IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS 1549 v. Cinnabar Brown Holdings Ltd.,* 2024 BCSC 970

Date: 20240430
Docket: S152530
Registry: Victoria

Between:

The Owners, Strata Plan VIS 1549

Plaintiff (Respondent)

And:

Cinnabar Brown Holdings Ltd.

Defendant (Appellant)

Before: The Honourable Justice Morley

On appeal from: An Order of an Associate Judge acting as Registrar, dated January 8, 2024, (*The Owners, Strata Plan VIS 1549 v. Cinnabar Brown Holdings Ltd.*, 2024 BCSC 25)

Oral Reasons for Judgment in Appeal from Registrar

(In Chambers)

Counsel for the Plaintiff (Respondent):	A. Mujtabah
Counsel for the Defendant (Appellant):	C. A. Siver
Place and Dates of Trial/Hearing:	Victoria, B.C. April 29 and 30, 2024
Place and Date of Judgment:	Victoria, B.C. April 30, 2024

[1] **THE COURT:** This is an edited transcript of an oral judgment in chambers. Before me is an appeal of a decision of Associate Judge Bouck sitting as a registrar (the "Registrar") in an assessment under a consent referral order (the "Referral Order").

[2] The Registrar was to assess costs, expenses, fines, and interest as set out in the Referral Order. The costs and expenses relevant to this appeal were legal fees and disbursements covered by the defendant/appellant Cinnabar Brown Holdings Ltd.'s ("Cinnabar") indemnity of the plaintiff/respondent the Owners, Strata Plan VIS 1549 (the "Strata Corporation"). The indemnity was granted in return for the Strata Corporation's permission of alterations to the strata lot owned by Cinnabar, as set out in a 2013 Alterations and Indemnity or "A&I" Agreement. The Registrar assessed the total net reasonable legal fees and disbursements covered by the A&I Agreement at $525,000. Most of these arose as a result of related proceedings known as *Sherwood v. Strata Plan VIS 1549*, Vancouver Registry No. S147102 (the "Sherwood Proceeding").

[3] Cinnabar says the Registrar made the following errors:

a) It says she misinterpreted the authority granted to her by the Referral Order by viewing its mandate too narrowly. Cinnabar asked her to find that the Strata Corporation had made a legal error in insisting that it try to reach an agreement with Douglas and Rosslyn Sherwood, the plaintiffs in the Sherwood proceeding, as a condition of permitting different alterations than those found in the A&I Agreement. It also asked her to find that the Strata Corporation owed it a fiduciary duty. The Registrar declined to do either of these things on the basis they were outside the scope of the Reference Oder, which she said limited her to "assess[ing] the reasonableness of the expenses identified in the order, and in particular the legal fees incurred by the Strata Corporation."

b) Second, Cinnabar says the Registrar erred in law by finding that the scope of the A&I Agreement was determined in previous court decisions. It says those decisions expressly did not resolve the issues in this action.

c) Third, Cinnabar says the hearing before the Registrar was rendered unfair because it was not given sufficient notice of her view of the limits of the consent order, depriving it of the opportunity to make submissions.

[4] For reasons I will go into in greater detail, I do not find any of the errors alleged were made out:

a) **The Registrar correctly interpreted the scope of the reference.** Legal issues or issues involving principles of equity that do not relate to the reasonableness of the expenses identified in the order were not relevant and therefore not within the scope of all relevant legal and equitable principles. In light of this, it was immaterial whether the Strata Corporation owed Cinnabar a fiduciary duty or whether it was authorized to insist on agreements with the Sherwoods at various points in the dispute that led to the litigation. If the Strata Corporation engaged in actions that rendered the entire litigation unreasonable, then that would be relevant, but the fact that she did not agree with Cinnabar's submissions in this regard is not an error of law.

b) **Read in context, the Registrar's assertion that the scope of the A&I Agreement had already been determined was correct.** The Registrar did *not* think the issues relating to reasonable legal fees and expenses had already been determined. The scope of this agreement was relevant to the question of whether the alterations that were the basis of the indemnity included the change to the roof that led to the Sherwood Proceeding. That it did had already been decided. The

Registrar was correct in finding that other issues with respect to the scope of the A&I Agreement were not before her.

c) **I do not agree that Cinnabar was denied a chance to make submissions either about the scope of the referral order or about the bindingness of past findings of this court or the Court of Appeal.** Indeed, it made extensive submissions on the question of the bindingness of past findings and the Registrar gave both parties an appropriate opportunity to make submissions about the scope of the referral order.

