Court File No. 13-10362-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

In the matter of a reference under the *Construction Lien Act*, R.S.O. 1990, c. C.30 as amended
And in the matter of R. 54, Ontario Rules of Civil Procedure

DUNCAN W. GLAHOLT, Referee

Date: **28 September 2016**

File: 13-10362-00CL

Title: **In the Matter of a Plan of Compromise or Arrangement of Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.**

REASONS

28 September 2016

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[1] On 11 August 2016, I issued reasons for a Partial Award/Report of the same date. The original intent of issuing a Partial Award/Report was to allow monies to flow to the Lien Claimants while relatively small residual issues of costs as between the Private Mortgagees and the Bank of Montreal were resolved.

[2] Then matters became somewhat more complicated. Although I had reduced my own account up to and including 11 August 2016 by $13,783.95, such that there were no Referee costs beyond the initial deposits ordered by Justice Newbould on 8 January 2015, two additional costs-related disputes emerged:

a. <u>Facility costs</u>: Counsel for Argo and Newmar wrote on 15 August 2016 taking issue with costs of the reporter's facility in which we conducted our hearings. This position was supported by counsel for the Lien Claimants on 16 August 2015, and opposed by counsel for the Private Mortgagees on 15 August 2015. The bill from the reporter's facility amounts to $3,888.52 and covers the period 11 to 14 July 2016. I deal with this issue under the heading "Facility costs" below.

b. <u>25 July 2016 costs</u>: Counsel for the Silver Streams defendants wrote on 12 August 2016 seeking leave to make submissions on the costs of an attendance arranged for 25 July 2016 to hear argument on the claim of Argo and Newmar for full indemnity costs in the amount of $8,500. I deal with this issue under the heading "25 July 2016 costs" below.

[3] Finally, there is the executed issue of costs as between the Private Mortgagees and the Bank of Montreal:

a. The Bank of Montreal's revised bill of costs filed 26 August 2016 claimed $375,855.00 for fees, $1,409.57 for disbursements and HST, for a total of $426,125.72.

b. The Private Mortgagees made "Cost Submissions" on 9 September 2016.

c. The Bank of Montreal made "Reply Costs Submissions" on 16 September 2016. These "Reply Costs Submissions" prompted an email to me and the bank's counsel from counsel for the Private Mortgagees on Saturday, 17 September 2016, providing reply submissions under 12 headings keyed to the paragraph numbers in the Bank of Montreal's "Reply Costs Submissions".

d. This was followed on Monday, 19 September 2016 by an unsolicited telephone call to me from the Bank of Montreal's lawyer, in the absence of counsel for the Private Mortgagees, wishing to make 'reply' submissions to the Private Mortgagees' Saturday, 17 September 2016 email. *Ex parte* contact like this strongly discouraged, even for simple scheduling matters like this, however I felt it best at this stage to bring closure to these proceedings in short order, without a further expensive round of submissions on the need for reply. I advised counsel for the Private Mortgagees and the Bank of Montreal that I would consider only <u>genuine</u> reply by the Bank of Montreal, to be received no later than close of day Wednesday 21 September 2016.

e. The Bank of Montreal's "Further Reply Costs Submissions" arrived on Wednesday 21 September 2016.

[4] I have carefully considered all submissions made and all arguments advanced. I have thoroughly read all briefs and all exhibits. Any failure on my part to specifically recite or describe any such argument, brief, exhibit or conclusion in these Reasons does not change the fact that they were all carefully read and considered by me in reaching my conclusions. I have specifically excluded any consideration whatsoever of anything said to me by counsel for the Bank of Montreal in their unsolicited call to my office on 19 September 2016.

Facility costs

[5] At paragraph 37 of my Reasons on the Partial Award/Report, I noted my understanding that "[a]*ll facility costs prior to the 25 July 2016 hearing of the Argo and Newmar*

interest hearing were to be borne, I understand, in some consensual fashion by the Lien Claimants and Private Mortgagees."

[6] Counsel for Argo and Newmar, supported by counsel for the "Medi Client" lien claimants, points to paragraph 4 of the Order of Justice Newbould dated 8 January 2015, directing this reference, and paragraph 26 of the Initial Order dated 17 December 2013, providing that any additional "costs of the Referee" were secured by an Administration Charge and are to be paid by the Monitor. This of course begs the question as to whether the facilities costs were "costs of the Referee", or costs to be borne in some consensual fashion by the parties.

