

CANADA / JUDGMENT

Dempsey v. Pagefreezer Software Inc.

2023 BCCA 58

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 58 Dempsey v. Pagefreezer Software Inc. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Dempsey v. Pagefreezer Software Inc., 2023 BCCA 58 Date: 20230207 Docket: CA48392 Between: Nathan K. Dempsey Appellant (Petitioner) And Pagefreezer Software Inc. & Michael Riedijk Respondents (Respondents) Corrected Judgment: The text of the judgment was corrected at paragraph 23 on February 14, 2023. SEALED FILE Before: Registrar T.R. Outerbridge Assessment of Special Costs Reasons for decision from: An order of the Supreme Court of British Columbia, dated June 30, 2022 (Dempsey v. Pagefreezer Software Inc., 2022 BCSC 1246, Vancouver Docket S220956). The Appellant, appearing in person (via videoconference): N.K. Dempsey Counsel for the Respondents: C.W. Garton E. De Paoli, Articled Student Place and Date of Hearing: Vancouver, British Columbia January 26, 2023 Written Submissions Received: January 30, February 1 and 3, 2023 Place and Date of Decision: Vancouver, British Columbia February 7, 2023 Summary: Registrar's assessment of special costs arising from an application holding the appellant in contempt. The respondents claim the sum of \$45,523.15 in fees and disbursements, including for the assessment itself. While the application was not overly complex or difficult, it was distinguishable given the high standard of proof required. In addition, the respondents achieved complete success in a matter that had significant importance to their commercial interests. That said, the sum was still objectively high given the amount of time that ought to have been spent, so the amount claimed was reduced to \$36,726.09. Reasons for Decision of Registrar Outerbridge:

- [1] The respondents seek \$45,523.15 in special costs and disbursements arising from an application that found the appellant in contempt of court. The amount includes the assessment of those costs.
- [2] The appellant, Mr. Dempsey, is a former shareholder of the respondent company, Pagefreezer Software Inc. ("Pagefreezer"). The other respondent, Michael Reidijk, is the company's founder and CEO. The underlying appeal is taken from an order refusing to set aside a settlement agreement, which sought to resolve certain disputes between Mr. Dempsey and Pagefreezer.

- [3] Confidential and sensitive documents concerning Pagefreezer were filed in the Court below. Sealing orders were made with terms preventing Mr. Dempsey from disclosing them or their contents without leave of that Court. As those documents made their way into the record on appeal, this Court made a similar "protective" order on 22 August 2022.
- [4] On 3 November 2022, Justice Marchand declared Mr. Dempsey to be in contempt of that protective order, fining him \$5,000 and ordering him to pay special costs to both Pagefreezer and Mr. Riedijk of the contempt application.
- [5] Rule 71 of the new Court of Appeal Rules governs special costs. Rule 71(2) states that, "if costs of the proceeding are ordered to be assessed as special costs, the registrar must allow each fee the registrar determines was properly or reasonably necessary to conduct the proceeding."
- [6] In conducting that assessment, "all of the circumstances" are considered and the following non-exhaustive factors are reviewed under Rule 71(3):
- a) the complexity of the proceeding;
 - b) the difficulty or novelty of the matters involved;
 - c) the amount involved in the proceeding;
 - d) the time reasonably spent in conducting the proceeding;
 - e) the importance of the proceeding, or of the result obtained, to the party whose costs are being assessed;
 - f) the benefit, to the party whose costs are being assessed, of the services rendered by the party's lawyer;
 - g) the skill, specialized knowledge and responsibility required of the lawyer of the party whose costs are being assessed; and
 - h) any party's conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding.
- [7] As did the former Rule 63, new Rule 72 provides for reasonable amounts of disbursements necessarily or properly incurred and conveys the authority to add payable taxes.
- [8] This Court has reviewed the principles that apply to an assessment of special costs in *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, leave ref'd 2020 CanLII 13154:
- [49] while there may be a close relationship between actual legal expenses and special costs, they are not necessarily the same. In fairness to the losing party who must pay the special costs, the successful party is entitled only to those fees and disbursements that were proper or reasonably necessary to conduct the proceeding. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (B.C. S.C.) at para. 28, aff'd (1992), 73 B.C.L.R. (2d)

212 (B.C.C.A.), Justice Bouck stated that a special costs assessment will usually amount to about 80 to 90 per cent of an assessment of a similar bill reviewed under the Legal Profession Act, S.B.C. 1998, c. 9.