BACKGROUND

[5] Extensive factual background is set out in the reasons of Madam Justice Gray in the Sherwood Proceeding, indexed at 2018 BCSC 890. Since then, there have been six more years of litigation. I do not intend to go into the background in that level of detail. I will try to keep it brief.

[6] Cinnabar Brown Holdings Ltd. is the owner of Strata Lot 14 in the Beach Acres Resort in Parksville. The respondent is the strata corporation for that Beach Acres Resort. The principals of Cinnabar are Curtis and Li Sharp.

[7] Lot 14 is a duplex with Strata Lot 13. Strata Lot 13 is owned by the Sherwoods.

[8] In 2012, Cinnabar and the Sherwoods had the idea of adding about 34 square feet to their respective living spaces by making alterations that would have the effect of enclosing some limited common property. A critical part of the necessary work would be to build a new roof.

[9] On February 26, 2013, Cinnabar entered into the A&I Agreement with the Strata Corporation. The Strata Corporation agreed to permit Cinnabar to make alterations to its unit in return for an indemnity that included claims arising from “the grant of permission or installation of the Alterations or anything related to the

Alterations," specifically including legal costs as between the solicitor and his or her own client. The scope of the term "Alterations" was at one time a major issue between these parties, but has now been resolved as including the building of the roof.

[10] As it turned out, *very* expensive litigation arose out of the building of the roof.

[11] The roof Cinnabar built had a single slope, although the design approved by the Strata Corporation's delegate had a double-slope design. The Sherwoods sued the Strata Corporation for failing to enforce its bylaws and allegedly treating them significantly unfairly. Cinnabar and its principals also alleged that they were treated significantly unfairly by the Strata Corporation. This three-way dispute led to an 18-day trial, multiple appeals, multiple applications to vary the order of the original trial judge, a number of adjourned or completed cost assessments, and numerous other applications before this court and the Court of Appeal.

[12] Cinnabar takes the view that this litigation would have been unnecessary, or at least reduced in scope, if the Strata Corporation had acted differently early on. After Cinnabar constructed the wrong design of roof, it says it offered to rebuild the roof with the originally-approved double slope, although the Strata Corporation says it never made an appropriately unconditional offer to that effect.

[13] In any event, the Strata Corporation was only willing to agree to rebuilding using the originally-approved double slope, at various points at least, if the result was symmetrical, which would require the Sherwoods also to build a similar roof. The Sherwoods at various points refused this option.

[14] The Strata Corporation was willing to allow Cinnabar to go back to the original roof, but Cinnabar refused that option because it would have resulted in a loss of the approximately 34 square feet of what had previously been common property.

[15] The result was a trilemma, one that unfolded into expensive litigation.

The Referral Order

[16] This action, the one that resulted in the reference to the Registrar, was one in which the Strata Corporation sued Cinnabar under the indemnity provisions of the A&I Agreement for various expenses. The expenses important here are the legal expenses.

[17] Instead of going to trial on this indemnity action, the parties agreed to a consent order providing for an assessment by a registrar. The consent order has five paragraphs. Paras. 1 and 3 are the most relevant to this appeal.

[18] Para. 1 says:

> 1. Cinnabar is liable to reimburse the Strata Corporation, on a full indemnity basis, for all reasonable costs and expenses, including legal fees ... that the Strata Corporation has incurred, and continues to incur, pursuant to paragraphs 9 and 13 of the Alterations and Indemnity Agreement, dated February 26, 2013 (the "A&I Agreement").

[19] Para. 3 states the following:

> 3. The assessment of the costs and expenses and the fines and interest referred in this order will be conducted by the registrar having regard to all relevant legal and equitable principles.

