IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Olympia Trust Company (A50545) v. Shuswap Association for Eco Development and Fairtrade,* 2025 BCSC 26

Date: 20250108
Docket: S57450
Registry: Vernon

Between:

Olympia Trust Company (A50545) and Peter Barry Kerr

Petitioners

And:

Shuswap Association for Eco Development and Fairtrade formerly known as Shuswap Association for the Promotion of Eco Desarrollo

Respondent

Before: The Honourable Justice Kirchner

Reasons for Judgment on Costs

Counsel for the Petitioners:	A.A. Edwards
Appearing on behalf of the Respondent:	I. Zbarsky
Place and Date of Hearing:	Vancouver, B.C. September 11, 2024
Written Submissions on Costs:	October 11, 2024 and January 3, 2025
Place and Date of Judgment:	Vernon, B.C. January 8, 2025

Background

[1] In oral reasons for judgment given on September 11, 2024, I dismissed an appeal brought by the respondent, Shuswap Association for Eco Development and Fairtrade ("Shuswap"), from a judgment of Associate Judge Schwartz dismissing Shuswap's application to vary an order *nisi* made February 1, 2022 in a foreclosure proceeding. The respondents on the appeal, who are the petitioners in the foreclosure proceeding (the "Petitioners"), seek an order of special costs for the appeal.

[2] Shuswap was not represented by counsel at the appeal or in any of the foreclosure proceedings. The mortgage is a self-directed mortgage by a non-institutional lender. It is administered by Olympia Trust Company but Peter Kerr is the lender in his personal and individual capacity. He is funding the foreclosure proceedings and the appeal proceedings himself.

[3] The mortgage agreement provides for payment of the lender's legal fees "on a solicitor and client basis" unless the court allows those to be paid on a different basis.

[4] The foreclosure proceedings were commenced on December 22, 2021. Shuswap did not initially file a response to the petition. The original order *nisi* was granted February 1, 2022. No one from Shuswap attended the hearing at which the order *nisi* was granted so, out of an abundance of caution, counsel for the Petitioners scheduled a further hearing on March 1, 2022 to confirm the order when a representative of Shuswap could be present. The representative attended that hearing and was advised to seek legal advice but the order *nisi* was not varied or set aside.

[5] Shuswap filed a response to petition on September 13, 2022 and sought to amend the order *nisi* at a hearing on October 25, 2022. Associate Judge Schwartz dismissed that application and granted an application by the Petitioners for an order for conduct of sale. On November 25, 2022, Shuswap filed a notice of appeal of Associate Judge Schwartz's order dismissing the application to vary the order *nisi*

but did not initially pursue that appeal. In August 2024 Shuswap filed a second notice of appeal of the same order and set down the appeal for September 4, 2024 in Vancouver rather than Vernon. It did not consult counsel for the Petitioners on either the date or venue for the appeal. The Petitioners received a copy of the Notice of Appeal just before 4:00 p.m. on Friday, August 30, 2024, before the Labour Day long weekend.

[6] On September 3, 2024, the parties appeared before Associate Judge Schwartz in Vernon to speak to the Petitioners' application to approve a sale of the property. That hearing was adjourned to September 17, 2024 so that Shuswap's appeal could be heard before the order for sale might be granted.

[7] The Petitioners say that Shuswap's last-minute unilateral scheduling of the appeal required significant work for the Petitioners' counsel, including arranging to have the Vancouver registry accept materials filed in Vernon which is the registry for the foreclosure file, attending to the adjournment of the application for an order of sale, and substantively responding to the appeal which required a review of some two years of litigation history since the original notice of appeal was filed.

[8] At the originally scheduled hearing of the appeal on September 4, 2024, Justice Gaul adjourned the matter over to September 11, 2024, which is when it came before me. I dismissed the appeal in oral reasons given that day.

[9] The evidence in the record on this appeal shows that, at times, Shuswap's representative was disruptive of some of the foreclosure proceedings, including one incident when the matter had to be stood down while a sheriff attempted to bring calm to the courtroom. However, that behavior was not repeated during the hearing before me and I take no issue with how Shuswap's representative conducted himself at the hearing of the appeal.

[10] After giving my oral reasons for judgment dismissing the appeal, I directed that the parties could make written submissions on costs. I advised that I did not consider Shuswap's conduct of the appeal to be "reprehensible" which is the

standard ordinarily required for an order of special costs: *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (B.C.C.A.) at para. 17. However, I invited further submissions on costs based on a term in the mortgage agreement by which the petitioners might have a contractual entitlement to costs on a solicitor-client basis (essentially special costs). The relevant provision of the mortgage agreement reads as follows:

> (6) The borrower will pay to the lender on demand all expenses and costs incurred by the lender in enforcing this mortgage. These expenses and costs include the lender's cost of taking and keeping possession pf the land, the cost of the time and services of the lender or the lender's employees for so doing, the lender's legal fees and disbursements on a solicitor and client basis, unless the court allows legal fees and disbursements be paid on a different basis, and all other costs and expenses incurred by the lender to protect the lender's interest under this mortgage. These expenses and costs will be added to the principal amount, be payable on demand and bear interest until they are fully paid.
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> [Emphasis added]

[11] The Petitioners filed written submissions on October 11, 2023 seeking their costs of the appeal to be assessed as special costs relying on the term in the above term of the mortgage agreement, s. 20 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and Shuswap's conduct of the appeal. Shuswap did not provide written submissions on costs or any response to the Petitioners' submissions.

