IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2015 BCSC 1545

Date: 20150831
Docket: S118825
Registry: Vancouver

Between:

1043325 Ontario Ltd.

Petitioner

And

CSA Building Sciences Western Ltd., Ralph Jeck, and Maria Jeck

Respondents

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment re Costs

Counsel for Petitioner:	Robert S. Fleming
Counsel for Respondents:	Michael B. Morgan; Lauren E. Cook
Place and Dates of Hearing:	Vancouver, B.C. July 14 and 17, 2015
Place and Date of Judgment:	Vancouver, B.C. August 31, 2015

Background

[1] Following my decision on the question of remedy [2015 BCSC 1160] where I ordered the respondent Mr. Jeck to purchase the petitioner's shares for $508,000, the parties made submissions on the question of costs.

[2] The petitioner seeks costs throughout on the basis that it was substantially successful. In addition it seeks special costs against the respondents because of what it asserted was conduct designed to delay the proceedings and increase costs, including special costs against the respondent Maria Jeck even though she was successful in defeating the petitioner's claims. In the alternative, the petitioner seeks a *Sanderson* order for any costs payable to Maria Jeck.

[3] The respondents take quite a different position. They say that Maria Jeck should have her costs as the claims against her were defeated but contend that the other respondents should have their costs as well because they were substantially successful in defeating claims in excess of $4 million and in the process of doing so made reasonable settlement offers. Alternatively the respondents seek apportionment of the costs relating to the issue in which the petitioner sought damages for forgeries of Mr. Skene's signature to engineering documents, which was unsuccessful. The respondents say that this is not an appropriate case for special costs but, if it is, such an order should be limited to a portion of the proceeding.

[4] Under R. 14-1(9), the court must award the successful party its costs unless it orders otherwise:

> Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

The Successful Party

[5] The initial question is who the successful party was. In *Loft v. Nat*, 2014 BCCA 108, the successful party was described "at its most basic level" as "a plaintiff who establishes liability under a cause of action and obtains a remedy or a defendant who obtains a dismissal of the plaintiff's case" (at para. 46). The fact that a plaintiff obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving that party of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328.

[6] Although the petitioner was successful in establishing oppression and in obtaining an order with a remedy of a buyout, the respondents say that they were in fact successful because the claim advanced at trial in monetary terms was far greater than the amount of recovery. The respondents argue their success is also based on the defeat of many of the of the petitioner's claims, including claims for the repayment of all management fees since 2004, the disgorgement of all profits resulting from Mr. Jeck's forgery of Mr. Skene's signature and misuse of his engineering stamp, the valuation of CSA as if Mr. Jeck had not received any management fees since 2004, a declaration that CSA Western had paid no rent to the Jecks as if CSA owned the business premises, and all trust claims against properties owned by Ralph and Maria Jeck.

[7] The respondents, although not suggesting that they had made an offer to settle better than the result at trial, nevertheless say that the settlement offers should be taken into consideration in the Court's exercise of its discretion in awarding costs and determining which party was substantially successful.

[8] The settlement offers can be summarized in brief as follows:

(a) October 18, 2012 – the petitioner offered to settle for $1.05 million without costs;

(b) October 25, 2012 – the respondents offered to purchase the petitioner's shares for $278,000 on a payment schedule, less $30,400 posted as security for costs by the petitioner;

(c) October 26, 2012 – the petitioner offered to settle for $975,000 without costs on a payment schedule to be determined;

(d) April 13, 2013 – the respondents offered to purchase the petitioner's shares for $400,000 over 3½ years;

(e) May 6, 2013 – the petitioner offered to settle for $1.6 million plus costs plus a full indemnity to Mr. Skene;

[9] The following offers were made after the trial reasons were released on June 30, 2014 [2014 BCSC 1197]:

(f) June 9, 2015 – the respondents offered to settle for $480,000 on a payment schedule of $10,000 each month along with an agreement to make reasonable efforts to obtain financing to accelerate payment;

(g) June 17, 2015 – the petitioner offered to settle for $950,000.

[10] Notwithstanding that the petitioner obtained a lesser award than it sought in this proceeding and that the respondents' offers (particularly in 2013) were closer to the result than the petitioner's offer, I have concluded that the petitioner was substantially successful for these reasons:

(a) The petitioner succeeded in demonstrating that the operation of the company's affairs was done in a manner that was oppressive and unfairly prejudicial to the petitioner. Although it advanced a number of claims or grounds under the heading of oppression and unfairly prejudicial treatment and only some were successful, the petitioner obtained a remedy of a buyout after establishing oppression.

(b) Although the court has discretion under R. 9-1(5)(d) to require a successful plaintiff to pay the defendant's costs if the amount awarded is less than an offer made by the defendant, that did not occur in this case. Apart from the operation of R. 9-1(4), I was shown no authority for the proposition that settlement offers in an amount less than a judgment obtained by a petitioner or plaintiff are relevant on the question of substantial success.