The Hearing Before the Registrar

[20] Before the Registrar, Cinnabar did not take issue with the Strata Corporation's legal bills, *per se*, but said, first, that the indemnity did not apply to litigation brought by the Sherwoods, and alternatively that the legal expenses under the A&I Agreement indemnity should be limited to those expended up to July 7, 2013, the date on which the Sherwoods launched their complaint.

[21] Cinnabar argued that the Strata Corporation made an error in insisting that Cinnabar obtain the agreements of the Sherwoods before reconstructing the roof in accordance with the agreed-upon design, and that fees and disbursements after that date were not owed. Apparently in support of this argument, Cinnabar said the

Strata Corporation owed an *ad hoc* fiduciary duty as a result of its invulnerabilities in indemnifying a party.

[22] The hearing of the assessment was set for 10 days; eight days of evidence and argument occurred in late November and early December of last year. I will address submissions when analyzing the issue of whether the hearing was fair.

The Registrar's Decision

[23] Bouck AJ's decision is indexed at 2024 BCSC 25.

[24] At para. 4, the Registrar stated the following:

> [4] As will be further discussed below, there is some dispute between the parties as to the effect of the Order. I have concluded that by the terms of the Order, the defendant admits liability for the payment of the various expenses, leaving the reasonableness of those amounts as the only matter to be resolved by the registrar. ...

[25] At paras. 48 through 57, she explained this conclusion in more detail and addressed her understanding of the submissions of Cinnabar. She said:

> [48] The defendant accepts that the A&I is a binding agreement and that the fines and penalties imposed were permitted under the bylaws. Furthermore, the defendant concedes the reasonableness of the engineering fees, construction costs, and the administrative costs. The defendant did not take issue with the reasonableness of legal bills per se, but says that indemnity for those charges should be limited to a certain end date.
>
> [49] In general, the defendant says that only a fraction of the plaintiff's claims should be allowed because:
>
> a. The parties did not contemplate the A&I Agreement to cover expenses related to litigation brought by an "unrelated" party such as the Sherwoods and any indemnity is limited to legal expenses incurred in a common defence or claim;
>
> b. The defendant should only pay the Strata's legal costs up to July 7, 2013, being the date on which the Sherwoods launched a complaint about the As-Built roof. At that time, the fees and disbursements amounted to $21,394.88. Thereafter, the Strata's "error" in insisting that the defendant reach agreement with the Sherwoods to resolve the roof dispute led to the accumulation of legal and other costs, for which the defendant should not be held liable. Alternatively, the indemnity might be broadened to cover fees and

> disbursements incurred up to September 2014 ($45,490.69) or, at the very most, up to the point when the Strata, erroneously, pursued variation of the Gray Order to permit removal of the wood shed and additional renovations ($490,010.77). Still, further alternatively, the indemnification would end on October 7, 2019 by virtue of the order of Hinkson, CJSC.; and
>
> c. The Strata [again, the Registrar is characterizing the arguments of Cinnabar] owed the defendant a fiduciary duty pursuant to the A&I Agreement to act reasonably in incurring the various expenses as the defendant was "peculiarly vulnerable" and that the position taken by the Strata since 2013 has not been reasonable.
>
> [50] The defendant asks the registrar to ignore the findings and rulings made in the Sherwood action and by the court of appeal, the suggestion being that different findings and rulings can be made here on the same evidence.

[26] She also noted that the defendant took issue with the costs of the Grant Thornton report, a point on which she ruled in favour of the defendant.

[27] But at para. 52, the Registrar went on to say:

> [52] The first issue to be resolved is the scope of the reference. It is trite law that a registrar's jurisdiction is limited by the terms of the court's order.

No party takes issue with that basic proposition.

[28] At para. 53, she stated:

> [53] On a plain reading of terms 1, 2 and 5 of the Order, the defendant admits liability for the various category of charges owing pursuant to the A&I Agreement and the bylaws.

I note parenthetically that there is no issue taken with that in this appeal, so the finding that the order amounted to an admission of liability by Cinnabar for the categories of charges is not disputed here.

