

Headline: The Case of the Invalid Lien

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The failure of an owner to pay strata fees on time raises a number of issues for strata councils including: should interest be charged, should the owner be fined, and if a lien is filed what charges can be included.

The *Strata Property Act* (the "Act") contains answers to many of these questions and recently, a British Columbia Supreme Court case clarified what amounts may be included in the lien.

Interest

The Act permits a strata corporation to charge interest on strata fees if the strata corporation has a bylaw permitting interest to be charged. Section 107 of the Act provides that a bylaw that establishes a schedule for the payment of strata fees may set out a rate of interest. Section 107(2) of the Act provides that the interest payable on a late payment of strata fees in accordance with a bylaw is not a fine and forms part of the strata fees for the purposes of section 116 of the Act, which is the section relating to the filing of the lien. The recent amendments to the Act now permit interest to be charged on overdue special levies. Section 108(4.1) and (4.2) provide that the interest may either be set out in a bylaw or in the resolution approving the special levy. As with strata fees, the Act provides that interest is not a fine and forms a part of the special levy for the purposes of section 116.

The Regulations establish that the maximum amount of interest that may be charged is 10% per annum compounded annually. In the case of interest charged on overdue strata fees or special levies, the interest forms part of the amount owing and can be included in the lien.

Fines

Most strata corporations have bylaws requiring strata fees to be paid by the first of the month. If an owner fails to pay strata fees by the date required, the owner is in breach of the bylaw and may be subject to a fine. Two important issues arise if a strata council intends to fine an owner for the late payment of strata fees. Firstly, the strata council must comply with the processes established by section 135 of the Act. Section 135 of the Act requires that before a strata corporation imposes a fine, the strata corporation must have received a complaint about the contravention, give the owner the particulars of the complaint in writing and provided the owner with an opportunity to answer the complaint, including requesting a hearing.

Of particular significance in section 135 is the need to give the owner the particulars of the complaint in writing and an opportunity to be heard or request a hearing before a fine is levied. The practice which is often used by strata corporations is to write to an owner advising that strata fees are in arrears and levy fines immediately. Such a practice contravenes section 135 of the Act.

If the strata corporation wishes to fine an owner for breaching a bylaw, including a bylaw requiring that strata fees be paid by the first of the month, the strata council must ensure that it is in compliance with section 135 of the Act. Such compliance is necessary regardless whether the strata corporation refers to the amount charged against the owner as a fine, an administrative penalty, or administrative fee.

Secondly, if the strata corporation has levied fines against an owner, for the breach of any bylaw, including the bylaw requiring payment and then proceeds to file a lien against the title of the strata lot, it is imperative that the fine amount not be included in the amount of the lien. The case of *Strata Plan VR 386 v. Luttrell*, a recent decision of the British Columbia Supreme Court considered the validity of a lien that included an amount for fines and other charges. The Judge found that a lien that included fines was invalid and did not rank in priority to the other charges on title.

The Judge in *Luttrell* considered section 116(1) of the Act which sets out the types of charges for which a lien may be filed. Section 116(1) of the Act provides that a lien may be filed if an owner fails to pay strata fees, special levies, the cost of work ordered by a public authority or the strata lot's share of a judgment against the strata corporation. As noted above, interest charged on strata fees and special levies can be included in the amount of the lien. Section 116(3) of the Act specifically provides that a lien may not be filed if the amount owing is in respect of a fine or the costs of remedying a contravention.

Strata corporations should be careful when levying fines against owners for the failure to pay strata fees to ensure that there is compliance with section 135 of the Act and that any liens filed do not include the amount of a fine.