IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1125003 B.C. Ltd. v. The Owners, Strata Plan KAS 1886,* 2023 BCSC 1617

Date: 20230629
Docket: S219362
Registry: Vancouver

Between:

1125003 B.C. Ltd.

Petitioner

And

The Owners, Strata Plan KAS 1886

Respondent

Before: The Honourable Mr. Justice Giaschi

On appeal from: A master's order of the Supreme Court of British Columbia, dated November 23, 2022 (*1125003 B.C. Ltd. v. The Owners, Strata Plan KAS 1886*, Vancouver Docket S219362).

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	A. Grewal
Representative for the Respondent, appearing in person:	R. Gauthier
Place and Date of Hearing:	Vancouver, B.C. March 10, & June 29, 2023
Place and Date of Judgment:	Vancouver, B.C. June 29, 2023

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Introduction

[1] This is an appeal pursuant to Rule 23-6(8.1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*] from an assessment of costs made by a master acting as registrar. The appeal raises two issues in relation to Tariff B: first, whether the number of units allowed under tariff items 26 (preparation for a petition hearing) and 27 (hearing of a petition proceeding) should be determined by including time spent waiting to be heard; and second, whether there is any discretion in the registrar to award less than three units under tariff item 37 (attendance at court for a hearing that did not proceed).

[2] For the reasons that follow, I have determined that waiting time is not to be included in determining the number of units under items 26 and 27 of the tariff. However, the master did err in his assessment of the number of units allowed under item 37. There is no discretion to award less than three units under item 37.

Facts

Background

[3] The petitioner commenced this proceeding by filing the petition on October 8, 2021.

[4] The respondent brought an application under Rule 9-5(1) of the *SCCR* to strike the petition on the grounds, *inter alia*, that *issue estoppel* applied and the petition was an abuse of process. The application to strike was heard by Justice Brongers on Thursday, May 19, 2022. At that hearing, the petitioner was represented by counsel and the respondent was represented by its president, Mr. Gauthier.

[5] On May 24, 2022, Justice Brongers granted the application and struck the petition. He ordered that the petitioner pay the costs of the respondent in accordance with Scale B of the tariff.

[6] The parties attended for taxation of costs on October 11, 2022. The taxation hearing did not proceed on that day as there was no master available.

[7] The parties next attended for taxation on November 23, 2022. The hearing proceeded on that day before Master Vos.

[8] The draft bill of costs submitted by the respondent claimed 106.5 units, which at $110 per unit totalled $11,715, plus GST and disbursements. The draft bill of costs included 22.5 units for item 26 of the tariff and 45 units for item 27 of the tariff. These items were claimed in respect of opposed appearances on January 19 and 21 and May 13, 19 and 24, 2022. In addition, the draft bill of costs included three units for item 37 of the tariff, which was in respect of the attendance on October 11, 2022, where no master was available.

Hearing Before Master Vos

[9] The evidence at the hearing before Master Vos consisted solely of two affidavits of Mr. Gauthier, the president of the respondent. These affidavits did little more than attach the draft bill of costs. The affidavits did not address the units claimed for items 26 and 27. This caused difficulties at the hearing as the master was unable to determine from the evidence what had occurred on the various dates in issue or how much time had been spent on the appearances, either before the presider or in total. These deficiencies were rectified somewhat at the hearing by the production of some sort of court record, which I have not seen. In any event, it is clear that the master relied on the parties to advise him concerning what occurred on the various dates and how much time was spent. This, in turn, was problematic as counsel for the petitioner was not counsel at all of the various hearings.

[10] It is apparent from the transcript that the master had great difficulty determining what was before the court on any particular date or the amount of time that was used. He expressed his frustration on several occasions. He advised Mr. Gauthier that the materials were “woeful” and advised both parties that neither of them had provided materials clarifying what happened on the various dates.

