

CANADA / JUDGMENT

BCI Bulkhaul Carriers Inc. v. Wallace

2015 BCSC 107

COURT

Supreme Court of British Columbia

DECIDED

26 January 2015

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2015 BCSC 107 BCI Bulkhaul Carriers Inc. v. Wallace IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: BCI Bulkhaul Carriers Inc. v. Wallace, 2015 BCSC 107 Date: 20150126 Docket: S075187 Registry: Vancouver Between BCI Bulkhaul Carriers Inc. Plaintiff And David Scott Wallace, Shona Yvonne Wallace, Eugene Lewis Wallace and Evelyn Mary Wallace Defendants Before: The Honourable Madam Justice B.J. Brown Reasons for Judgment Re: Costs Counsel for the plaintiff: S.A. Mellows Counsel for the respondents: S.B. Jackson Place and Dates of Trial: Vancouver, B.C. Oct 15-17; 21 - 23; 25; December 16 - 20, 2013 February 11 - 13, 2014 September 18, 19, 2014 Place and Date of Judgment: Vancouver, B.C. January 26, 2015

Introduction

- [1] I delivered judgment following trial in May 2014. My reasons for judgment are indexed at 2014 BCSC 885.
- [2] This application deals with the costs of the trial and of prior applications. The plaintiff also asked me to determine the amount of property tax paid by the plaintiff for 2002 and 2003. The Position of the Plaintiff
- [3] The plaintiff takes the position that it is entitled to its costs for the entire proceeding. It says that the offers to settle relied on by the defendants do not constitute offers pursuant to Rule 9-1 of the BC Supreme Court Civil Rules (the "Rules") and should not result in costs to the defendants from the date of the offer.
- [4] With respect to prior applications, the plaintiff says that, in the various applications at issue, the court considered the issue of costs and ordered that costs would be in the cause. The plaintiff argues that this Court does not have the jurisdiction to vary these orders and, as it succeeded in the cause, it is entitled to the costs of these applications.
- [5] With respect to property tax calculations, the plaintiff says that, for the 2002 tax year, the plaintiff did not have evidence of the amount it paid and does not know whether the figure would be higher or lower than the amount paid in 2001. The plaintiff proposes using the 2001 amounts paid to calculate the amounts for the year 2002. It says, as a result, the payment for the property at 2800 Smith Street for 2002 would be \$2,322.39 and the payment

for the property at 2780 Smith Street would be \$2,938. For 2003, the plaintiff proposes to use an average of the 2002 and 2004 figures which, for the property at 2780 Smith Street, would be \$2,750. The Position of the Defendants, David and Shona Wallace

[6] David and Shona Wallace say that costs should be divided. They argue:

- (a) The plaintiff complicated and greatly lengthened the proceedings through its claims that there was a binding agreement and an express trust. The defendants say these claims were bound to fail;
- (b) There were numerous pre-trial applications and the plaintiff was almost entirely unsuccessful in these applications;
- (c) The plaintiff alleged and maintained, throughout the litigation, a claim based on deceit and/or fraud when there was no basis for such a claim; and
- (d) These defendants made three offers to settle, all of which were reasonable. One of the offers was "undeniably generous". The plaintiff ought to have accepted at least two, and possibly all three, of these offers.

[7] They say that the appropriate resolution with respect to costs is:

- (a) The plaintiff shall have its costs at Scale B to August 16, 2013;
- (b) All defendants shall have their costs at Scale B, taxed as double costs, from October 11, 2013 forward;
- (c) There will be no entitlement for costs as between the plaintiff and these defendants between August 16 and October 11, 2013;
- (d) These defendants shall have their costs for the preparation of and attendance at and entry of the order related to the October 12, 2011 application before Mr. Justice Goepel; and
- (e) The plaintiff shall not be entitled to its costs for any of the pre-trial applications for any portion of the proceedings during which it is otherwise entitled to its costs. The Position of the Defendants, Eugene and Evelyn Wallace

[8] Eugene and Evelyn Wallace say that the plaintiff should be sanctioned in costs for unreasonably refusing to accept the offers to settle of October 2, 2012 and October 11, 2013. They say that the plaintiff should be entitled to its costs on a party and party basis at Scale B until the date on which the offers to settle ought reasonably to have been accepted. They say that the defendants should have their costs from the day following the date on which the offers to settle ought to have been accepted as special costs, double costs, or alternatively, party and party costs.

[9] These defendants say that the plaintiff failed to prove that there was an enforceable contract between the parties and that the plaintiff was not entitled to an equity position in the property. Therefore, they argue that the parties had divided success at trial.

[10] They say that the plaintiff pleaded that the defendants acted dishonestly and that there was knowing participation in the defendant's alleged breach of a trust agreement. They argue that the pleadings are equivalent to a pleading of unlawful or fraudulent conduct, which is reprehensible conduct that warrants an award of special costs to the defendants.

