

CANADA / JUDGMENT

Chung v. Quay Pacific Property Management Ltd.

2020 BCSC 1016

COURT

Supreme Court of British Columbia

DECIDED

8 July 2020

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2020 BCSC 1016 Chung v. Quay Pacific Property Management Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chung v. Quay Pacific Property Management Ltd.,

2020 BCSC 1016

Date: 20200708

Docket: S195053

Registry: Vancouver

Between:

Chun Yuen Nelson Chung

Plaintiff

And:

Quay Pacific Property Management Ltd.

Defendant

And:

Veronica Wynn

Third Party

Subject to Rule 15-1

Before: The Honourable Madam Justice Adair

Reasons for Judgment on Costs

Counsel for the Defendant:

C. R. Wardell

Counsel for the Third Party:

H. Parsons

Written submissions received from the Third Party:

May 27 and June 22, 2020

Written submissions received from the Defendant:

June 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2020

1. Introduction.. 2
 2. Costs in fast track actions. 3
 3. Is Ms. Wynn entitled to costs based on para. 4.9.2 of the Share Purchase Agreement? 4
 4. Is an order for special costs justified?. 6
 5. Ms. Wynn's offer to settle. 8
 6. Should Ms. Wynn recover costs under Appendix B?. 9
 7. Summary and disposition.. 10
1. Introduction
- [1] On May 8, 2020, I issued reasons for judgment in this fast track action in which the plaintiff, Mr. Chung, sought compensation for wrongful dismissal by the defendant, and the defendant sought indemnity in respect of the plaintiff's claim from the third party, Ms. Wynn. My Reasons for Judgment are indexed at 2020 BCSC 714, and I will use the same abbreviations in these reasons.
- [2] In summary, I awarded damages to Mr. Chung and dismissed the defendant's third party claim against Ms. Wynn. I note that the defendant has filed a notice of appeal.

- [3] I ordered further that, unless the parties wished to make submissions concerning costs, costs would follow the event. Accordingly, Mr. Chung was entitled to costs in accordance with Rule 15-1(15) against the defendant, and Ms. Wynn was entitled to costs in accordance with Rule 15-1(15) against the defendant. The parties were given leave to make written submissions concerning costs: see Reasons, at paras. 172-174.
- [4] I have been advised that costs in relation to the plaintiff's claim have been resolved. However, costs as between the defendant and Ms. Wynn, with respect to the third party claim, have not been.
- [5] Ms. Wynn says that:
- (a) she should recover contractual legal costs from QP based on the provisions of para. 4.9.2 of the Share Purchase Agreement whereby "The Company will be responsible for . . . all legal obligations relating to the termination of the Chief Financial Officer . . . including . . . legal costs, costs of defense or other proceedings";
 - (b) alternatively, she should be awarded special costs payable by QP, based on what Ms. Wynn says were reckless and baseless allegations made by QP against her and Mr. Nichols;
 - (c) alternatively, she should be awarded double costs based on an offer to settle made by her in December 2019;
 - (d) finally, and also alternatively, she should be awarded costs based on the ordinary tariff (Scale B of Appendix B), rather than under Rule 15-1(15).
- [6] On the other hand, the defendant says that there is no justification for any of the orders sought by Ms. Wynn. In the defendant's submission, costs payable to Ms. Wynn should be assessed based on the Rules that apply to a fast track action. The defendant says that these costs amount to \$14,000 (taking into account two days of trial beyond the three contemplated by Rule 15-1(15), at \$1,500 per day), plus applicable taxes and disbursements.
2. Costs in fast track actions
- [7] Fast track actions are governed by Rule 15 of the Supreme Court Civil Rules. Rule 15-1(15) provides in relevant part:
- Unless the court otherwise orders or the parties consent, . . . the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
- ...
- (c) if the time spent on the hearing of the trial is more than two days, \$11,000.
- [8] Rule 15-1(16) provides that, in exercising its discretion under Rule 15-1(15), the court may consider an offer to settle as defined in Rule 9-1.

[9] The court may "otherwise order" where special circumstances warrant the departure from the limits set out in Rule 15-1(15). Special circumstances have been held to apply in cases where, for example, the trial took longer than the maximum amount of days referenced in Rule 15, or where the action was complex, or where a reasonable offer to settle was made but not accepted. See, for example, *Peacock v. Battel*, 2013 BCSC 1902, at paras. 17-18.

3. Is Ms. Wynn entitled to costs based on para. 4.9.2 of the Share Purchase Agreement?

[10] Ms. Wynn says first that special circumstances, namely, the provisions of para. 4.9.2 of the Share Purchase Agreement, justify a departure from the limits in Rule 15-1(15). In Ms. Wynn's further amended response to QP's further amended third party notice, she sought an order that QP's claim be dismissed with "legal costs pursuant to" para. 4.9.2 of the Share Purchase Agreement.