[11] Mr. Gauthier advised the master that, for all of the dates in issue, a full day was spent by the parties either waiting or before the presider. The petitioner's counsel initially conceded this point to “simplify matters”: Transcript p. 17 L. 20-25. He advised the master that the real issue was whether the attendances on January 19 and 21 and May 13, 19 and 24 properly fell under items 26 and 27 as opposed to items 21 and 22 (preparation for and attendance at an application): Transcript p. 15 L. 8-14, p. 17 L. 27-28. Notwithstanding the concession made by petitioner's counsel, the amount of time required for the various hearings was canvassed during the hearing. The petitioner made submissions that some appearances were less than a full day. Additionally, Mr. Gauthier conceded that at least one of the appearances, the appearance on May 24, 2022, for the delivery of Justice Brongers' oral reasons, was less than a full day.

[12] Doing the best that he could with the limited information available to him, the master determined:

a) The January 19 hearing date was for the petition hearing. He allowed 7.5 units under items 26 and 27 of the tariff, based on a half-day attendance;

b) The January 21 hearing date was an application for an adjournment of the petition hearing. He allowed 7.5 units under items 26 and 27 of the tariff, based on a half-day attendance;

c) The May 13 hearing was an application for an adjournment. He allowed four units under items 21 and 22 of the tariff, based on a half-day appearance;

d) The May 19 hearing was for the application to strike. He allowed eight units under items 21 and 22 of the tariff, based on a half-day attendance; and

e) The May 24 hearing was for delivery of oral reasons. He allowed four units under items 21 and 22 of the tariff, based on a half-day attendance.

[13] At various points in the transcript, the issue of whether waiting time should be included in calculating the time spent at a hearing was addressed. The master

expressed his opinion several times that waiting time should not be included. For example, at pages 23–24 of the transcript, the following exchanges occurred:

> 45 THE COURT: Well, but you were actually before the court for less than a half day.
>
> 46 RENE GAUTHIER: But waiting counts.
>
> 1 THE COURT: No, it doesn't.
>
> …
>
> 27 THE COURT: There is nothing in this rule that says
>
> 28 that waiting gets you a full day. In fact, it
>
> 29 says the opposite. It says if the time spent is
>
> 30 less than two and a half hours. That's what the
>
> 31 time (sic) says.

[14] Concerning item 37 of the draft bill of costs, the master requested that the parties explain the basis for the three units claimed. It was explained that the parties attended at court on October 11, 2022 to assess the costs but no presider was available. This rationale was also explained in Mr. Gauthier's affidavit #4. Without giving any reasons, the master awarded one unit.

Submissions

[15] The respondent submits, in respect of items 26 and 27 of the bill of costs and the court appearances on January 19 and 21 and May 13, 2022, the master erred by determining the number of units based on half-day attendances as opposed to full-day attendances. The respondent says the master allowed only 2.5 units for item 26 and five units for item 27 for each of these days for a total of 22.5 units, whereas he should have allowed five units and ten units for each day for a total of 45 units. The respondent submits that the master allowed only half the number of units because he wrongly determined that time spent waiting to be heard was not to be taken into account in determining the appropriate number of units.

[16] The respondent further submits that the master erred in allowing only one unit for the failed attendance on October 11, 2022. The respondent says that there is no discretion under the tariff to reduce the number of units applicable to item 37.

[17] The petitioner submits that for the days in issue there was no properly admissible evidence of the amount of time spent waiting in court to be heard as opposed to the actual time spent in front of a presider. The petitioner further says that there is no rule or principle that time spent waiting to be heard is to be included in determining the number of units. The petitioner submits that the master exercised his discretion in allowing half days and such exercise of discretion is not subject to review or appeal.

