

CANADA / JUDGMENT

0856464 B.C. Ltd. v. TimberWest Forest Corp.

2015 BCSC 985

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0856464 B.C. Ltd. v. TimberWest Forest Corp.,

2015 BCSC 985

Date: 20150610

Docket: S095698

Registry: Vancouver

Between:

0856464 B.C. Ltd., Main Logging Ltd., Geoffrey Lawton Courtnall,
and Penelope Olivia Courtnall

Plaintiffs

And

TimberWest Forest Corp., TimberWest Holdings Ltd.,
and TimberWest Forest Company

Defendants

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment re Costs

Counsel for the Plaintiffs:

Christopher J. Moore

Counsel for the Defendants:

Warren B. Milman;

Tammy M. Shoranick

Place and Dates of Hearing:

Vancouver, B.C.

May 1, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2015

INTRODUCTION

- [1] Following my reasons for judgment dated December 23, 2014 [2014 BCSC 2433], I heard submissions from counsel concerning the costs of trial.
- [2] The plaintiff numbered company 0856464 B.C. Ltd. sought costs on a solicitor and own client basis for all legal costs and disbursements of and incidental to the action, pursuant to an indemnity in the contract between Munns Lumber (1956) Limited ("Munns") (assigned to the plaintiff numbered company) and TimberWest, as I have collectively referred to the associated corporate defendants. The plaintiffs also said that costs should follow the event because they were successful on the major issues of substance and that although R. 14-1(15) provides the court with discretion to apportion issues and costs, in this trial issues were not separate and discrete but significantly intertwined such that apportionment is not appropriate. As to the lack of success of the individual investor plaintiffs on the fraudulent misrepresentation issue, the plaintiffs say the misrepresentation evidence took little time and that costs against those individual plaintiffs should be limited to 5% of the tariff costs for the trial. Finally the individual investor plaintiffs say that it is not an appropriate case to order special costs against them notwithstanding the failed claim for fraudulent misrepresentation. In general terms the plaintiffs say that if solicitor and own client costs are not ordered in their favour, costs should be on Scale C on the basis that the case was of more than ordinary difficulty.
- [3] The defendants argue that solicitor and own client costs or special costs should not to be awarded under the indemnity. The defendants argue that costs should generally be on the scale of ordinary difficulty and costs should be apportioned to reflect success on distinct issues. Given that the numbered company plaintiff, although successful on the breach of contract issue, was unsuccessful on the set-off issues, the defendants submit that the plaintiffs should receive 63% of their tariff costs on Scale B based on monetary recovery.

From that amount, the defendants say that prior costs orders of Fitzpatrick J., and the cost of preparing a supplemental report by the expert Bob Sandy because of late production of documents, should be subtracted.

- [4] The defendants also seek an award of half of their costs as special costs against the individual investor plaintiffs for defending the unsuccessful allegation of fraudulent misrepresentation.
- [5] There are three central issues that I will address first before deciding the particular costs order. They are: (a) whether solicitor and own client costs should be awarded under the indemnity for successfully suing for damages and enforcing the indemnity; (b) whether there were distinct issues under which the defendants were successful and whether there should be an apportionment of costs; and (c) whether the defendants should be awarded special costs for successfully defending the fraudulent misrepresentation allegations.

INDEMNITY AND SOLICITOR AND OWN CLIENT COSTS

- [6] The contract between Munns and TimberWest contained an indemnity in favour of each party. The provisions are the same.
- [7] The indemnification in favour of Munns, which the numbered company plaintiff is entitled to the benefit of as assignee, reads:

5.3 Company's Indemnification. The Company covenants and agrees with the Contractor to defend, indemnify and save harmless the Contractor and its shareholders, directors, officers, employees, agents, successors and assigns from and against:

- (a) Breach of Covenant or Agreement. Any and all Claims (including third party Claims) incurred or suffered by the Contractor by reason of, resulting from, in connection with, or arising in any manner whatsoever out of the breach or nonfulfilment of any covenant or agreement on the part of the Company under this Agreement.