Issues

[11] This application raises the following issues:

1. Was there an offer to settle within the Rules?
2. Was there divided success at trial?
3. Did the plaintiff advance a claim of fraud or its equivalent, thereby engaging in reprehensible conduct?
4. What is the effect of earlier orders awarding "costs in the cause"?
5. What amount is the plaintiff entitled to for property taxes for 2002 and 2003? Was there an offer to settle and, if so, what is the effect?

[12] The defendants gave the plaintiff three offers to settle:

1. October 2, 2012: All of the defendants offered to settle the plaintiff's claim for \$275,000, including interest and costs. The offer was open for acceptance until November 1, 2012 ("Offer #1").
2. August 16, 2013: The defendants, David and Shona Wallace, offered to settle the claim against them on the basis that they would receive \$260,000 from funds held in trust; the claim against them would be dismissed without costs to any party; and the action would continue between the plaintiff and Eugene and Evelyn Wallace ("Offer #2").
3. October 11, 2013: All of the defendants offered to settle the plaintiff's claim for \$450,000, including interest and costs. That offer was open for acceptance until October 15, 2013 at 1:00 p.m. ("Offer #3").

[13] The total award in this case was approximately \$330,000, including interest.

[14] In my view, none of the offers to settle was an offer that would affect costs pursuant to Rule 9-1.

[15] Rule 9-1 provides:

- (1) In this rule, "offer to settle" means ...
- (c) an offer... made under this rule, that

- (i) is made in writing by a party to a proceeding, (ii) has been served on all parties of record, and (iii) contains the following sentence: "The[party(ies)]....., ...[name(s) of party(ies)]....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding." ...
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [16] Mr. Justice Masuhara in *Dodge v. Shaw Cablesystems Ltd.*, 2009 BCSC 1765 at para 11, cited *Mackenzie v. Brooks*, 1999 BCCA 623 at para. 21 for the proposition that the object of this rule is to encourage settlement by "rewarding the party who makes an early and reasonable settlement offer, and penalizing the party who declines to accept." See also *Brewster v. Li*, 2014 BCSC 463 at paras. 15-16.
- [17] The party "seek[ing] to displace the usual rule [as to costs] has the burden of persuading the judge that the rule should be displaced": *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 75, citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24

- [18] In considering whether the offers made ought reasonably to have been accepted, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable to accept it: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24. Factors to consider include timing of the offer, whether it had some relationship to the claim or was a nuisance claim, whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [19] The rule is permissive. Unlike under the former Rule 37, it is not mandated under Rule 9-1 that a plaintiff who rejects a reasonable offer should face some sort of sanction: *Wafler v. Trinh*, 2014 BCCA 95 at para. 82.
- [20] The amount offered in Offer #1 was insufficient to compensate the plaintiff for the amount of mortgage payments and property taxes it had paid and did not address the costs incurred to date or the issues in dispute.
- [21] Offer #2 was made by the defendants, David and Shona only, and would not conclude the litigation.
- [22] Offer #3 was not properly served in accordance with Rule 9-1(1)(c)(ii) and therefore it would be inappropriate for the court to apply the cost options set out in Rule 9-1(5). The conditions of Rule 9-1(1)(c) require strict compliance: *Lau v. Rai*, 2009 BCSC 696 at para. 26. Offer #3 was emailed to plaintiff's counsel on the afternoon of Friday, October 11, 2013. The plaintiff does not have an email address for service. The offer was set to close Tuesday, October 15, 2013 at 1:00 p.m. Monday, October 14, 2013 was the Thanksgiving holiday. Formal service did not occur until after the expiration of Offer #3 in accordance with its terms.
- [23] Even if it had been formally served on October 11, 2013, it did not permit the plaintiff sufficient time to consider the offer.
- [24] I am unable to say that it was unreasonable for the plaintiff to have rejected the defendants' offers to settle. Was success at trial divided?
- [25] Although the plaintiff obtained judgment, it did not 'succeed' on the live issues at trial. The defendants were the successful parties. The judgment gave the plaintiff the amount that it was out-of-pocket from paying the mortgage and property taxes on the property. Each of the defendants conceded that the plaintiff was entitled to this amount. Evelyn and Eugene each said so in the course of their evidence. They also said so in their trial brief, filed September 25, 2012. The plaintiff made the mortgage payments (which were the bulk of the award) and the majority of the property tax payments before the property was transferred to David and Shona Wallace. Accordingly, the concession of Evelyn and Eugene would be sufficient to ensure that those funds were recovered by the plaintiff, even if David and Shona did not agree. However, the point was not strenuously opposed by David and Shona. David and Shona did argue that the payments the plaintiff made were among the benefits flowing back and forth between Eugene and Evelyn and the various family businesses and could not constitute a basis for a finding of unjust enrichment. Although David and Shona advanced

this argument, it was an argument to be advanced by Evelyn and Eugene, should they choose to make it. Eugene and Evelyn did not make this argument.