Legal Principles

Standard of Review

[18] The standard of review to be applied in this matter is not in dispute. The standard is as set out by Justice B.D. MacKenzie in *Ocean Rodeo Sports Inc. v. Oyen*, 2019 BCSC 1393:

> [9] The standard of review applicable to a review of an assessment of costs by a registrar under Rule 14-1(29) of the *Supreme Court Civil Rules* is not in dispute. A court will not interfere with a registrar's decision involving the exercise of discretion unless the registrar has made an error in principle or was clearly wrong as to findings of fact: *Fairhurst v. Anglo American PLC*, 2014 BCSC 827 at para. 18; *Jiwan v. Davis & Company, A Partnership*, 2008 BCCA 494 at para. 15, citing *Walker v. Schober*, 2008 BCCA 19 at para. 34.
>
> [10] The standard of review on questions of principle is correctness (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Jiwan* at para. 17), while the "clearly wrong" standard that applies to findings of fact is synonymous with the standard of palpable and overriding error (see *Waters v. Michie*, 2018 BCSC 1206 at para. 6). Determining "what constitutes reasonable costs is a question of fact", and registrars are entitled to deference on review due to their expertise and the discretionary, fact-specific nature of costs assessment: *Wright v. Sun Life Assurance Co. of Canada*, 2015 BCCA 312 at para. 10.

Appendix B

[19] The tariff items in issue are items 26 and 27, which provide:

26	Preparation for an application or other matter referred to in Item 27, for each day of hearing (a) if unopposed (b) if opposed		4 5

27	Hearing of proceeding, including petition, special case, proceeding on a point of law, stated case, interpleader or any other analogous proceeding, and applications for judgment under Rule 7-7 (6), 9-6 or 9-7, for each day (a) if unopposed (b) if opposed		 6 10

[20] Also relevant are items 21 and 22, which provide:

21	Preparation for an application or other matter referred to in Item 22, for each day of hearing if hearing begun (a) if unopposed (b) if opposed		 2 3
22	Application, other than an application referred to in Item 23 or 27, for each day (a) if unopposed (b) if opposed		 4 5

[21] Items 26 and 27 address respectively preparation for the hearing of the proceeding and the hearing of the proceeding. Item 26 prescribes five units for preparation for each day of hearing if the hearing is opposed. Item 27 prescribes ten units for each day of the hearing if the proceeding is opposed.

[22] “Proceeding” is a defined term in Rule 1-1 of the *SCCR*. It means:

> ... an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal;

[23] Given the definition of proceeding, items 26 and 27 relate to preparation for and attendance at the actual trial or hearing of the petition.

[24] In contrast, items 21 and 22 address preparation for an application and the hearing of the application (with exceptions as noted). These items relate to interlocutory applications as opposed to the hearing of the action or petition, which is why the number of units given per day is significantly less than for a trial or a hearing of a petition.

[25] The master was alive to the differences between items 26 and 27 and items 21 and 22, which is why he questioned the parties as to what was before the court on the various dates in issue. He ultimately found that the petitioner's draft bill of costs wrongly included appearances under items 26 and 27 that should have been under items 21 and 22.

[26] Section 4 of Appendix B of the *SCCR* provides guidance as to how to determine the number of units applicable to a tariff item. It provides:

> Daily rates
>
> 4 (1) If, in a Tariff Item, a number of units is allowed for each day but the time spent during a day is not more than 2 1/2 hours, only 1/2 of the number of units is to be allowed for that day.
>
> (2) If, in a Tariff Item, a number of units is allowed for each day but the time spent during a day is more than 5 hours, the number of units allowed for that day is to be increased by 1/2 of the number.
>
> (3) If, in a Tariff Item, a number of units is allowed for preparation for an attendance but the time spent on the attendance is not more than 2 1/2 hours, only 1/2 of the number of units for preparation is to be allowed.
>
> (4) If, in the Tariff, units may be allowed for preparation for an activity, the registrar may allow units for preparation for an activity that does not take place or is adjourned up to the maximum allowable for one day.

[27] Pursuant to s. 4(1), if the time spent "is not more than 2 1/2 hours" then the number of units per day is to be reduced by one-half.