[29] The Registrar went on to say at para. 53:

> The registrar is not tasked with revisiting the findings made by this Court or the court of appeal. Cinnabar's conduct in re-litigating judicial determinations has been unfavourably commented upon by many presiders in both this Court and in the court of appeal.

[30] I note parenthetically that what I take this to be is a finding on the Registrar's part that it was not part of her jurisdiction to revisit the findings because of the scope of the Referral Order.

[31] She then said:

> [54] There has been no finding by any court that the parties are in a fiduciary relationship. In the absence of the pleadings in this action, I am unable to say whether Cinnabar even made that plea in its response to civil claim. Regardless, the Order does not direct the registrar to consider that issue.

[32] I take that to be a conclusion that whether there is a fiduciary relationship or duty was not within the scope of the issues that she had to deal with under the order.

[33] The Registrar went on to say the following:

> [55] That leads to a discussion of what term 3 of the Order actually means. Neither party made submissions on the term, except in response to a query from the registrar. The Strata says that the defendant insisted upon the term but there was no real thought put into the words that were agreed upon. Mr. Siver [counsel for Cinnabar both before the Registrar and on appeal] says that Cinnabar wanted the language of term 3 to be “as broad as possible” but also could not really explain the application of the language to this reference. The registrar is of course obliged to apply the law.

[34] Para. 56 contains probably the most controversial statement that the Registrar made:

> [56] I find that Cinnabar's position has no legal basis. The scope of the A&I Agreement has already been determined in the Gray Reasons. The bylaws speak for themselves.

[35] My interpretation is that “Cinnabar's position” referred to in para. 56 is the position the Registrar had summarized at para. 49. So, on my interpretation, her conclusion is that those positions had no legal basis and the remaining two sentences in para. 56 are stated in support of that conclusion.

[36] In my own analysis of the grounds of appeal, I will come later to my interpretation of the sentence, “The scope of the A&I Agreement has already been determined in the Gray Reasons” in light of this context.

[37] The overall reason for the conclusion that Cinnabar's position has no legal basis is summarized at para. 57:

> [57] What the registrar can do is assess the reasonableness of the expenses identified in the Order, and in particular, the legal fees incurred by the Strata.

[38] What I take that to mean is that her interpretation of the Referral Order gives the Registrar the authority and responsibility to determine whether expenses are identified in the order and then whether they are reasonable, and so the references in para. 3 to “relevant” legal and equitable principles means only those she considers relevant to determining *that* issue. I take the final sentence of para. 55 to mean that she considered she would have been under a duty to do that in any event, even if para. 3 had not been there, but that this does not change her interpretation of para. 3 of the Referral Order, which is for greater certainty.

[39] In determining whether the legal fees and disbursement accrued by the Strata Corporation were reasonable, the Registrar referred to *Mah v. Lawrence*, 2023 BCSC 1256 at para. 10, and *Hobbs v. Warner*, 2020 BCSC 1180 at para. 36: see para. 61 of the Registrar’s reasons.

[40] From these cases, she concluded that, as a contractual indemnity case, the assessment could be “guided by” the factors set out in s. 71 of the *Legal Profession Act*. She did not suggest, and I do not interpret her to have believed, that she was conducting a review under s. 70 of that Act, or that the factors under s. 71 were exhaustive, and she expressly said they were not.

[41] Indeed, she emphasized that there was a difference with Rule 14-1(3) and s. 71, in that the indemnity was not limited to legal fees arising out of a proceeding, and therefore included the advice that the Strata Corporation would have received before a proceeding had been initiated. So it is clear that she did not think she was bound just to address the matters that would be addressed in a s. 70 review.

[42] The Registrar did not allow all of the Strata Corporation's actual legal expenses as a result of the Sherwood proceeding. She did not allow charges

relating to an application to Chief Justice Hinkson of September 2019, or of a subsequent appeal, and reduced substantially the expenditures on a forensic accounting report. However, she implicitly found that the litigation as a whole was not rendered unreasonable by any act of the Strata Corporation.