[11] For convenience, I again set out para. 4.9.2:

4.9.2 The Vendor will deliver to the Chief Financial Officer at Closing a termination notice, effective 30 days after the Closing Date. The Company will be responsible for the payment of the compensation to the Chief Financial Officer for his services during the 30 days after the Closing Date and all legal obligations relating to the termination of the Chief Financial Officer, including all amounts required to be paid either by Applicable Law or by contract, including payment in lieu of notice, termination pay, severance pay, vacation pay, legal costs, costs of defense or other proceedings, and all other outstanding amounts relating to the Chief Financial Officer. Any such payment made to the Chief Financial Officer shall not be an offset against the Purchase Price.

[12] Ms. Wynn says that, since QP is responsible for all legal obligations relating to the termination of Mr. Chung, it follows necessarily that QP is also responsible for all "legal costs, costs of defense or other proceedings" relating to the judicial determination of the legal obligations owed to Mr. Chung arising from the termination of his employment, including her legal costs. Ms. Wynn says that QP should be held to its contractual bargain, and be ordered to pay Ms. Wynn's legal costs and costs of defence relating to the determination of responsibility for the amounts payable to Mr. Chung pursuant to para. 4.9.2.

[13] However, in my view, para. 4.9.2 cannot be interpreted in the way Ms. Wynn asserts.

[14] The basic principles of contractual interpretation are well settled. They are summarized in (for example) *British Columbia (Technology, Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2017 BCSC 940, at paras. 128-132, and *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926, at paras. 148-150.

[15] In my view, and applying those principles, QP and Ms. Wynn did not intend that para. 4.9.2 would obligate QP to pay Ms. Wynn's legal costs in the circumstances of this proceeding, and para. 4.9.2 was not intended as the mechanism to deal with claims (including claims for indemnification for legal expenses) as between QP and Ms. Wynn. Rather, para. 4.9.2 is intended to address the scope of QP's obligations to and respecting Mr. Chung. The

obligations described in para. 4.9.2 relate directly to employment entitlements of Mr. Chung and to defending litigation or other proceedings (for example, at the Employment Standards Branch) concerning those entitlements. Only QP (as Mr. Chung's employer) had responsibility for amounts payable to Mr. Chung.

[16] On the other hand, s. 5.2 of the Share Purchase Agreement (including paras. 5.2.1 and 5.2.2) is the place where QP and Ms. Wynn addressed liability and indemnity for claims between the two of them. It is here that they addressed the circumstances in which, for example, "legal fees on a solicitor and own client basis" would be recoverable by one of them from the other.

[17] Accordingly, I find that para. 4.9.2 of the Share Purchase Agreement does not apply in relation to Ms. Wynn's costs in this action.

4. Is an order for special costs justified?

[18] I turn next to Ms. Wynn's submission that QP should be ordered to pay her costs assessed as special costs.

[19] An award of special costs is intended to chastise a party for reprehensible conduct, which can range from milder forms of misconduct deserving of reproof or rebuke to scandalous or outrageous conduct: see *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). It is not necessary that all aspects of a party's conduct in the litigation are reprehensible in order to make an award of special costs that applies to the entire action. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue. See, for example, *Bradshaw v. Stenner*, 2012 BCSC 237, at para. 9 (and the cases cited there), and *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, at para. 37.

[20] Unproven allegations of fraud or dishonesty may attract an award of special costs, since the allegations are serious and potentially very damaging to those accused of deception: see, for example, *Bradshaw*, at para. 10 (citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, at para. 26, among other cases). A meritless claim alone will not necessarily attract an award of special costs: *Westsea*, at paras. 42-43 and 48. Factors to consider are whether the allegations were obviously unfounded, recklessly made, pursued for some improper motive or made out of malice. The court must exercise restraint in awarding special costs, and the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order: *Westsea*, at para. 73.

[21] The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation and the conduct of the litigation itself, the person or persons against whom the order is sought has acted in a manner that is sufficiently reprehensible to warrant chastisement of the court: *Bradshaw*, at para. 10.