(c) There is authority which establishes that in considering whether costs should follow the apportionment of liability as set out in s. 3(1) of the *Negligence Act*, R.S.B.C. 1996, c. 333, the court can take into consideration, among other things, settlement offers: *Moses v. Kim*, 2007 BCSC 1820. However, the *Negligence Act* does not apply in this case.

(d) Even if the amount of an offer by a respondent being less than the amount obtained at trial by the petitioner is a relevant consideration on the question of substantial success under R. 14-1(9), I am not satisfied that the respondents' offer of April 2013 ought reasonably to have been accepted. I find the petitioner's submissions on this point at para. 34 of its written submissions to be persuasive, including the fact that (a) there was no response to the position of the petitioner on the question of valuation, (b) the offer was for an unsecured promise to pay over time and did not address indemnity or the question of compensation, and (c) the matter of forged engineering reports was a live issue that the petitioner was assessing at that time.

[11] In all the circumstances I conclude the petitioner was the successful party and costs should follow the event.

Apportionment

[12] I turn next to the question of apportionment.

[13] The test for the apportionment of costs is well known. In *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, the court set out the test in what is now R. 14-1(15) at paras. 29-31:

> [29] A plain reading of the rule appears to give the judge a broad discretion to award costs to an unsuccessful party, or to deny costs to a successful party, with respect to an identifiable issue or part of the proceeding. As with every discretionary power, it must be exercised on a principled basis.
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> [30] ***British Columbia v. Worthington (Canada) Inc.*** is the leading case with respect to the application of Rule 57(15). It affirms that under Rule 57(15) the Court has full power to determine by whom the costs related to a particular issue are to be paid. As Esson J.A. states in ***Worthington***, the discretion of trial judges under Rule 57(15) is very broad, and must be exercised judicially, not arbitrarily or capriciously. There must be circumstances connected with the case which render it manifestly fair and just to apportion costs.
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> [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
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> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
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> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
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> (3) it must be shown that apportionment would effect a just result.

[14] The respondents say that the 2013 hearing predominantly concerned Mr. Skene's personal claims against Mr. Jeck and the question of forgery. The respondents say that they were successful on the issue, on the grounds that it involved personal claims that that were not properly brought in an oppression proceeding and that were out of time.

[15] In all the circumstances, I am not satisfied that this issue satisfies the *Sutherland* test, which requires it to be sufficiently separate and discrete or such that apportionment would effect a just result. Although the respondents succeeded, I did not conclude that the petitioner over-litigated or added an unnecessary issue. The issue was rather closely connected to, and was asserted to be, a ground of oppression even though the respondents succeeded on limitation and standing grounds. The petitioner also did establish that his signature was forged by Mr. Jeck, and the findings in connection with the issue were relevant to my conclusions on credibility. My findings on this claim appear at paras. 230-233 of my reasons for judgment of June 30, 2014.

[16] Accordingly, I decline to make an order apportioning costs in favour of the respondents.

Special Costs

[17] On the issue of special costs, the test from *Garcia v. Crestbrook Forest Industries Ltd*. (1994), 9 B.C.L.R. (3d) 242 (C.A.) is well known. I find the discussion of special costs in Madam Justice Gropper's decision in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, to be instructive and I quote from her judgment in part:

> [32] Lambert J.A. [in *Garcia*] decided to introduce clarity into the law of special costs by synthesizing the different variations on the standard for a special costs award into a single standard, that of reprehensible conduct. He held at para. 17:
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>> Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui (District)*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.
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> [33] Lambert J.A. recognized that the meaning of "reprehensible" conduct was still quite broad. In order for a special costs award to be justified, the circumstances had to be exceptional. He continued at paras. 23 and 25:
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>> However, the fact that an action or an appeal "has little merit" is not in itself a reason

> for awarding special costs. ... <u>Something more is required</u>, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
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> ...
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> If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.
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> [Emphasis added.]

> [34] Lambert J.A. identified a number of factors that together gave rise to the conclusion that Crestbrook had acted reprehensibly. The appeal had no prospect of success, yet the appellant had pursued it anyway. The appellant knew the litigation was a financial drain for the respondent. The appellant had also failed to promptly pay Mr. Garcia's termination payment and provide him with his record of employment, as required by law. The appellant also stalled in paying compensation to Mr. Garcia for his lost wages.
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> [35] Mr. Garcia was awarded special costs.

[18] In this case, I find that the positions taken by the respondents as well as conduct that rendered the resolution of the forgery issues considerably more time-consuming than was necessary satisfy the test for reprehensible conduct that warrants an award of special costs.

[19] I commented on that in my reasons. Mr. Skene spent days going through documents to identify forgeries when Mr. Jeck could have conceded, as he subsequently did, that he had signed Mr. Skene signature.