STANDARD OF REVIEW

[43] I accept that if there is an error of law in the Registrar's reasons, the standard of review is correctness. An error of fact or of mixed fact and law, if inextricable, or any kind of discretionary decision, must be reviewed on a palpable and overriding standard.

DID THE REGISTRAR ERR ON THE SCOPE OF THE REFERENCE?

[44] The first question I have to ask is did the Registrar err on the scope of the reference. I accept that on this question, the appropriate standard of review is correctness. But I find that the Registrar was correct in holding that the scope of the reference before her was “the reasonableness of the expenses identified in the Order,” including the legal expenses arising out of the alterations and proceedings resulting from those alterations, and that would include the Sherwood Proceeding.

[45] No one disputes the basic principle the Registrar was operating on, namely that a registrar's jurisdiction is limited by the term of the order providing for the reference/assessment. The Referral Order provides that Cinnabar is liable on a full-indemnity basis for all reasonable costs and expenses, including legal fees incurred pursuant to paras. 9 and 13 of the A&I Agreement. Para. 9 says, in relevant part:

> The Owner [i.e. Cinnabar] hereby agrees to indemnify and save harmless the [Strata Corporation] ... from and against any and all claims, actions, causes of action, liability, losses, damage, suits or costs, including legal costs as between a solicitor and his or her own client, arising from, but not limited to, the following: ...

[46] And I note that the “not limited to” language means it does not have to fall within para. (h), but I find that it does, (h) being:

> (h) Any other damage, costs or expenses arising out of the grant of permission or the installation of the Alterations or anything related to the Alterations and affixed to or placed on the common property, the strata lot or limited common property.

[47] Before the Registrar, there was an argument as to whether the Sherwood proceeding was caught by subpara. (h). This argument is repeated in Cinnabar's written argument, but was not pressed by counsel in oral argument.

[48] In my view, it is obvious that a suit by another strata lot holder, as a result of an allegedly unauthorized installation of the proposed alterations, would be costs arising out of the grant of permission or the installation of the alterations, and specifically the “or the installation” part means that it cannot just be what was permitted. So the fact that the alterations were not exactly as permitted does not mean that the costs of the proceeding were not within the scope of the indemnity. This sort of action by another strata lot holder would be at the core of what a party in the position of the Strata Corporation would have sought to be indemnified for in return for approving the alterations.

[49] Cinnabar disclaimed any argument that the A&I Agreement was not enforceable as a result of a fundamental breach or for any other reason. The Registrar made no error in finding that such an argument would be foreclosed by the admission of liability in para. 1 of the Referral Order.

[50] It follows that para. 1 of the Referral Order gave the Registrar authority to assess legal costs on a full-indemnity or solicitor-and-own-client basis, which are synonymous terms in our law. This includes an implicit restriction to reasonable costs, but allows for all reasonable costs, as set out in *Mah* and *Hobbs*.

[51] The Registrar raised with the parties whether para. 3 extended this authority. I have reviewed their submissions and they are accurately reflected in the Registrar's reasons. She concluded that para. 3 did not extend her authority and I agree. That is because para. 3 instructs the assessing registrar to have regard to all *relevant* legal and equitable principles. What they must be relevant to is, of course, the assessment of the costs, expenses, fines, and interest.

[52] Para. 3 gives authority to explore legal and equitable issues relevant to whether such costs, expenses, fines, and interest were incurred, whether they were covered by the indemnity provisions of the A&I Agreement, and whether they were reasonable. It does not give any authority to explore legal and equitable interest issues that were not relevant to those matters. In the case of the fines, there might be other issues, but in terms of the legal expenses, those are the only issues which were relevant, and therefore legal, and equitable principles are only within the Registrar's authority to determine if they were relevant to those three issues.

[53] The Registrar was thus right to conclude that she was not directed to consider whether there was a fiduciary relationship or fiduciary duties arising between the Strata Corporation and Cinnabar. If there were, the Strata Corporation of course could only incur reasonable expenses, but that was also true if there were not fiduciary duties or a relationship. Either way, Cinnabar had indemnified for legal expenses on a solicitor-and-own-client basis arising from claims related to the alterations and was liable for all and only those expenses.