- [26] The plaintiff sought the property itself, or all of the funds received from the sale of the property, on two bases:
1. An agreement between the plaintiff and Eugene Wallace; or
 2. Unjust enrichment on the "value received" basis. Those were the issues at trial. The plaintiff was not successful on either of these issues.
- [27] The evidence regarding the alleged agreement took most of the time at trial. Did the plaintiff act reprehensibly?
- [28] The plaintiff pleaded that the defendants acted dishonestly in effecting the transfer and option and that David and Shona knowingly assisted Eugene and Evelyn in their breach of trust. Throughout the trial, the plaintiff has maintained a position that the defendants acted dishonestly or fraudulently.
- [29] A pleading of fraud, or its equivalent, is one of the forms of reprehensible conduct that may lead to censure from the court and an award of costs against the party.
- [30] As Mr. Justice Burnyeat observed in *Swiss Reinsurance Co. v. Camarin Ltd.*, 2013 BCSC 1066, not every allegation of fraud (or its equivalent) will warrant a costs penalty:
- [37] Special Costs may be ordered against a party who does not prove allegations of fraud or dishonesty where the party ought to have concluded from available information that a defendant had merely been negligent: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 at paras. 25-26. Here, the "fraud allegation" was also not required as the rescission remedy sought by Swiss Re is available even in the absence of fraud. Simply pleading negligent or even innocent misrepresentation would have been sufficient to obtain the rescission that Swiss Re sought.
- [31] Mr. Justice Edwards in *Fibercom Systems Inc. v. Rogers Cable Inc.*, 2005 BCSC 673 determined that where the evidence as it is disclosed does not support the allegation, it should be withdrawn:
- [11] Because of the potential for harm to the reputations of those accused of fraud, a plea of fraudulent misrepresentation should be advanced cautiously based on an objective assessment of the evidence and abandoned if evidence to support it is not disclosed during pre-trial discovery or fails to materialize at trial. ...
- [15] The Court's chastisement for pleading and pursuing unproven fraud, by an award of special costs, is to protect parties falsely alleged to have committed fraud, whose reputations may be damaged, by deterring the pursuit of such a claim where the evidence, on an objective assessment, does not support it.

- [16] It is incumbent on counsel acting for a party in an action where an allegation of fraud may be appropriate to assess and reassess the evidence as it develops and advise that party of the risk of pleading or pursuing an allegation of fraud which cannot be proved.
- [17] Failure to prove alleged fraud will result in an award of special costs only where it is clear that the allegation of fraud ought not to have been made or pursued through trial, for example, where the evidence of fraud is so weak as to be "obviously unfounded" or where the allegation is malicious, reckless or advanced for an improper purpose, such as settlement leverage.
- [32] The plaintiff acted recklessly in pursuing its allegations of improper conduct against the defendants. The allegations were clearly unfounded and the principal of the plaintiff must have known they were. These are family members who know each other well: brothers who spent a good deal of time together before the litigation started and a father and son who worked together for decades and still see each other daily. The plaintiff would not need discovery to determine whether the defendants were acting fraudulently. Yet the plaintiff pursued these allegations through trial.

Conclusion

- [33] As I have said, the plaintiff failed on all of the live issues at trial. Although the plaintiff obtained judgment for the amount it was out-of-pocket, that amount had been conceded by the defendants as early as September 25, 2012. The plaintiff had formal notice of this position by way of the filed trial briefs. Armed with this knowledge, the plaintiff proceeded to trial on the issues on which it failed. The plaintiff failed in its cause. The defendants succeeded on the issues that they disputed. They succeeded in the cause.
- [34] In my view, the appropriate result is to award the plaintiff costs to September 25, 2012 and the defendants costs after September 25, 2012, all at Scale B. The defendants were put through an expensive trial. They succeeded on the issues at trial. They should have their costs of doing so.
- [35] Where costs were awarded "in the cause", the plaintiff will have its costs for applications before September 25, 2012 and the defendants for applications after September 25, 2012.
- [36] What of the misconduct of the plaintiff in pursuing allegations equivalent to fraud against the defendants? It is a factor that I have considered when concluding that the defendants were successful at trial. In my view, the award I have made with respect to costs is sufficient in the circumstances of this case to address the reprehensible conduct of the plaintiff.
- [37] As to property taxes, I accept the calculation proposed by the defendants as the most fair to all parties. Therefore, for 2002, property tax is calculated as \$2,322.39 for 2800 Smith Street and \$2,938.00 for 2780 Smith Street. For 2003, property tax for 2780 Smith Street is calculated as \$2,750.00. "B.J. Brown J." The Honourable Madam Justice B.J. Brown

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