weeks.

[35] If the delay is calculated from the commencement of the proceedings (June 21) to the date of hearing (August 24), the delay was just over two and a half months. If calculated from the date it was originally set down (August 3) to the date it was heard, the delay was only two and a half weeks. In any event, the delay was significantly less than the delay in this case. The delay, in combination with the mortgagors' substantial equity in their property, was sufficient for the court to award solicitor-and-client costs. Justice Huddart (as she then was) said that not doing so would be unfair: *Kalanj* at 387.

[36] In this case, Mr. Dietterle's conduct delayed the order *nisi* hearing for almost two years. Over that time, Mr. Dietterle put Canguard to legal expense—far beyond what would be incurred in a usual foreclosure proceeding—culminating in a two-day summary trial before me in which he was unsuccessful.

[37] This factor weighs in favour of special costs in this case.

2023 BCSC 573 (CanLII)

2023 BCSC 573 (CanLII)

f) Would party-and-party costs be inadequate to provide a reasonable recovery against Canguard's actual expenses incurred to enforce the mortgage?

[38] I am satisfied that party-and-party costs are inadequate to provide a reasonable recovery against Canguard's actual expenses in this case. In its submissions, Canguard said that it has incurred total fees and disbursements in connection with this action in excess of $225,000. Because Mr. Dietterle has filed a notice of appeal, Canguard has not disclosed particulars of the legal costs it has actually incurred to avoid any argument that it has waived privilege. In any event, any costs ultimately awarded would be subject to assessment by the Registrar.

[39] Canguard's assessable costs at Scale B and disbursements total just over $46,000 based on a draft, unassessed, bill of costs.

[40] On Scale B, Canguard would recover less than a quarter of its total fees and disbursements. That is inadequate in my view.

[41] The total fees and disbursements estimated by Canguard seem excessive, but, in my view, that will be addressed by the Registrar on assessment.

g) Are there other relevant factors that should be considered in this case?

[42] In addition, I have considered, in the exercise of my discretion under s. 20 of the *LEA*, the fact that Canguard made two offers in an effort to settle this foreclosure proceeding. On March 2, 2022, Canguard offered to consent to the order *nisi* at a reduced interest rate of 9.95%, an eight-month redemption period, and legal costs of $60,000, representing approximately 70 percent of Canguard's actual legal costs. On April 29, 2022, Canguard offered to consent to the order *nisi* at an interest rate of 12.00%, a $30,000 reduction of the principal amount, and legal costs of $97,500, representing approximately 75 percent of Canguard's actual legal costs.

[43] Had Canguard's first offer been accepted, Mr. Dietterle would have avoided the legal fees Canguard incurred to challenge the admissibility of the Mandy Report, achieved a discounted interest rate, obtained an extended redemption period,

avoided the costs of preparing for and attending the summary trial, and obtained a discount on Canguard's legal fees. Had Canguard's second offer been accepted, Mr. Dietterle would have achieved a discounted interest rate, a reduction on the principal, and a discount on Canguard's legal fees.

2023 BCSC 573 (CanLII)

Conclusion

[44] For all the foregoing reasons, and considering the circumstances of this proceeding, I conclude that Canguard is entitled to its special costs of this proceeding in an amount to be assessed by the Registrar, unless otherwise agreed to by the parties. As is the usual case, Canguard is also entitled to its special costs of this costs hearing.

"MacNaughton J."