[54] Similarly, a legal mistake made by the Strata Corporation prior to 2013 could only be relevant, and therefore within the Registrar's mandate, if that legal mistake implied that legal expenses were not incurred in relation to the alterations or were not reasonable. Otherwise, the legal mistake was outside the Registrar's mandate on an assessment.

[55] Before me, Cinnabar argued that if the Strata Corporation made a legal mistake about its authority to require symmetry — in other words that whatever the roof alterations done by Cinnabar would have to be the same for the Sherwoods — then that would render any subsequent legal expenses unreasonable.

[56] As an unqualified general rule, that is clearly not correct. Parties often make legal mistakes and subsequently engage in legal expenses that are recoverable on a solicitor-and-own-client basis. This can be true even if the legal expenses would not have been incurred if the legal mistake had never been made. Indeed, indemnification for legal expenses would not be worth much if it were otherwise,

because if a party loses a case, it typically will be true that the legal action would not have occurred if they had not made the original legal mistake.

[57] Thus the Registrar was completely correct to conclude that whether the Strata Corporation did or did not make a legal error in the position it took with Cinnabar about the reconstruction of the roof was not before her. She was appropriately concerned with re-litigation of matters that had already been addressed, but this conclusion does not turn on those concerns. Rather, it is simply that a legal mistake, *per se*, does not render subsequent legal expenses unreasonable.

[58] At para. 12 of its written submissions, Cinnabar argues that in the assessment hearing, “the Plaintiff had a duty to show the charges it incurred were reasonable and not in breach of the contract under which those costs are claimed.” It says that, as a result, the facts of the entire dispute between the parties had to be reviewed. But while the Strata Corporation had a duty to show that charges were reasonable, it did not have a duty to show that it did not breach the contract in some other way. A breach of the A&I Agreement by the Strata Corporation, other than a fundamental breach with an acceptance of repudiation, which is not alleged here, would not affect the enforceability of the indemnity clause. It would thus be irrelevant to the issues before the Registrar and she was correct to proceed on the basis that finding whether such a breach had occurred was outside her jurisdiction.

[59] I therefore do not agree with Cinnabar that an issue as broad as “whether the Respondent acted reasonably with regard to the Appellant's interest as the receiver of the Appellant's indemnification” was properly before the Registrar.

[60] To the extent that interest is in not paying unreasonable legal or other costs, then that was before the Registrar, but she dealt with it in a manner that has not been shown to involve any error. To the extent other interests arising from the A&I Agreement were at stake, they were not part of her jurisdiction under the Referral Order. Whatever remedy Cinnabar has must be in a different proceeding.

[61] To be sure, Cinnabar was free to argue that the Strata Corporation acted so unreasonably in 2013 that all of its subsequent legal expenses were outside what could be recovered as solicitor-and-own-client costs. The Registrar did not explicitly address this argument, if that is how the argument she does summarize at para. 49(b) is to be interpreted, but reading her reasons as a whole, it is clear to me that she implicitly rejected it. She went through the numerous applications, appeals, and settlement attempts in considerable detail, and her comments set out sufficient reasons to reject the proposition that the litigation was all because of the unreasonableness of the Strata Corporation. In particular, when she did think that litigation expenses were as a result of unreasonableness of the Strata Corporation, she did not allow them. Reading her reasons generously, as I am required to do as an appellate court, I find that they are interpreted appropriately as being that she did not accept that the whole of the litigation was because of unreasonableness of the Strata Corporation in the sense that would disentitle a party to solicitor-and-own-client costs.

[62] The Registrar not only stated the test correctly, she also applied it in a way that worked, in some respects, in favour of Cinnabar. She rejected some significant expenditures as unreasonable. What she was unwilling to do was to make findings and holdings unrelated to the reasonableness of the expenses the Strata Corporation was claiming. In declining to do this, she was correct -- and indeed it would have been a jurisdictional error on her part had she done so.

Did the Registrar err in incorrectly finding the scope of the A&I Agreement had been determined in previous decisions?

