IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blueshore Financial v. 1134038 B.C. Ltd.,* 2023 BCSC 2304

Date: 20231116
Docket: H230628
Registry: Vancouver

Between:

Blueshore Financial Credit Union

Petitioner

And

1134038 B.C. Ltd., 1114853 B.C. Ltd., Canada New Generation Chinese Entrepreneurs Fund GP Ltd., Fountana (King George) Limited Partnership, Fountana Trading Corporation, Chia Lin, Mason Link Development Ltd., Mason Link Properties Ltd., Yue Wai

Respondents

Corrected Judgment: The cover page of the Judgment was corrected on January 10, 2024.

Before: Master Robertson

Oral Reasons for Judgment

Counsel for the Petitioner:	A. Frydenlund, KC
No other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. November 16, 2023
Place and Date of Judgment:	Vancouver, B.C. November 16, 2023

[1] **THE COURT:** This matter is a foreclosure matter, with the *order nisi* going unopposed. Counsel for the petitioner however, is seeking to have costs recovered on a full indemnity basis, and sought reasons on that issue. At the time of doing so, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] Notwithstanding that most mortgage documents contain a specific term or covenant for costs on a true indemnity basis, costs in unopposed foreclosure matters are generally ordered under what is referred to as the "usual rule", namely on a party and party basis, Tariff Scale A, in accordance with s. 20 of the *Law and Equity Act*, RSBC 1996 c. 253 ("*LEA*"), s. 14-1(1) and (2) of the *Supreme Court Civil Rules,* BC Reg. 168/2009 (the "*Rules*") and s. 5 of Appendix B thereto ("*Appendix B*").

[3] Section 20 of the *LEA* is discretionary. In a foreclosure matter the court "may" order costs as party and party costs despite a covenant or mortgage term to the contrary. Rule 4-1(1) and (2) provide that if costs are payable under the Rules, they must be assessed as party and party costs in accordance with *Appendix B* except in prescribed circumstances which includes that an order for special costs is made. Section 5 of *Appendix B* requires that party and party costs in an unopposed foreclosure proceeding under R. 21 "must" be assessed under Scale A.

[4] There has been inconstant treatment in foreclosure matters as to whether or not *Appendix B* is a complete codification of the costs in foreclosure matters, notwithstanding the discretionary wording in the *LEA*. Specifically, in *First West Credit Union formerly known as Valley Fist Credit Union v. Gateway Industrial Park Ltd.,* 2018 BCSC 1749 ("*Gateway*") the court found that the plain words of R. 14-1 and s. 5 of *Appendix B* must be given effect to, effectively finding them to be a complete codification.

[5] Prior to *Gateway,* the Court of Appeal considered the issue in light of what was the relatively recent enactment of s. 18.2, now s. 20, of the *LEA* in *CIBC*

Mortgage Corporation v. Lalji, (1986) CanLII 819 (BC CA) ("*Lalji*"). *Lalji* involved an appeal of a decision where party and party costs were ordered in accordance with what was then s. 18.2*.* Prior to that, the courts had found that there was no right to a judge to deprive, as a matter of discretion, a mortgagee of its contractual rights to its negotiated true indemnity clauses: see for example *Penvern Investment Ltd. v. Whispering Creek Cattle Ranches Ltd.* (1979), 1979 CanLII 477 (BC CA).

[6] The Court in *Lalji* concluded as follows:

> [9] In my opinion, the plain meaning of s. 18.2 of the *Law and Equity Act* is to confer upon the court in a foreclosure proceeding where costs are awarded a discretion to order costs on a party-and-party or solicitor-and-client basis. The effect of the amendment to the *Law and Equity Act* is to provide that the contract between the mortgagor and mortgagee is no longer to govern the awarding of costs in foreclosure proceedings and to leave it to the court to award costs upon an appropriate scale, depending upon the circumstances in the particular case.
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> [10] In these proceedings, the chambers judge was of the view that the starting point in considering an award of costs was the party-and-party scale. That is a lower scale than the scale for solicitor-and-client costs. I share that view.
>
> [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. 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 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.

[7] More recently, and since *Gateway,* in *Forjay Management Ltd. v. 0981478 B.C. Ltd.,* 2022 BCSC 1314 the court noted as follows with respect to special costs orders in foreclosures:

> [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), 1986 CanLII 819 (BC CA), 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.

[8] Simply, in foreclosure proceedings the court retains the discretion under the *LEA* to order special costs without a finding of reprehensible conduct worthy of censure, just has it retains the discretion to order party and party costs notwithstanding that a mortgage term or covenant provides for special costs. In my view, it is only once that discretion has been exercised, and an order for party and party costs been made, that the mandatory nature of *Appendix B* is triggered.

[9] Such an interpretation is not only consistent with the Court of Appeal's comments in *Lalji* and more recently by this court in *Forjay,* but is also consistent with the principle of statutory interpretation by which there is a presumption of harmony, coherence and consistency between statutes dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd., 2001 SCC 56*, [2001] 2 S.C.R. 867, at para. 52; Ruth Sullivan, Statutory Interpretation, 2nd ed (Toronto: Irwin, 2007), at pp. 149-151. To find that R. 14-1(1) and (2) and *Appendix B* override the *LEA* is not consistent with that principle.

[10] However, the mere existence of a covenant or term in the lending documents will not generally be sufficient to compel the court to depart from the "usual rule", particularly in the case of a simple residential foreclosure. Rather, in exercising the discretion under s. 20 of the *LEA* the existence of a combination of the following factors, although not exhaustive, will likely guide the court's consideration:

a) The mortgage term or covenant as agreed to by the parties provides for such costs which, but for s. 20 of the *LEA*, they would be awarded: *Epoch Press Inc. v. Sewak,* 2011 BCSC 323, at para. 13, and *Wanson (Bristol) Development Ltd. V. Sahba,* 2017 BCSC 2140, and *0856464 B.C. Ltd. v. TimberWest Forest Corp*, 2015 BCSC 985, at para. 19.

b) The sophistication of the parties and involvement of legal counsel in the preparation and execution of the lending documents;

c) Whether the matter is a commercial matter where the use of the lender's funds was intended to generate an opportunity to profit or earn income ;

d) Whether, although being brought as a foreclosure under R. 21-7, other agreements are being enforced as part of the proceedings such as personal property security, including debenture security, under s. 55(6) of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359 ("*PPSA*"); or guarantees and indemnity agreements, each of which may have their own covenant or term, outside of the mortgage, which provides for true indemnity costs;

e) Whether there have been delays in prosecuting the matter, including the need to obtain alternative service orders and requests for any forbearance by the mortgagor, such that the mortgagor has had an extended use of the borrowed funds post default; and

f) The overall complexity of the proceedings including the number of parties, and extent of the security and collateral.

[11] In the case at bar, most of these factors exist and support an order for special costs. Specifically, there is a contractual term providing for true indemnity costs, the parties are sophisticated, this was a commercial transaction entered into with the assistance of counsel, there are a number of other agreements including security agreements under the *PPSA* and guarantees that also provide for full indemnity of costs (this point was particularly emphasized by counsel), and it was a transaction intended to earn profit or income by the borrower.

[12] As such, the *order nisi* will go on the term set out in the statement of relief sought with costs on a true indemnity, or special costs, basis.

"Master Robertson"