[12] After receiving the Petitioners' submissions, I had the opportunity to review a transcript of my oral reasons for judgment of September 11, 2024. Having done so, I issued a memorandum to the parties on November 28, 2024 providing further clarification on the scope of the submissions I would accept on costs. I reiterated that I had ruled out an award of special costs based on any alleged "reprehensible" conduct but I confirmed that I would consider submissions about the court's broader discretion to award special costs in a foreclosure proceeding under s. 20 of the *Law and Equity Act* as the petitioners had advanced in their written submissions. In view that additional clarification, I gave Shuswap a further opportunity to provide written submissions with a deadline of December 31, 2024. However, Shuswap has apparently declined that opportunity and I now give my judgment on costs.

Legal Principles

[13] In *Vanguard Mortgage Investment Corporation v. Dietterle*, 2023 BCSC 573 at paras. 5-20, Justice MacNaughton summarized the legal principles relating to costs of foreclosure proceedings. As she said at para. 7, s. 20 of the *Law and Equity Act* "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." Section 20(2) of the *Law and Equity Act* reads:

> 20 (2) In a foreclosure in which costs are awarded, the court may,
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> (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
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> (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.

[14] As I have said, an order for special costs is ordinarily made in civil proceedings only where the unsuccessful party engaged in "reprehensible" conduct in the course of the litigation: *Garcia,* para. 17. However, s. 20 permits a court to award special costs in a foreclosure proceeding even if the unsuccessful party's conduct does not rise to the level of being "reprehensible": *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2022 BCSC 1314 at para. 66. The court is not compelled by the terms of the mortgage agreement to order special (or solicitor-client) costs but nor is it bound to find reprehensible conduct before ordering special costs. As stated in *CIBC Mtge. Corp. v. Lalji* (1986), 8 B.C.L.R. (2d) 310 (C.A.) at para. 11:

> [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 [now s. 20] 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.
>
> [Emphasis added]

[15] As MacNaughton J. stated in *Vanguard* at para. 19, the starting point for an award of costs in any foreclosure proceeding is party-and-party costs. From there, the court might consider a variety of factors in determining whether to depart from the norm and award special costs instead. In *Forjay* at para. 102, Fitzpatrick J. identified some of those factors as follows:

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

Analysis

[16] In my view, the weight of these factors favour a departure from the starting point of party-and-party costs and warrants an order for special costs. On the one hand, while the mortgage agreement provides for costs on a solicitor-client basis, it expressly acknowledges the court's discretion to award costs on other terms. Further, while there appears to be some amount of equity in properties, it is not substantial. The sale price for the properties is not significant despite some considerable exposure to the market. This appears to relate to the remote location and irregular shape of the properties. I view these factors as tending to favour an order for party-and-party costs.

[17] On the other hand, the transaction is not a standard commercial one with sophisticated business entities. Mr. Kerr is a personal lender with Olympia serving as administrator. Mr. Kerr is personally paying the costs to enforce the mortgage

terms. He has run into considerable resistance from Shuswap whose personal representatives have at times been disruptive of court hearings during the foreclosure proceedings (though not at the hearing of this appeal). These points weigh heavily in favour of special costs, despite Shuswap's conduct not being reprehensible.

[18] Shuswap's position throughout the foreclosure proceedings and on this appeal has essentially been that the properties generate revenue to support development work Shuswap does in Somalia, Guatemala, the state of Chiapas in Mexico, and in the Philippines. Shuswap seemed to concede at the hearing that Mr. Kerr was trying to help Shuswap in these efforts by agreeing to loan Shuswap the money that is secured by the mortgage. Shuswap's tenacious resistance to the foreclosure proceedings while failing or refusing to make the required mortgage payments (despite its verbal assurances that it would) has made this matter particularly complex and unduly lengthy. This has added significantly to Mr. Kerr's legal costs, as has the unconventional way that this appeal was brought forward. In my view, party-and-party costs are now inadequate to provide Mr. Kerr with a reasonable recovery against his actual expenses to enforce the mortgage through responding to this appeal.

[19] For these reasons, I find that the Petitioners are entitled to costs of the appeal assessed as special costs.

"Kirchner J."