[28] Item 37 of the tariff provides:

37	Attendance at the court for trial or hearing if party is ready to proceed and when trial or hearing not started		3

Authorities

[29] I have been provided with a few authorities addressing the two issues raised by this appeal.

[30] The petitioner relies heavily on an online publication by the Continuing Legal Education Society of British Columbia ("CLEBC") entitled *Practice Before the Registrar,* dated May 1, 2021. It purports to be "the authoritative guide to the conduct

of hearings before the registrar in the British Columbia Supreme Court". At s. 2.3, it addresses the limits on a registrar's discretion in calculating per diem units:

> **D. Per Diem Units under the Tariff [2.30]**
>
> Registrars do not have any discretion where an item in the tariff is expressed as being "for each day". Section 4 of appendix B provides that where a daily rate is prescribed, then, if the time spent during one day doing the work described in the item was less than two-and-a-half hours, the registrar must allow half the units for which provision is made in the tariff. If the time occupied was more than five hours, the registrar must allow one-and-a-half times the prescribed number of units (Appendix B, s. 4(1). and (2)).
>
> Preparation time is calculated as follows: if the activity for which the preparation was undertaken took place and occupied two-and-a-half hours or less in a day, then half the units for preparation must be allowed. However, no extra preparation units are allowed where work took more than five hours in a day (Appendix B, s. 4(3)).
>
> In calculating attendance time, lunch breaks are not counted. But where an application is scheduled for hearing at 10 a.m., and counsel are not heard until later in the day, the time spent waiting is included in the calculation, even if counsel have been able to occupy themselves on other matters while they wait.
>
> Section 4(4) of Appendix B authorizes the registrar to allow units for preparation for an activity that does not take place at all, or is adjourned and takes place later, but only up to the maximum allowable for one day. If an adjournment is ordered because of some act or omission on the part of the party presenting the bill, the registrar may disallow the preparation time. If a hearing does not occur because it is adjourned by consent, then the item for the attendance will not be allowed even if counsel attended to speak to the adjournment. Where a hearing fails to proceed because no judge is available, the court may make an allowance under Item 37 (see *Lodge v. Khan*, 1994 CanLII 3103 (BC SC). (Registrar), which held that cases decided prior to the introduction of the 1990 tariff, such as *Union Carbide Canada Ltd. v. Scott-Foster Ltd*., [1964] B.C.J. No. 58 (QL) (S.C.) (Chambers), do not apply to claims under Item 37).
>
> [Emphasis added.]

[31] I note that no authority is given in *Practice Before the Registrar* for the proposition that time spent waiting to be heard is included in the calculation. However, in *Bank of Montreal v. Zimmer*, 2012 BCSC 281, Master B.M. Young as registrar referred to and adopted the relevant statement:

> [34] On December 1, 2011, the parties appeared in Vancouver at 10 a.m. and waited most of the day to be heard. The application was heard after 3 p.m. I rely on the practice for calculation of time described in *Practice Before the Registrar*, s. 2.30, p. 2-25:

> In calculating attendance time, lunch breaks are not counted. But where an application is scheduled for hearing at 10 a.m., and counsel are not heard until later in the day, the time spent waiting is included in the calculation, even if counsel have been able to occupy themselves on matters while they wait.
>
> [35] The petitioner is entitled to 3 units for preparing for a full-day contested hearing, and 5 units for appearance at an opposed hearing.

[32] I have been provided with no other authorities addressing whether time spent waiting to be heard is to be taken into account.

[33] The publication *Practice Before the Registrar* also addresses the limits on the discretion of a registrar. Section 2.27 states that a registrar has no discretion to deviate from the number of units specified in the tariff:

> Although registrars may disallow fees for claimed items of work, they cannot, when fixing fees, allow less than the minimum or more than the maximum units for which provision is made by the tariff (*Silvicon Services Inc. v. Millar*, 2005 BCSC 1753 (Master).).

