IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Western Bank v. Webb Brothers Contracting Ltd.,* 2023 BCSC 1055

Date: 20230620
Docket: H2361800
Registry: Prince George

Between:

Canadian Western Bank

Petitioner

And

Webb Brothers Contracting Ltd., Dale Lexington Webb, Marie Carol Webb also known as Carol Marie Webb, TD Canada Trust formerly known as The Toronto-Dominion Bank, Accord Small Business Finance Corp., Accord Small Business Leasing Corp. and Accord Financial Canada Corp.

Respondents

Before: Master Bilawich

Reasons for Judgment

Counsel for the Petitioner:	T. Holte, appearing as agent for E.C. Ledding
No other appearances.	
Place and Date of Hearing:	Fort St. John, B.C. April 27, 2023
Written Submissions on Special Costs Received:	May 10, 2023
Place and Date of Judgment:	Prince George, B.C. June 20, 2023

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Introduction

[1] This matter came before me on April 27, 2023 as an uncontested application for a variety of relief in an order *nisi* hearing. I granted the majority of the relief sought in the amended statement of relief sought, including setting a redemption amount for two loans totalling $60,895.56, a six-month redemption period and granting personal judgment against Webb Brothers Contracting Ltd. ("Webb Bros") and Dale Webb. With regard to costs, the petitioner sought costs payable on a "solicitor and own client basis" in accordance with the terms of the mortgage, or on such other basis as the court may deem appropriate. I requested that counsel provide written submissions regarding costs, which were received May 10, 2023.

Background

[2] The petitioner describes this action as a debt claim brought against Webb Bros and Dale Webb relating to funds the petitioner lent to Webb Bros and which were secured by a Security Agreement and two General Security Agreements (GSAs). Under one of the GSAs, Dale Webb granted the petitioner an uncrystallised floating charge on land as partial security. In the application before me, the petitioner sought to crystallise its charge against Dale Webb's interest in a property described in the materials as "Lot 198".

[3] The petitioner says the lending relationship started in 2014. The relevant transactions include a promissory note dated November 21, 2019 between Webb Bros as borrower and the petitioner as lender in the principal amount of $73,937.31 ("Loan 1") and a promissory note dated November 21, 2019 between Webb Bros as borrower and the petitioner as lender in the principal amount of $51,037.08 ("Loan 2"). I will refer to Loans 1 and 2 collectively as the "Loans".

[4] The balances owing on the Loans were secured by a Security Agreement over certain serial numbered property and a second GSA (the "Webb Bros GSA"). The terms of the Webb Bros GSA provide that Webb Bros agreed to pay the petitioner's legal expenses for collection proceedings on a solicitor and own client

basis. Guarantees were also given by Cody and Jamie Webb and a limited guarantee by Dale Webb.

[5] Before this proceeding was commenced, but after Webb Bros defaulted on the Loans, Webb Bros, Cody Webb, Jamie Webb and Dale Webb entered into a forbearance agreement (the "Forbearance Agreement") with the petitioner which provided they would pay the petitioner's legal costs relating to their default, the Forbearance Agreement and any legal proceedings taken by the petitioner relating to the debt on a solicitor and own client basis.

[6] The Forbearance Agreement also provides that Dale Webb agreed to grant the petitioner further security for his guarantee in the form of a security interest (the "Dale Webb GSA") in all of his present and after-acquired personal property and an uncrystallised floating charge on his interest in real property in BC. This includes his undivided one-half interest in Lot 198. It further provides that he agreed to pay the petitioner's legal expenses as between solicitor and own client in relation to the exercise of any rights and remedies under the Dale Webb GSA.

[7] Webb Bros, Dale Webb, Cody Webb and Jamie Webb defaulted on the Loans and the Forbearance Agreement. After notice of default, but before this proceeding was started, Cody Webb and Jamie Webb made assignments in bankruptcy. The petitioner has taken steps to execute against certain serial numbered goods which are covered by the Security Agreement.

Applicable Law

[8] A standard costs award made in foreclosure proceedings is party and party costs. When matters are relatively straight-forward and uncontested, Scale A costs are typically granted.

[9] Many mortgages contain terms which provide that in the event of a default, the mortgagor agrees to pay the mortgagee's actual legal costs and expenses of collection proceedings. These are sometimes referred to as "solicitor and own client" costs. There are other variations on this language.

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[10] Section 20 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 governs costs in foreclosure proceedings:

> Cost in foreclosure proceedings
>
> **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.
>
> (3) This section applies to all proceedings commenced before April 14, 1986 other than a proceeding in which a court has made an order for costs.

[11] In *CIBC Mortgage Corp. v. Lalji*, [1986] B.C.J. No. 979 (C.A.) at para. 8, Justice Hinkson, as he then was, described s. 20's predecessor (s. 18.2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224) as follows:

> **8** In my opinion, the plain meaning of s. 18.1 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.

[12] In *Vanguard Mortgage Investment Corporation v. Dietterle*, 2023 BCSC 573 [*Vanguard*] at para. 7, Justice MacNaughton summarized s. 20 as follows:

> [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. …

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[13] At para. 8, Justice MacNaughton noted that Justice Fitzpatrick had recently concluded in another case that when considering whether to award "special costs" under s. 20, it was not necessary for the court to find the respondent had engaged in reprehensible conduct:

> [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.

[14] And at paras. 19–20:

> [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.

Analysis

[15] I now consider the factors identified in *Vanguard*.

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a) Does the mortgage provide for the mortgagor to pay solicitor-client costs incurred by the mortgagee?