- [8] "Claims" are defined in clause 1.2 as follows:

"Claims" means injury, loss, expense, liability, demand, damage, action, cause of action, proceeding or other claim;

- [9] The issue is whether under the indemnity provision the costs that may be awarded in legal proceedings to enforce that indemnity should be actual legal costs on a solicitor and own client basis. The issue is essentially a matter of contractual interpretation. The defendants argue that if the contract, properly interpreted, provides for the awarding of solicitor and own client costs, the court has a discretion and should nevertheless exercise its discretion to not award costs on that basis.

- [10] Counsel referred me to a number of authorities that have discussed when actual legal fees pursuant to an indemnity or covenant have been allowed or not allowed by the court in proceedings to enforce the agreement.

- [11] In *Bakshi v. Shan*, 2013 BCSC 969, Madam Justice Brown considered a provision in a mortgage that provided for payment of costs:
- [42] The mortgage, in Form E attached as a schedule, provides:
5. In case of default of any term of this mortgage either before or after maturity, all legal expenses relating to rectification of that default are to be paid by the mortgagor on a solicitor and his own client basis.
- [43] The promissory note similarly states:
5. The Borrower agrees to pay all expenses including legal expenses as between a solicitor and his own client, incurred by the Lender/Seller in collecting the loan or in enforcing and realizing upon the security of the loan.
- [44] Generally, parties are free to contract as between themselves that a party is entitled to a specific order of costs in certain circumstances. Where a contract exists, however, a contractual right to be indemnified by solicitor-and-client costs must be clearly and unequivocally expressed: *M. Orkin, The Law of Costs*, 2d ed. (looseleaf) (Toronto: Thomson Reuters, 2012) at §219.1.1. Nevertheless, no magical incantation is required in order for a party to be entitled to a specific order of costs: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, 1999 ABQB 266 at para. 19. Like all questions of contractual interpretation, the reasonable intention of the parties falls to be determined on the basis of the language used: *Aegon Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 1239 (S.C.) at para. 8. See also: *Epoch Press Inc. v. Sewak*, 2011 BCSC 323.
- [45] Here, the mortgage and the promissory note expressly provide that the plaintiffs are entitled to the payment of all legal expenses relating to the rectification of the defendants' default under the mortgage and incurred by the plaintiffs in enforcing the terms of the promissory note on a solicitor-and-client scale.
- [46] I am satisfied that the parties intended that the plaintiffs would be fully indemnified by the defendants for the actual costs incurred by the plaintiffs to collect on the mortgage and the promissory note.
- [Emphasis added.]
- [12] Other cases referred to by counsel included *Aegon Canada Inc. v. ING Canada Inc.*, 2003 O.J. No. 1239; *Canada Deposit Insurance Corporation v. Canadian Commercial Bank*, [1999] A.J. No. 425; *Epoch Press Inc. v. Sewak*, 2011 BCSC 323; and *299 Burrard Management Ltd. v. The Owners, Strata Plan BCS3699*, 2014 BCSC 390 [299 Burrard Management].
- [13] In *Epoch Press*, Gropper J. said at paras. 13 and 14:

- [13] The express words of the credit agreement provide that Mr. Sewak agreed to "indemnify [Epoch Press] and see [Epoch Press] paid for [its] account" and to "assure full responsibility for any costs incurred, including legal fees or collection of the account." I agree with the plaintiff that any costs must include legal fees and disbursements. Canada Deposit Insurance Corp. and Aegon Canada Inc., emphasize that there are no strict requirements or "magical words or phrase[s] in order to be entitled to a specific order of costs."
- [14] I am satisfied that the use of the words in this credit agreement, including "indemnify," "assure responsibility" and "any costs including legal fees" support a finding that the intention of the parties was that Epoch would be fully indemnified by Mr. Sewak for the unpaid invoices, interest, and the actual costs incurred by the plaintiff to collect on the invoices.
- [14] 299 Burrard Management was a recent decision of the Supreme Court of British Columbia. In that case, the defendant strata corporation was contractually bound pursuant to an indemnity agreement with 299 Burrard Management Ltd. ("299") to indemnify 299 for all actions, suits, costs, expenses, charges, damages, losses, claims and demands arising out of contracts, including what was called the Techierge Contract. Florida lawyers for a client called Simplikate demanded money from 299 on the Techierge Contract and ultimately 299 paid Simplikate about \$18,000 dollars in settlement. 299 then sought the settlement monies and its legal fees paid to its lawyer during settlement negotiations with Simplikate from the defendant strata corporation.
- [15] Justice Kent set out the contractual provision on which the case turned at para. 15:
- [15] As of January 26, 2010, the Strata Corp. became contractually bound to both the Techierge agreement with Simplikate and to the indemnity obligation to 299. The latter is found in para. 3 of the AAA and provided as follows:
- The Assignee [Strata Corp.] covenants with the Assignor [299] to indemnify the Assignor [299] against all actions, suits, costs, expenses, charges, damages, losses, claims and demands for or on account of or in any way arising out of the Contracts [including the Techierge Contract] from and after the date of the filing of the Strata Plan.
- [16] Justice Kent discussed the different claims and said at para. 59:
- [59] The indemnity obligation in the AAA also uses broad and inclusive language the plain meaning of which is inescapable and which squarely applies to the Simplikate claims for the amounts due under the Techierge contract. The clause states the Strata Corp is to indemnify 299 against "all actions, suits, costs, . charges, . claims and demands for or on account of or in any way arising out of the [Techierge contract]". Both the initial lawsuit instituted by Simplikate and the subsequent claim for the balance due under the contract are clearly captured by the language of this clause and absent any other legal defence to the indemnity claim the strata corporation is liable to 299.

- [17] Having reached the conclusion that the legal costs that 299 incurred in settling with Simplikate were covered by the indemnity, he turned to the question of costs in the legal action where the indemnity itself was sued on and he reached this conclusion at paras. 72 through 76:
- [72] 299 also claims that the indemnity clause entitles it to be awarded costs of these proceedings as special costs on a full indemnity basis. It points out that, although the indemnity clause does not expressly refer to recovery of solicitor/client or substantial indemnity costs in the event of enforcement proceedings are necessary, no such "magic words" are required and points to *Epoch Press Inc. v. Seak*, 2011 BSCS 232 as authority for such proposition.
- [73] The Epoch case involved a credit agreement pursuant to which the defendant agreed to pay interest on the account and also to "assure full responsibility for costs incurred, including legal fees or collection of the account". The court referred to a number of other authorities to the effect that no "special formula" was required and that exposure to special costs in the enforcement litigation "falls to be determined on the basis of the language used" (citing *Aegon Canada Inc v. ING Canada Inc.*, 2003 O.J. No. 1239 (Ont. SC) at para 8).
- [74] The Epoch case is distinguishable in so far as the credit agreement under consideration made express reference to payment of legal fees and collection of the account. I note that the indemnity clause in the Aegon case also made reference to "reasonable legal fees" as did some of the other cases referred to in the Epoch ruling.
- [75] In my view, the indemnity in this case cannot be stretched to encompass a covenant to pay solicitor/client or special costs for any indemnity enforcement proceedings. There is no reference to such costs in the actual indemnity. Further, the indemnity only applied for expenses "in anyway arising out of the [Techierge contract]".
- [76] While the attorney's fees incurred in Florida to dispute and settle the Simplikate lawsuits are properly captured by the indemnity, it cannot be said that the present indemnity enforcement proceedings "arise out of the Techierge contract". At best, there is ambiguity on this point which in all the circumstances is appropriately resolved in favour of the Strata Corp.
- [18] Counsel for the plaintiff says that 299 Burrard Management was decided on the particular words of the indemnity that was limited to expenses arising out of the Techierge Contract but here the indemnity is broader and not so limited. The issue that I am concerned with is whether the indemnity intended payment of actual legal costs incurred in a proceeding such as this to enforce the indemnity.
- [19] The question of whether the indemnity provides for the numbered company plaintiff as assignee to recover the actual legal fees it incurred in this action is a matter of contractual interpretation and the usual rules of interpretation apply. Those rules were summarized in *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, at paras. 20-21, and include that: (a) words must be given their plain and ordinary meaning unless to do so would result in an