- [9] These principles and others were also extensively reviewed in *Gichuru v. Smith*, 2014 BCCA 414, leave ref'd [2014] S.C.C.A. No. 547.
- [10] Where special costs are being awarded as a result of a party's conduct, the law is well established. In *Morriss v. British Columbia*, 2021 BCCA 451, the Court stated:
- [21] Special costs are awarded where there has been some form of "reprehensible conduct." Reprehensible conduct encompasses "scandalous or outrageous conduct" as well as "milder forms of misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, 1994 CanLII 2570.
- [22] Special costs are not compensatory in nature; they are punitive. The purpose of special costs is to deter and to express the court's disapproval of litigation misconduct. In order to justify a special costs award, the circumstances must be "exceptional": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56, 131-133.
- [23] Among the bases for awarding special costs are abuse of the court's process, misleading the court and persistent breaches of the rules of court that prejudice the other party: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.
- [11] I have regard to the above principles when conducting my assessment and turn now to consider the factors under Rule 71(3), beginning with the complexity.
- [12] There were actually three separate notices of application before Justice Marchand on 3 November 2022: 1) seeking to hold Mr. Dempsey in contempt; 2) to dismiss the appeal; and 3) seeking to permanently seal the appeal. The special costs here are awarded only in respect of the contempt application. That application was filed on 14 October 2022, and relied on seven (7) affidavits:
- a) First Affidavit of Nathan Dempsey, made on July 12, 2022;
 - b) First Affidavit of Mariana Campos, made on July 14, 2022;
 - c) First Affidavit of Michael Riedijk, made on July 14, 2022;
 - d) Second Affidavit of Michael Riedijk, made on July 28, 2022;
 - e) Second Affidavit of Nathan Dempsey, made on August 15, 2022;
 - f) Fourth Affidavit of Mariana Campos, made on October 7, 2022; and
 - g) Fourth Affidavit of Michael Riedijk, made October 7, 2022.

- [13] Accompanying the application was an 11-page written argument, which summarized the background to the application, outlined Mr. Dempsey's various breaches of the orders, including those to which he admitted, cited prominent authorities on the issue of contempt, proposed sanctions, and sought special costs. Though Mr. Dempsey did not file material in specific response to the application, there were several lengthy affidavits in the Court's record.
- [14] The proceeding on all three applications occupied an entire day of Court time. The contempt aspect took about 1.5 hours in the morning and about 45 minutes in the afternoon. At the hearing, Mr. Dempsey sought unsuccessfully to adduce further material.
- [15] Although the contempt application was not particularly difficult or complex, there was a need to conduct the application with the precision and high legal standard required to prove civil contempt: *Peel Financial Holding v. Western Delta Lands Partnership*, 2003 BCCA 551 at para. 18. This standard justifies some of the higher costs, distinguishing it from a more routine application.
- [16] The unique facts underlying the application required additional research on the appropriate sanction, including reference to at least one case outside British Columbia. However, with respect to proving contempt itself, it was not an overly complex or difficult task for counsel to establish that Mr. Dempsey breached the order or had actual knowledge of it: he admitted these facts in his affidavit evidence and had signed the protective order. This is true even accepting the respondents' submission that extra care and time was required to make this out definitively.
- [17] While counsel argue that Mr. Dempsey's status as a self-represented litigant meant it took longer to prepare for the application, it is probably fairer to say that additional preparation time was caused by the need to review the lengthy history of his case and less than focused affidavits and correspondence. A person's status as a self-represented litigant does not automatically lead to a conclusion that more time ought to be spent by an opposing lawyer, but I agree the respondents have shown additional time was necessary here.
- [18] Given the complexity and nature of the application, some amount of skill, specialized knowledge and a fair degree of responsibility was required by the respondents. In preparing for the application, the respondents enlisted the aid of three lawyers, Brodie Noga, Sergio Ortega and Christian Garton, called to the bar respectively in 2018, 2019 and 2022. These counsel billed between \$380 and \$460 per hour and the effective hourly rate of all counsel on the application of \$437.82. This is a reasonable rate, given the circumstances.
- [19] Mr. Noga, the lead counsel, acknowledges that a contempt application would normally be brought by a more senior counsel; however, they were unavailable during Mr. Dempsey's breach of the order. As a result, less senior counsel had to spend more time familiarising themselves with the background of the litigation as part of their preparation.