[7] Counsel for the "Medi Client" lien claimants pointed out that as some lien claimants attended the hearing and some did not, but all benefited from the settlement, saddling any particular group of lien claimants with even this small amount would be unfair and "*quite frankly . . . difficult to collect at this point.*" In 26 July 2016 submissions, the point was made (among others) that the hire of a hearing room was a necessary incident and unavoidable cost of retaining a Referee, as "[i]*t is not as if the hearing could have been conducted in a phone booth*", and that the whole sense of the settlements reached was that the Lien Claimants have no further responsibility for costs.

[8] In response, counsel for the Private Mortgagees noted that the Administrative Charge was just that, security for payment, not a pre-determination of responsibility for costs, a jurisdiction which the Judgment of Reference granted to me as Referee.

[9] In order that the reporter's business not be inconvenienced by this debate, I paid their bill in full myself in the amount of $3,888.52 on 13 September 2016, merely as a courtesy to the reporter who had accommodated our on-again, off-again week of adjournments leading up to the settlement.

[10] On balance, I am persuaded by the arguments made by the Medi Client group of lien claimants that costs beyond the $100,000 deposit are to be borne by the Monitor, and that the settlements were intended to cut off any further exposure of the Lien Claimants for costs. Therefore I will record the $3,888.52 as a disbursement in my final bill to the Monitor to be issued following release of my Final Award.

25 July 2016 costs

[11] Counsel for the Silver Streams defendants wrote on 17 August 2016 claiming full indemnity costs of $8,500 inclusive of fees, taxes and disbursements, or partial indemnity costs of $5,300, for opposing the cost and interest claims of Argo and

Newmar. A 19 July 2016 "without prejudice" offer of judgment in the amount $1,500, all inclusive, against the Silver Streams defendants, in favour of Argo and Newmar, plus personal judgment for *Courts of Justice Act* interest of approximately $12,000 was included with these submissions.

[12] Counsel for Argo and Newmar responded by letter on 23 August 2016 citing *McDonald v. Anishinabek Police Service* [2007] O.J. No. 424 for the proposition that "costs of costs" are generally not awarded except in unusual circumstances, which in their view did not exist in this case. It was argued that there are no circumstances in this case to support a claim for substantial indemnity costs. In addition, the quantum of costs was challenged on various grounds.

[13] While the Silver Streams defendants prevailed on the issue of costs and interest, their offer of judgment involved credits that might have required clarification and it was not unreasonable therefore that the Argo and Newmar costs claim proceed. As provided at paragraph 8 of my Partial Report/Award, the exceptional cooperation of counsel and parties in the resolution of this complex matter argues strongly in favour of no further costs being awarded to any party especially on issues of costs. No costs are awarded to the Silver Streams defendants on the Argo and Newmar claims for costs and interest in this reference.

BMO costs claimed against the Private Mortgagees

[14] On 15 August 2016 I received copies of accounts and a Bill of Costs from lawyers for the Bank of Montreal current to 18 June 2016. A further account for the period 18 June 2016 to 22 August 2016 followed on 26 August 2016. The amount claimed on a full indemnity scale was $426,125.72 inclusive of fees, disbursements and taxes.

[15] On 8 September 2016, I received costs submissions from the Private Mortgagees, which I would summarize as follows:

a. As to liability:

   i. The settlement in which the Bank of Montreal participated was on a "without costs" basis, and the Bank of Montreal neither sought nor obtained costs against the Lien Claimants. This restricts any claim that the bank may have for costs to matters exclusively at issue between the Bank of Montreal and the Private Mortgagees.

   ii. There were no cross-claims or other matters directly in dispute between the bank and the Private Mortgagees. Any proceedings that increased costs, such as the November 2015 application to compel Bank of Montreal records and answer undertakings, were initiated by the Lien Claimants, not the Private Mortgagees.

b. As to scale and quantum:

   i. Scale cannot be determined by reference mortgage documents to which the Private Mortgagees were not parties.

   ii. Nothing in the Private Mortgagee's conduct on this reference displaces the presumption of partial indemnity costs. In fact the conduct of this matter as between the Private Mortgagees and the Bank of Montreal was one of marked cooperation throughout this matter.

   iii. The fees claimed in the amount of $375,855.00 are disproportionate to the stake the bank had in the matters at issue and the bank's peripheral role in the whole process. This claim is three times the fees of the lawyers for the Private Mortgagees who held the labouring oar. Moreover, the Bank of Montreal's claim includes significant non-reference related time entries (such as the collateral Tarion proceedings before Justice Wilton-Siegel), leaving about $130,000 of fees related to the reference, at most.

   iv. Rates and time charged were also challenged.

c. It is the Private Mortgagee's submission that no costs should be awarded to the Bank of Montreal, or, if awarded, on a partial indemnity basis only, in the amount of $40 – 45,000 plus disbursements of approximately $1,500 and associated taxes.