absurdity; (b) words must be interpreted in light of the whole of the contract and the intention of the parties expressed therein; and (c) the court assumes that the words in a contract are there for a purpose and may reject an interpretation that would render one of the contract's terms ineffective.

- [20] The language of the indemnity is broad. To paraphrase, it contemplates recovery for expenses, incurred or suffered in connection with or arising from a breach of contract by TimberWest. I recognize that no magic words are necessary for the court to find the parties intended that costs of enforcing the indemnity contract were to be recoverable on a solicitor and own client basis. The indemnity does not directly address the question of costs of suing on or enforcing the indemnity. Objectively, I would expect that it would be in the reasonable contemplation of the parties that the extent of recovery of legal costs to enforce an indemnity would be governed by the court rules. It is of course open to the parties to agree in their contract on the level or nature of costs or legal expenses that will be recoverable. If the intention of the parties was that actual legal expenses were to also be recoverable, that could have been stated in a number of different ways. Here I do not find there to be a contractual right to indemnification on a solicitor and own client basis. If that was the intention of the parties, I think that they could easily have made that clear with sufficient language, but I find that they did not do so.
- [21] I have determined that the costs in favour of the parties will be awarded pursuant to the tariff in the Rules of Court and that the indemnity does not mean that costs be awarded on a solicitor and own client basis.

APPORTIONMENT OF SUCCESS

- [22] The plaintiffs were successful on the central and most time-consuming issue at trial: the issue of whether the defendant had breached the agreement to negotiate in good faith and the damages that flowed from that breach.
- [23] I recognize that merely because a party obtains judgment in an amount less than the amount sought is not a proper reason to deprive them of costs. However when a court rules against a successful party on one or more distinct issues that occupied a discrete amount of time at trial the court may award costs in respect of those issues to the other party. Such an award and order is not a regular part of litigation and should be confined to relatively rare cases: see *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27.
- [24] The defendants had success against the numbered company plaintiff on the set-off issues and against the individual plaintiffs generally. The set-off issues were largely discrete. The issue of the unpaid advance and the trucking issue for example were distinct issues on which the defendants had success.
- [25] Those set-offs were discussed at paras. 393-416 of the judgment.

[26] Although the defendants suggest that those issues involve a significant amount of time and that the apportionment of costs should reflect something along the lines of the dollar amount awarded in damages and the amount awarded pursuant to the set-offs, I do not think that accurately reflects the amount of time at trial on the various issues, and at the conclusion of these reasons after I deal with the defendants' claim for special costs, I will set out the apportionment that I find appropriate.

SPECIAL COSTS

- [27] The individual plaintiffs made an unsuccessful claim in fraudulent misrepresentation against the defendants. Their allegation generally was that the subdivision plan which I found took place was in fact generated and concealed from the defendants at a much earlier point in time.
- [28] The standard for awarding special costs was discussed in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 45 B.C.A.C. 222 (C.A.) at paras. 11, 12 and 17:
- [11] Special costs are the costs that used to be called solicitor and client costs. In *Bradshaw*, Mr. Justice Bouck, at p. 318, equated special costs to the old solicitor and client costs and referred to the tests for awarding special costs constituted by the phrases "positive misconduct", citing *Dusik v. Newton* (1984), 51 B.C.L.R. 217 at 219 (B.C.S.C.), and "scandalous conduct" citing *Sussex Investments Ltd. v. Leskovar* (1981), 30 B.C.L.R. 372 at 378 (B.C.C.A.). Mr. Justice Bouck's reasons, as I have said, were adopted as the reasons of this court. Consequently, I propose to consider this matter on the basis that the principles which formerly governed the awarding of solicitor and client costs continue to govern the awarding of special costs.
- [12] In *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307, I said this at p. 311:

The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. See *Cominco v. Westinghouse Can. Ltd.* (1980) 16 C.P.C. 19 at 22 (B.C.S.C.); *Jackh v. Jackh* (1981), 31 B.C.L.R. 309 at 312 (S.C.); *Sussex Inv. Ltd. v. Leskovar* (1981), 30 B.C.L.R. 372 at 378 (C.A.); and *Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd.* (1988), 27 B.C.L.R. (2d) 81 (C.A.).

- [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, 84 B.C.L.R. (2d) 1, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, 74 B.C.L.R. (2d) 311, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung*, 77 B.C.L.R. (2d) 314, 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.

- [29] It does not follow simply as a matter of course that a failed plea of fraud or fraudulent misrepresentation will result in an award of special costs, but the court has discretion to make such an order. A description of the discretion a judge has in those circumstances was accurately stated in *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1990] B.C.J. No. 2024:

Mr. Dixon, on behalf of these respondents, conceded that the mere fact of an unproved claim of fraud does not, in and of itself, require the court to exercise its discretion to award solicitor-and-client costs. (see *Owen et al v. Wickens et al* (1980), B.C.L.R. 320 S.C.B.C. at 322). The court may look at the circumstances surrounding the case to determine whether a plea of fraud was warranted in the circumstances even where the claim is ultimately discontinued or not proven. (see *Doyle Construction Co. Ltd. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 28 B.C.L.R. (2d) 81 (B.C.C.A.)) He conceded as well that the question whether costs on a solicitor-and-client scale should be awarded is a matter in the discretion of the trial judge and that only in exceptional circumstances should such an award be made. (see *Stiles v. Workers' Compensation Board* (1989), 38 B.C.L.R. (2d) 307.)

- [30] There are of course cases where fraud or fraudulent misrepresentation has been pleaded and abandoned, or failed after trial, and the court has awarded special costs. The question in exercising my discretion in this case is whether the conduct of the individual investor plaintiffs has met the threshold of conduct described in the authorities that I have referred to above.
- [31] I do not find that the conduct of the individual investor plaintiffs in the circumstances justifies an order of special costs. Although the plaintiffs failed to prove their allegations of fraudulent misrepresentation, I do not find that the allegations were made recklessly, carelessly, without foundation or maliciously. If any of those criteria were satisfied, it may be appropriate to award solicitor client costs, but they have not been.
- [32] I have concluded that although the defendants are entitled to costs against the individual plaintiffs for successfully defending the fraudulent misrepresentation claim, it is appropriate in the circumstances that those costs be on an ordinary scale. A key aspect of the breach of good faith claim was the development of the defendants' subdivision plan. Although the individual plaintiffs failed to prove that the defendants had and concealed that plan at an earlier stage, the advancement of the individual plaintiffs' position through trial

does not meet the level required to justify an award of special costs in my view.

CONCLUSION

- [33] The plaintiff numbered company is entitled to 85% of its costs against the defendants. That reflects my assessment of apportionment of success taking into consideration the main claim and the set-offs.
- [34] The defendants are entitled to 25% of their costs against the individual investor plaintiffs for the failed claim of fraudulent misrepresentation.
- [35] Costs shall be on the scale of ordinary difficulty. The indemnity does not provide for full indemnity for actual legal fees and I decline to award special costs in this case.
- [36] I also decline to make any particular order as to costs in connection with the supplementary Sandy report. Any earlier costs orders that were made in any event of the cause will remain in place.

"The Honourable Mr. Justice J. Sigurdson"

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