[20] The petitioner refers to my findings, summarized at para. 285, that:

> ... the petitioner was met with positions in this litigation which were time-consuming and costly for the petitioner but were then abandoned by the respondents. In this respect, I am referring to the position that the consent resolutions "appear to bear Mr. Skene's signature" and the cross-examination of the writing expert for a lengthy period, then the suggestion much later it was never disputed the signatures were applied by Mr. Jeck. The same type of conduct appeared in the defence of the allegation that Mr. Skene's signature was improperly applied to engineering reports and documents. After indicating that the accuracy of that allegation would be established by the production of files, and after Mr. Skene spent over eight days looking at files in a boardroom, the respondents said that Mr. Jeck had applied the signatures and that Mr. Skene knew of this all along.

[21] The respondents say that statements made by Mr. Jeck prior to his cross-examination were rectified by him and an award of special costs in such circumstances is not appropriate as it would discourage other witnesses from clarifying and correcting earlier potentially misleading statements. Although not asking me to reconsider my findings, the respondents say that their conduct should be assessed in light of the offers to settle that they made in this case. Alternatively, if special costs are

warranted, the respondents say that the Court should exercise its discretion to limit the order of special costs only for a particular period of time relevant to the impugned conduct.

[22] I am satisfied that the conduct of the respondents justifies an award of special costs but I do not think it is appropriate to award special costs for the entire proceeding. The award is appropriate on a limited basis. To award special costs throughout would be in my view an unjust result.

[23] I award the petitioner special costs for the portion of the proceeding relating to the cross-examination of the handwriting expert at the initial hearing, the preparation and retention of a handwriting expert, and the time Mr. Skene spent examining files to determine whether the signatures on the engineering documents were genuine.

Costs of the Defendant Maria Jeck

[24] I turn finally to the question of costs of the defendant Maria Jeck. I see no basis for awarding special costs against her. On the evidence, Mr. Jeck is the directing mind of the respondent company.

[25] The next issue is whether it is an appropriate case for a *Sanderson* order as sought by the petitioner.

[26] Under R. 14-1(18), the court has discretion to order the costs of one defendant be paid by another. In *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1842, Abrioux J. set out the principles applying to a *Sanderson* order at para. 53, which include:

- the plaintiff bears the onus of justifying a departure from the usual rule that costs follow the event: *0915406 B.C. Ltd. v. 0834618 B.C. Ltd.*, 2013 BCSC 1529 at para. 15;
- the test is whether it was reasonable for the plaintiff to sue the successful defendant together with the unsuccessful defendant. There must be something that the unsuccessful defendant did to warrant being made to reimburse the plaintiff for the successful defendant's costs: *Grassi v. WIC Radio Ltd*. Once the threshold question is answered affirmatively then the granting of a Sanderson order becomes an exercise of judicial discretion in determining what is just and fair in the circumstances: *Robertson v. North Island College Technical and Vocational Institute and Wing,* [1981] 26 BCLR 225 at 228 (C.A.); *Brown v. Lowe*, 2002 BCCA 7 at paras. 129-130;
- a Sanderson order can be granted when there is a close legal relationship between a successful and unsuccessful defendant but it is not required that there be some unusual circumstances; *Brown v. Lowe* at paras. 131-132;
- when exercising its discretion, the court may consider whether it was appropriate for a plaintiff to maintain his or her action against the successful defendant when it becomes apparent during the course of litigation that the claims against that party have no reasonable prospect of success: *Lee (Guardian of) v. Richmond Hospital Society*, 2002 BCSC 862 at para. 58, rev'd on other grounds 2005 BCCA 107;

- a successful defendant will not be entitled to costs if the unsuccessful and successful defendants are represented by the same counsel and no separate steps were taken on behalf of the successful defendant that resulted in additional legal costs: *St. George Transportation Ltd. v. Sawicky*, 2004 BCSC 1488 at para. 4; and
- in cases where counsel take separate steps on behalf of the successful defendant, it may be appropriate to limit costs awarded to the portion of the trial solely related to claims against the successful defendant: *Lam v. Chiu*, 2013 BCSC 1281 at para. 100; *Antrobus v. Antrobus*, 2012 BCSC 613 at paras. 21-25.

[27] In these circumstances I think that a *Sanderson* order is appropriate. There is a close relationship between the individual respondents, Mr. and Mrs. Jeck. For example, at para. 149 I noted that on the evidence I was not persuaded that the payment by the company to Mrs. Jeck was other than for income-splitting purposes. In this case, she was represented by the same counsel as Mr. Jeck and no apparent steps were taken on her behalf that resulted in additional legal costs. In all the circumstances, given that there were limited if really any additional costs incurred to defend Mrs. Jeck, a close legal relationship existed between the successful and unsuccessful respondent and the fact that it was in my opinion reasonable to sue the successful personal respondent, in my view it is fair and just in the circumstances that a *Sanderson* order be granted.

[28] Accordingly to the extent that there are additional costs incurred by the successful respondent Mrs. Jeck, there will be an order that those costs be payable by Mr. Jeck.

[29] Finally, there will be an order that the security for costs paid into trust by the petitioner be paid out to the petitioner.

"The Honourable Mr. Justice J. Sigurdson"