- [22] Special costs can be ordered in a fast track action: see, for example, *Wildcat Helicopters Inc. v. Ellis*, 2017 BCSC 506, at paras. 33-34.
- [23] Ms. Wynn says that in QP's third party notice (as amended from time to time), QP made baseless and reckless allegations that she and her lawyer (Mr. Nichols) acted in bad faith and dishonestly in making demands in January 2019 for payments that were contrary to the terms of the Share Purchase Agreement. QP alleged further that Ms. Wynn's conduct was "malicious, high-handed, reprehensible and deserving of rebuke." Ms. Wynn says that QP's allegations of dishonesty and unethical conduct publicly impugned both her and Mr. Nichol's personal and professional reputations. Ms. Wynn says that, at trial, QP did not argue that dishonesty or bad faith were relevant factors for the determination of its rectification and severance arguments, and the serious (and ultimately unfounded) allegations of dishonesty served no useful purpose in the litigation.
- [24] I do not read the allegations in QP's third party notice (as amended) as impugning Mr. Nichols' personal or professional reputation. In my view, the specific identification of Mr. Nichols in para. 18 of the third party notice could not qualify as a material fact and was unnecessary. However, the allegations do not amount to reprehensible conduct so as to justify an award of special costs. The "Demands" (as defined in QP's pleadings) are Ms. Wynn's demands, not Mr. Nichols'.
- [25] The allegations made against Ms. Wynn in QP's pleadings are of a more serious character. The allegation that Ms. Wynn's "Bad Faith Demands" represented conduct by Ms. Wynn that was "malicious, high-handed, reprehensible and deserving of rebuke" was made in support of QP's claim for punitive damages against her. However, this was not pursued at trial. Ms. Wynn's main complaint appears to be that QP did not take the additional step of removing the allegations from its pleadings.
- [26] It is unfortunate indeed that the issues between QP (and its representatives) and Ms. Wynn (and her representative) became personal, and that personal dislike and hostility appear to have coloured or influenced positions taken in connection with Mr. Chung and in this litigation. It is also unfortunate that in QP's pleadings, it went beyond a concise statement of the material facts, although the same criticism could be made of Ms. Wynn's pleadings. However, in my view, QP's conduct does not rise to the level of reprehensible conduct, so as to justify an order for special costs.
5. Ms. Wynn's offer to settle
- [27] Ms. Wynn says next that I should give effect to an offer to settle she made on December 19, 2019, and order that she recover double costs for all steps taken by her after that date.

- [28] In a letter from her counsel dated December 19, 2019 and addressed to counsel for QP, Ms. Wynn made an offer to settle on the basis of a consent dismissal of the third party claim with costs to be assessed "on the usual scale." In her submissions on costs, Ms. Wynn describes "the usual scale" as "ordinary tariff costs." The offer contained no expiry date and remained open as of trial.
- [29] The court may consider an offer to settle when exercising the court's discretion in relation to costs: see Rule 9-1(4). The available options are set out in Rule 9-1(5), which provides in relevant part:
- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- ...
- (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;
- [30] Rule 9-1(6) provides:
- (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.
- [31] Ms. Wynn says the key factors here are (a) and (b).
- [32] Ms. Wynn says that, given the evidence and law available to QP at the time the offer was made, the offer should reasonably have been accepted. Ms. Wynn says that, by this time, discoveries had been completed, and there was no evidence of a prior oral agreement between Ms. Wynn and QP, or any factual basis to sever para. 4.9.2 from the Share Purchase Agreement. Ms. Wynn says that, had her offer been accepted, QP would have been left to defend a relatively straight-forward wrongful dismissal claim, which would have been capable of resolution in a one or two day hearing.
- [33] On the other hand, QP says that no effect should be given to Ms. Wynn's offer.

[34] I have not been persuaded that Ms. Wynn's offer was one that ought reasonably to have been accepted. Ms. Wynn's offer contained no compromise. Rather, it assumed more than a complete victory for Ms. Wynn, in that a term of the offer was that Ms. Wynn recover costs on the ordinary tariff, rather than the costs provided for under Rule 15. Furthermore, and in that respect, the terms of settlement offered by Ms. Wynn exceeded the result she achieved based on the final judgment of the court.

[35] In those circumstances, I consider the relevant factors to be, at best, neutral for Ms. Wynn. As a result, I decline to give effect to Ms. Wynn's offer to settle.

6. Should Ms. Wynn recover costs under Appendix B?

[36] Finally, Ms. Wynn says that the court should exercise its discretion to award her ordinary tariff costs (under Appendix B), rather than the fixed costs under Rule 15-1(15). Ms. Wynn says that the court's discretion to depart from Rule 15-1(15) can be exercised in cases where there are complicated factual and legal issues. Ms. Wynn says that the factual and legal issues raised by QP at trial bring this case outside the scope of a typical fast track proceeding. Ms. Wynn says that QP's wide-ranging and serious allegations in the third party notice presented a number of complicated factual and legal issues for determination, while the fast track rule is designed for the adjudication of relatively straight-forward claims.

[37] QP says that fast track costs, rather than costs assessed on Scale B of Appendix B, remain appropriate. QP accepts that there are special circumstances in that the trial took longer than three days, and says that it would be appropriate in this respect to take the same approach taken by the court in Peacock. Thus, since this trial occupied five days, costs should be assessed at \$14,000, plus applicable taxes and reasonable and necessary disbursements. QP points out that, while it was open to the parties prior to trial to take steps to have the action removed from the fast track Rule, no one did this.

[38] I agree with QP. In my view, the factual and legal issues in this action, and specifically those involved in the third party claim, were not so complicated as to justify an order that Ms. Wynn's costs be assessed under Scale B of Appendix B. Rather, costs should be assessed using the limits in Rule 15-1(15) as reference points, as QP has proposed.

7. Summary and disposition

[39] Accordingly, and in summary, I order that Ms. Wynn recover from QP costs in the sum of \$14,000, together with applicable taxes and reasonable and necessary disbursements.

"Adair J."

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