[63] Cinnabar takes aim at the following statement of the Registrar at para. 56 of her reasons (I have quoted it before, but I will quote the relevant sentence again):

> The scope of the A&I Agreement has already been determined in the Gray Reasons.

This is, of course, a reference to the decision of Madam Justice Gray at 2018 BCSC 890.

[64] Cinnabar says this is an error in law because the criteria for issue estoppel have not been met. It points out that at para. 354 of her reasons, Madam Justice Gray noted the following:

> The [Strata Corporation] does not claim costs from Cinnabar in this proceeding. The [Strata Corporation]'s claim for those costs, on a full indemnity basis, is the subject of the Victoria Lawsuit [i.e. the action in which the Referral Order was subsequently agreed to and in which the Registrar was making her decision], and must be dealt with there.

[65] Had the Registrar believed herself to have been estopped from considering the appropriate costs of the Strata Corporation, then that would clearly have been an error and would have been contrary to para. 354 of Justice Gray's reasons. But in considering the merits of this ground of review, it is important to read the Registrar's reasons in their totality and context to determine whether any such belief can be ascribed to her.

[66] In my view, the statement, "[t]he scope of the A&I Agreement has already been determined in the Gray Reasons", although it is not entirely clear, should be read in response to the argument at the assessment hearing summarized at paras. 49(a) and (b), namely that the agreement did not encompass the litigation at all, that is the argument at 49(a), and that the strata had made an error in its interpretation of the A&I Agreement, which is at 49(b).

[67] In relation to the first issue, the Registrar could rely on the Gray reasons for the proposition that the A&I Agreement included the alterations to the roof, because that was an issue in the Gray reasons and was determined in a final and binding way between the parties. This was relevant to the extent of determining what was indemnified by para. 9(h), which was incorporated by reference into the Referral Order, and therefore was before the Registrar.

[68] In relation to the second issue, the Registrar might be interpreted as relying on the Gray reasons for the proposition that Cinnabar's prelitigation position on the interpretation of what it was entitled to do was not correct, thereby diminishing the

argument that there was a fatal error in the Strata Corporation's own position, rendering all of the litigation costs unreasonable.

[69] Whether this was or was not a correct use of issue estoppel is immaterial, since the principal point is that the issue of whether Cinnabar's or the Strata Corporation's prelitigation position with respect to the roof was correct was not before the Registrar. It did not matter whose prelitigation position was correct. It only mattered if one party's prelitigation position rendered all subsequent legal fees and disbursements unreasonable in the sense that they would not be recoverable as solicitor-and-own-client costs.

[70] As I have explained, I interpret the Registrar's reasons as concluding that she did not think that Cinnabar had demonstrated that level of unreasonableness, and perhaps she relies on the Gray reasons just to that extent.

[71] Read in context and charitably, as I am instructed to do as an appellate court, and as I certainly would want an appellate court to do for me, the Registrar's principal point was that the issues Cinnabar was raising were not before her, unless they were relevant to the reasonableness of the costs, etc., that she was assessing.

[72] She was not prepared to revisit broader issues of the interpretation of the A&I Agreement that had been addressed by Madam Justice Gray, not primarily because of doctrines of issue estoppel, which she did not analyze, but because it was outside her jurisdiction to do so. As I have already explained, that was correct.

[73] I therefore find that there was no error in the sentence “[t]he scope of the A&I Agreement has already been determined in the Gray Reasons”, at least as interpreted contextually.

[74] If I am wrong about that, I find that the error is not one that affects the result, because the result turns not on the question of whether the scope of the A&I Agreement had already been determined in the Gray reasons, but on whether there was an indemnity for the Sherwood proceeding, and the extent to which the expenses claimed had been established to be reasonable.

Was Cinnabar denied a fair opportunity to make submissions about the findings of a prior court or the scope of the contractual relationship between the parties as a result of not receiving notice of the Registrar's views on her scope of her jurisdiction?