[16] The Bank of Montreal's "Reply Cost Submissions" advanced arguments I would summarize as follows:

a. The bank relies upon its standard charge terms with its borrower, Silver Streams, entitling it to indemnity. The bank also relies upon its acknowledged priority over the Private Mortgagees. The bank argues that it can simply tack any costs of recovery onto its mortgage debt, "*thereby in effect binding third parties who are subsequent in priority on title so as to lessen their security in the project.*"

b. The bank argues that as long as there was *any* possibility that the Private Mortgagees might take priority over the Lien Claimants in a way that would leave the Bank of Montreal exposed for deficiency in holdback, there was sufficient adversity in interest between the bank and the Private Mortgagees to ground an award of costs. This argument is repeated a number of ways throughout the bank's submissions.

c. The bank argues that until the Private Mortgagees conceded some priority to the Lien Claimants on 8 July 2016 (the bank calls this a *"seismic shift"*) the bank had no choice but to participate. This argument, also made in a variety of ways in the Reply Cost Submissions, is that priority should have been conceded sooner, and that this conduct justifies an award of costs in favour of the bank as against the Private Mortgagees.

d. The bank states that "[a]*s a consequence of the tactics employed by the Private Mortgagees in causing BMO to be kept in this litigation, the Private Mortgagees were able to negotiate favourable settlements with all of the lien claimants . . .*" The bank views the Private Mortgagee's defence of the lien claims as a mere gambit to force down their settlement value at the hearing itself. The bank says that it had no involvement in the settlements made between the Private Mortgagees and the Lien Claimants, and alleges that it was "excluded" from those negotiations.

e. The bank relies upon s. 86 of the *Construction Lien Act* to claim substantial indemnity costs, and Rule 57.01(1) as to the factors I should consider in assessing quantum on that scale. As to quantum, the bank argues carefully each of the considerations enumerated in Rule 57.01. I have considered all of these most thoroughly. Each allegation by the Private Mortgagees as to quantum is discussed and counter-argued.

f. The bank is also of the view that my jurisdiction extends to costs incurred outside of this Reference, relating to the underlying CCAA process, since this Reference was "*ordered to ensure that nay security it is entitled to is preserved (be it PPSA security or otherwise*)."

[17] The Private Mortgagees' email of 17 September 2016 advanced arguments which I would summarize as follows:

a. The Private Mortgagees further develop their "lack of adversity in interest" argument: neither Silver Streams nor the Private Mortgagees challenged the Bank of Montreal mortgages, or cross-claimed in any respect against the Bank of Montreal; in fact it was the Lien Claimants that alleged deficiency in holdback priority and those claims were settled on consent without costs.

b. The Private Mortgagees deny any agreement of any kind that the Bank of Montreal be entitled to any costs, on any scale, at any time. There is no evidence to support any representations by the Private Mortgagees as to deficiency in holdback, or entitlement to the Fund held by the Monitor, for costs or otherwise. Similarly there is no evidence on the record to support an exercise of discretion under s. 86 of the *Construction Lien Act*.

c. The Private Mortgagees concede that they did not involve the Bank of Montreal in the settlements made with the Lien Claimants, but argue that this "*supports that the Private Mortgagees never looked to BMO to assist in financing the settlement of the Lien Claimants*". In response to the allegation that the bank was actively excluded from the settlement process, the Private Mortgagees point to docket entries that "*confirm the many hours spent by counsel discussing the file and the settlement*."

d. As to quantum, the Private Mortgagees note that there were no CCAA issues in this Reference, that the bank in reality had no exposure, and that all they really had to do was to produce proper accounting of their advances.

e. As to proportionality, it is noted that there was no 'special deal' between counsel for the Private Mortgagees and client, or with Mr. Greenberg, that the client was billed and that the client paid these bills. A comparative analysis with the accounts rendered to the Private Mortgagees and to Argo and Newmar for example, is said to show the excessive nature of the claims being advanced by the Bank of Montreal.