[34] In *Silvicon Services Inc. v. Millar and others*, 2005 BCSC 1753, which is referred to in the publication, Master Baker wrote:

> [6] It was repeatedly impressed upon me during argument that the court has discretion in awarding or fixing costs. To a degree, that is correct. Registrars, however, have very limited discretion and authority in the awarding of costs. The discretion to *allow* costs is restricted to the procedure before them (as, for example, with the costs of an appointment to assess costs). The discretion to *fix* costs is restricted to fixing the proper number of units where a range is allowed, or to refusing items that simply do not apply to a particular litigant. The discretion to allow costs, in general, of trial is vested with the trial judge. Rules 57(7)(b) and (c) make that clear …
>
> [Emphasis added]

[35] More recently, in *Semenoff v. Bridgeman*, 2014 BCSC 1845, District Registrar Nielsen similarly wrote:

> [71] Preparing for and appearing at trial was “proper and reasonable” to say the least. Although registrars may disallow fees for claimed tariff items if they are extravagant and unjustified, as per *Bell v. Fantini*, *supra*, they cannot, when fixing fees, allow less than the minimum or more than the maximum units for which provision is made by the Tariff (as per *Silvicon Services Inc. v. Millar*, 2005 BCSC 1753 (Master)), nor can they deviate from the flat rate.

Discussion

Items 26 and 27

[36] This appeal raises an interesting issue, namely, whether time spent waiting in court for a matter to be heard is to be included when determining if the time spent during a day is more or less than 2.5 hours. The respondent submits that time spent waiting must be included and the master erred in not doing so. The respondent says that the master therefore undervalued the number of units allowed under items 26 and 27 in respect of the attendances on January 19 and 21 and May 13, 2022. The respondent says the master should have determined the number of units based on “time spent” of more than 2.5 hours.

[37] In order to succeed on this appeal, the respondent must first establish that on each of the days in issue, the total time spent, including waiting, was more than 2.5 hours. Only then does the legal issue of whether waiting time should be counted arise.

[38] The question of the “time spent” on the various dates in issue is a finding of fact and not reviewable unless the master was “clearly wrong”. The onus is on the respondent to show the master was clearly wrong in his determinations of the time spent. The respondent has not discharged this onus. The respondent cannot point me to any properly admissible evidence of the time spent by the parties on the various dates in issue. It follows that the respondent cannot show the master was clearly wrong in his assessments of the time spent by the parties.

[39] I appreciate that the respondent relies on what was said to the master at the hearing. However, that was not and is not evidence. In any event, what was said at the hearing does not establish that the master was clearly wrong in his assessments of the time spent.

[40] Concerning the January 19, 2022 attendance, Mr. Gauthier advised the master that the matter was adjourned after 1.5 hours: Transcript p. 19 L. 1-11, p. 20 L. 15-19. He did not advise the master of the total time spent on that day including

waiting time. Concerning the January 21, 2022 attendance, Mr. Gauthier advised the master that the hearing before the presider lasted 45 minutes: Transcript p. 20 L. 26-41, p. 21 L. 23-27. Mr. Gauthier later advised the court that they were not heard until 2:00 pm and that the matter was adjourned just before 3:00 pm: Transcript p. 23 L. 5-8. However, Mr. Grewal advised the master that he believed the attendance on that day was brief: Transcript p. 22 L. 26-31 and 41-43. Concerning the May 13, 2022 attendance, Mr. Gauthier advised the master that the petitioner requested an adjournment of the hearing on that date which was granted. He again did not advise the master of the total waiting time.

[41] The respondent must rely on Mr. Gauthier's statements to the master that the parties appeared for a full day on all occasions. However, this statement was inconsistent with Mr. Gauthier's later advice to the master that the May 24, 2022 appearance was for less than a full day.

[42] Given the lack of admissible evidence and the inconsistent and vague statements made to the master, the respondent has not proven the master was clearly wrong in his assessments of the time spent.