[75] The third and final ground of review is set out in the notice of appeal as follows:

> The Registrar did not alert Cinnabar Brown Holdings Ltd. the Registrar's authority was limited by the misinterpretation of the Consent Order and allow either submissions to be made or the Consent Order to be amended such that it more accurately reflected the intent of the parties at the time the Consent Order was made, and the Registrar did not provide Cinnabar Brown Holdings Ltd. with an opportunity to make submissions regarding the findings made by previous courts on the scope of the contractual relationship between the parties. Both and each of these errors thereby rendered the hearing in front of the Registrar unfair.

[76] I do not agree that the hearing was unfair. The Registrar was the one to raise the issue of her authority and did so in a way that encouraged submissions on the subject. At the end of the hearing, in the course of reply by counsel for the Strata Corporation, she raised the following point:

> THE COURT: ... I have one question. Mr. Siver touched upon this, but I'll -- I'll ask him to answer the question as well. The term -- term number three in the, what I'll call reference order, the March 2nd, 2023 order, is unusual, so I would like to hear submissions on what is meant by the registrar having regard to all relevant legal and equitable principles. What do you say that means?

[77] Both counsel provided responses to this question. Both had an opportunity to make submissions on the scope of the Registrar's authority as a result of this question. That, of course, is always at issue in any assessment or reference to a registrar.

[78] Mr. Siver, on behalf of Cinnabar, stated the following:

> CNSL C. SIVER: I -- I don't terribly disagree with my friend. The -- the idea, of course, was that if -- within the terms of this litigation, on the question of whether or not the A&I is a binding contract, yes, it is. And we agree to that. We've admitted that we agree that there are damages owing.

[79] I note that that is essentially agreement with the proposition that the order concedes liability but provides quantum to be assessed by the registrar.

[80] Returning to the quote, Mr. Siver stated the following:

> ... what we sought at -- at that time, because, as noted, I had just been retained, and as you have noted, this is a mountain of material, and there was no way I was going to be ready for trial at that time, was to admit the obvious, and have the -- the fight about whether or not those expenses were reasonably incurred at -- at a further assessment. Whether it was in front of a registrar or a judge was probably immaterial to our consent, but the idea is just making sure that this is not a simple s. 71 review, in terms of a solicitor's bill. This is actually about whether or not the amounts claimed under a contract are due and owing.

[81] The content of Cinnabar's submissions, therefore, was that what was before the Registrar was not simply a s. 71 style review: in other words, it was not simply limited to the issue of whether, between the Strata Corporation and the lawyers, the amount was properly incurred, but included broader issues of reasonableness, and that the nature of the proceeding was a contractual indemnity claim.

[82] In my review of the reasons, the Registrar accepted both of these submissions. She did not think she was confined to a s. 70-style review. She was aware that the amount claimed was under a contract. She applied the principles of contractual indemnification of legal fees on a solicitor-and-own-client basis or full-indemnity basis.

[83] There was an opportunity to make submissions about the nature of the scope of the order. It seems to me that the Registrar's conclusions in that regard were consistent with the submissions of counsel for Cinnabar.

[84] In both the submissions of counsel for Cinnabar and in the reasons of the Registrar, the ultimate issue was the reasonableness of the expenses incurred.

[85] I find that there was not a lack of ability for Cinnabar to make submissions about the weight of findings of prior courts. Cinnabar made multiple submissions on that, including in its opening and closing submissions. Cinnabar correctly pointed out

in the course of its submissions that it was not its own conduct that was relevant, but whether the Strata Corporation's expenses came within the contractual indemnity: in other words, the issue was whether those expenses were reasonable.

[86] The Registrar's analysis is entirely consistent with this principle. She allowed all and only those expenses that she found were reasonably incurred by the Strata Corporation and did not inquire into Cinnabar's own conduct, except to the extent that it was relevant to that question.

[87] Cinnabar made submissions that the reasonable legal expenses arising out of the Sherwood litigation were not within the scope of the indemnity. The Registrar did not agree with the submissions, but there was no lack of an opportunity to make them.

Order

[88] I therefore dismiss the appeal with costs at Scale B.

"J. G. Morley, J."
The Honourable Justice Morley