[18] Finally, on 21 September 2016 I received unexpectedly comprehensive "Further Reply Costs Submissions" from the Bank of Montreal, in twelve enumerated paragraphs, which I would summarize as follows:

a. The bank emphasizes in several ways, in several places, that it is <u>not</u> seeking costs against the Private Mortgagees, as such, but rather against the "Security" (the amount now held by the Monitor).

b. While acknowledging that the Private Mortgagees did not claim to rank ahead of the bank, they did claim priority over the Lien Claimants, thereby arguably exposing the bank to reimbursement of the Lien Claimants under Reimbursement Agreements. The nub of the bank's argument here seems to be that while the Security was in the aggregate face amount of the liens themselves, the bank's risk was with respect to lienable costs awarded beyond that amount.

c. The timing of the settlement is put in issue once again, this time supported by four emails among counsel, some marked "without prejudice", from the 5 – 9 July 2016 period. This is again said to be a "seismic shift" in the Private Mortgagees' position on the eve of trial which was "*part and parcel of* [a] *strategy to keep pressure on the lien claimants*", as the bank "*would be arguing strenuously that the lien claimants had priority over the Private Mortgagees to the Security*".

d. The bank argues its consent, Schedule D to the Partial Report/Award, as an agreement to entitlement to costs. The form of procedural order attached , paragraph 1, contemplates that after payment of the amounts found due to the Lien Claimants, and before payment to the Private Mortgagees, payment be made of "*the legal costs incurred by the Bank of Montreal ("BMO") arising in relation to this Reference which have not been otherwise reimbursed*".

e. The bank renews its s. 86 arguments.

[19] My ruling on this final costs issue is as follows:

a. I reject any suggestion of improper conduct by any counsel or party in this reference. There is no evidence of any such conduct. It is not unusual for complex lien matters to end up settling "on the courthouse steps". As I noted in my initial reasons, the conduct of all counsel in advancing all issues in this matter was exemplary. Their ability to get together to consent to this reference illustrates a level of cooperation that was sustained throughout the entire proceeding. There is no basis for application of s. 86 sanctions against any party or counsel.

b. It is the Lien Claimants who brought the bank into this litigation and kept the bank in this litigation. There was no cross-claim by the Private Mortgagees against the bank. For the most part, the bank simply supported the priority position taken by the Lien Claimants, a point emphasized in the bank's own Further Reply Costs Submissions. All possible costs claimable by or against the Lien Claimants were settled and must be excluded from any costs as between the Private Mortgagees and the Bank of Montreal.

c. The bank was involved in some fashion in the settlements being reached, as appears from contemporary docket entries. By way of example only, on 5 and 6 July 2016, just days before the hearing:

    i. July 5, 2016: "Correspondence from Sonja Turajlich enclosing Offer to Settle from Argo Lumber Inc, and Newmar Window Manufacturing Co."

    ii. July 5, 2016: "Correspondence from Emilio Bisceglia to Marco Drudi regarding settling the Arbitration/Reference with Bank of Montreal."

    iii. July 5, 2016: "Telephone discussion with James Klein regarding settlement with B.M.O."

    iv. July 6, 2016: "Receipt and review of offer to settle by clients of Emilio Bisceglia and Jim Klein."

    v. July 6, 2016: "Several discussions with client regarding proposed settlement of the Arbitration as between Bank of Montreal and those lien claimants represented by Jim Klein, Emilio Bisceglia and Jeff Long."

    vi. July 6, 2016: "Four page correspondence to client attaching Offer to Settle as negotiated with counsel to lien claimants but not counsel to Private Mortgagees; . . ."

    vii. July 6, 2016: "Telephone discussion with Greg Fedoryn regarding my correspondence, the Offer to Settle and our counter-offer."

d. I cannot see on the record before me in this case any occasion on which the Private Mortgagees caused the Bank of Montreal to incur costs unrelated to the claims advanced by the Lien Claimants. Costs incurred by the bank related in whole or in part to the conduct of the CCAA proceedings must also be excluded. They are not within my remit.

e. With respect to costs not related to the defence of the Lien Claims and not related in whole or in part to the conduct of the CCAA proceedings, I believe that over the course of this proceeding no more than 20% of the bank's claim related to achieving the overall settlement of this matter justifying an award of costs. This recovery should be on a partial and not substantial indemnity basis. As the full indemnity claimed was $426,125.72 inclusive of fees, disbursements and taxes, I fix and assess the bank's partial indemnity costs in this matter at

$50,000, inclusive of all fees, disbursements and taxes to date, to be paid out of the Security in priority to the Private Mortgagees.

[20] My jurisdiction is confined to this Reference, and I do not purport to limit what any party may claim in the CCAA or other proceedings for that matter.

[21] My Final Report/Award incorporating the above findings and the earlier Partial Report/Award will issue accordingly.

Duncan W. Glaholt, Referee
28 September 2016