[43] The above is sufficient to dispose of the appeal concerning items 26 and 27 in the draft bill of costs. However, as the point raised about waiting time is a matter of some interest, I will address it.

[44] The respondent relies heavily on the online publication of CLEBC, *Practice Before the Registrar*, where at s. 2.3 it is stated that the “time spent waiting is included in the calculation”. As I indicated, no authority was given for this statement in the publication but it was later referred to and adopted by Master Young in *Bank of Montreal v. Zimmer*, 2012 BCSC 281. It is my view that this is not a correct statement on the law.

[45] The resolution of this issue is an exercise in statutory interpretation. This involves an examination of the words of the statute or regulation according to their grammatical and ordinary sense, in their entire context and in harmony with the

scheme and object of the act or regulation: *Brenner v. Brenner*, 2010 BCCA 553 at para. 25; *British Columbia Hydro v. Workers' Compensation Board of British Columbia*, 2014 BCCA 353 at para. 44.

[46] Items 22 and 27 of the tariff specify the number of units to be allowed for each day of the “application” or “hearing”, respectively. Similarly, items 21 and 26 specify the number of units to be allowed for preparation based on each day of hearing. Section 4 of Appendix B then provides that if the time spent during the day is 2.5 hours or less, then one half the number of units are to be allowed for that day. Grammatically the phrase “time spent” is in relation to the application or hearing referenced in items 22 and 27. It means, if the time spent in the application or hearing is 2.5 hours or less, then one-half the number of prescribed units are allowed.

[47] Moreover, in the context of court appearances, it is widely understood that the hearing of an application, trial or petition starts when the matter is called and ends when it is concluded.

[48] Accordingly, in my view, the words used in items 21, 22, 26 or 27 and s. 4 of Appendix B, when given their ordinary grammatical meaning and considered in the relevant context, only refer to time before the presider. Waiting time is not included. In fact, there is nothing in the words used or the context to suggest that waiting time should be included.

[49] Additionally, the inclusion of waiting time would not be consistent with the logic of the tariff. The number of units allowed under the tariff for preparation is proportional to the number of days the hearing takes. The implicit assumption is that more preparation is required for longer hearings. The inclusion of waiting time is not consistent with this underlying assumption. The time spent preparing for the hearing of an application or trial does not increase merely because of a delay in appearing before a presider. The preparation time will, however, generally be greater for longer hearings. Thus, by including only time spent before a presider in the calculation, this relationship between preparation time and hearing time is respected.

[50] Therefore, the master was not wrong to determine the number of units allowed by reference to the time actually spent before a presider. He was not required to take into account waiting time.

Item 37

[51] I now turn to item 37 of the draft bill of costs.

[52] The respondent says that item 37 applies to hearings set down before a master or registrar and that it mandates three units be allowed where the hearing does not start but the party is ready to proceed. The respondent says the master had no discretion to reduce the number of units and erred in allowing only one unit for the October 11, 2022 attendance.

[53] I agree with the respondent that item 37 applies to a hearing before the registrar to assess costs. The word “hearing” is not a defined term but is, in my view, to be given a broad meaning. It is apparent that it is used throughout the tariff to mean all manner of appearances before the court including appearances to assess or tax costs. This is readily apparent from items 24 and 25. Item 24 prescribes three units for preparation for a “hearing” in item 25, which is “an inquiry, assessment, accounting or a hearing before” a master or registrar. By the conjunction of these two items, a hearing includes a hearing before a registrar.

[54] I further agree with the respondent that there is no discretion on the part of the master or registrar under item 37, which prescribes a set number of units. Once it is established that a party attended on the day in question, was ready to proceed, and the trial or hearing did not start, the tariff mandates that three units be allowed.

[55] It follows that the respondent is allowed two additional units under item 37.

Costs

[56] On the matter of costs, I am of the view that the petitioner was substantially successful and shall have its costs of this appeal.

"Giaschi J."