[16] The various agreements relevant to the mortgage in this matter do provide for the debtors (including Dale Webb) to pay solicitor and own client costs incurred by the petitioner. This factor weighs in favour of special costs in this case.

b) Does the mortgagor have substantial equity in the subject property?

[17] The petitioner emphasizes that this proceeding involves a debt claim and enforcement of a security agreement against the remaining serial number goods, any additional personal property that may yet be located under the Dale Webb GSA and the floating charge over two parcels relevant to this proceeding, namely “Lot A” and “Lot 198”.

[18] The petitioner says that after the petition was served on Dale Webb and Carol Webb, they sold a second property described as “Lot A” to Jaime Christine Webb for $125,000, despite the fact that the 2023 BC Assessment value for this property is $258,000. They are not certain whether this transfer involved an assumption of the existing mortgage. The petitioner questions whether this was a legitimate transfer for fair market value or potentially a fraudulent conveyance. This was not an issue that was addressed at the hearing before me and I do not have the necessary evidence in the petition record which would allow me to assess the merits.

[19] With respect to “Lot 198”, the petitioner says it was recently listed for sale on multiple listing service for $209,000. There is one mortgage registered on title, but the balance owing is not known, so Dale Webb’s potential equity in Lot 198 is also unknown.

[20] The petitioner argues this proceeding also potentially involves pursuit of other personal and real property which has not yet been identified. As such, there is potential for equity in other unknown property. I am not in a position to assess this based on the evidence currently before me.

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

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

[22] The petitioner argues Dale Webb has or had mortgages on Lot A and Lot 198. It suggests that at some point he was involved with Webb Bros and provided a limited guarantee. He was also represented by counsel when he signed various relevant agreements.

[23] The evidence tendered does indicate that this was a commercial transaction. There is little in the way of evidence with which assess the relative level of sophistication of Webb Bros or Dale Webb in particular. He did co-own two properties, both of which had mortgages registered on title.

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

d) Are the proceedings complex? And

e) Has the conduct of the respondents delayed or unnecessarily lengthened the proceedings?

[25] The petitioner argues this is not a typical foreclosure. It does not involve a residential home secured by a mortgage. Standard foreclosure precedents and summary procedures cannot be relied on to deal with the debt and security enforcement issues arising in this proceeding.

[26] Counsel also seeks to distinguish *Vanguard* on the basis that this proceeding and its enforcement of security has yet to be completed. Other real and personal property have yet to be identified and potentially realized upon. Counsel also says that realization of the crystallised floating charge over Dale Webb's undivided one-half joint interest in Lot 198 will potentially become a cumbersome, drawn-out and expensive process. Counsel also points to the potential of having to pursue fraudulent conveyance proceedings in relation to the sale of his interest in Lot A.

[27] I agree this is not a standard foreclosure. That said, it is not uncommon to have personal property security issues addressed in parallel with foreclosure proceedings. I also note that none of the respondents attended the hearing or

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opposed the relief sought. In *Vanguard*, the respondent vigorously opposed the relief sought and unsuccessfully raised allegations of unconscionability and tendered a purported "expert" report which the court concluded was inadmissible. The petitioner in that case incurred costs to rebut the report and cross examine the author in advance of a summary trial application. The respondent also failed to produce drafts of the report. In the present case there is no indication that the conduct of the respondents has thus far delayed or unnecessarily lengthened proceedings.

[28] I also do not have evidence regarding specifics of what, if any, other real or personal property might exist and eventually become the subject of realization proceedings. This is speculative at this point. I do accept that executing against a one-half interest in property does bring with it heightened complications and uncertainty; that flows from the nature of the security taken against Dale Webb. As noted, I am not in a position to speculate whether the sale of Lot A may eventually lead to fraudulent conveyance proceedings. If pursued, they may well be pursued through a separate action.

[29] In my view, this factor is neutral with respect to special costs in this case.

f) Are party-and-party costs inadequate to provide a reasonable recovery against actual expenses incurred to enforce the mortgage?

[30] Petitioner's counsel says this proceeding is only in its initial stages and there are many additional steps potentially necessary for the petitioner to realize on its security and try to collect the debt. This distinguishes it from the usual residential foreclosure and counsel cannot rely on standard precedents and streamlined procedures.

[31] The petitioner did not tender evidence regarding its actual or anticipated legal costs, so I am not in a position to assess the extent to which standard party and party costs represent reasonable recovery in the circumstances. Many of the cost concerns counsel has highlighted relate to potential future steps in the proceeding rather than steps taken thus far. I also note that it was within the petitioner's power to tender some evidence of its actual expenses, but it did not do so.

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[32] This factor weighs against special costs in this case.

g) Other relevant factors

[33] The petitioner argues that Webb Bros now has judgment against it and owns the remaining serial numbered goods which are secured by a different Security Agreement than the Dale Webb GSA which secures Dale Webb's guarantee and obligations under the Forbearance Agreement. Counsel argues this will contribute to the complexity of the petitioner's efforts to successfully realize upon its security and enforce its judgments against each of the respondent debtors. In my view, this issue is addressed under factor d) above.

[34] Counsel also says the respondent debtors received the benefit of additional time to arrange their affairs under the Forbearance Agreement. The confirmation of their promise to pay costs of the petitioner on a solicitor and own client basis in the event of default was a critical aspect of the petitioner's agreement to forbear. In my view this issue is addressed under factor a) above.

Conclusion

[35] Considering all of the foregoing factors, I conclude that it is appropriate to award the petitioner party and party costs of the proceeding at Scale B.

[36] The petitioner is at liberty to seek a higher scale of costs in relation to any future proceedings in this matter.

"Master Bilawich"

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