- [20] In terms of the amount involved in the contempt proceeding, the respondents asked the Court to impose a fine of up to \$10,000 or 100 hours of community service.
- [21] Given the nature of the offence and its prejudice to Pagefreezer, this application was of great importance to the respondents. Mr. Dempsey had relayed commercially sensitive and confidential information to dozens of persons and organizations in breach of this Court's order. The respondents benefitted from their counsel's complete success. In my view, these are important considerations and weigh heavily in the respondents' favour, helping to justify the sum claimed here.
- [22] Moving now to the time spent, the respondents spent a total of 89.7 hours preparing this application, divided as follows:
- a) September 6: Discovery, strategy and discussion: 21 hours (\$8,669.69);
 - b) September 6 - October 13: Drafting and preparation: 49.7 hours (\$21,862.89); and
 - c) October 25 - October 27: Final preparation and argument: 19 hours (\$8,740).
- [23] On 6 September, 12.4 hours is billed by Mr. Garton, where he considers the breached material, the law on contempt and conducts various research. Mr. Noga and Mr. Ortega also review various materials and consider strategy for a further 21 hours of time. The matter is then given to Mr. Noga to prepare the bulk of the application, where he is seized with compiling, writing and eventually arguing it, although his two colleagues continue to contribute their efforts. A significant amount of time is spent corresponding with Mr. Dempsey. The total preparation time is 49.7 hours. Following that, there is a further 19 hours spent preparing to argue the application itself, which continued to involve preparing the memorandum of argument and two supporting affidavits prepared between September and October.
- [24] During the hearing of the special costs application, Mr. Dempsey was afforded the opportunity to cross-examine Mr. Noga to test the evidence presented in support of the time spent and amount claimed. At times he was assisted by the Court, directing him to the respondents' time entries and bill of costs. Mr. Dempsey did not avail himself of the opportunity to meaningfully test the evidence, preferring instead to focus more broadly on the issues he has raised at large in both this proceeding and others.
- [25] Even so, the reasonableness of the amount claimed when squared with the underlying factors within Rule 71(3) as described above, is objectively high. Though this was an application of significant importance to the respondents from which they benefited greatly, the complexity, difficulty and novelty of the matter cannot totally justify the full amount claimed on an objective standard.

- [26] Allowing for this, I would reduce the bill by 20%, leaving a still sizable sum. I am conscious this places the special costs award inside the 80% to 90% range contemplated by *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309, aff'd [1991] B.C.J. No. 1657 (C.A.), though such a range is merely an aid to a proper assessment.
- [27] I find the remainder of the time billed was proper or reasonably necessary and the disbursements necessarily and properly incurred. I award the respondents \$31,418.06 (\$35,188.23 tax inclusive) and \$1,336.26 in disbursements associated with the contempt application.
- [28] There is also the matter of costs of this hearing, which I invited the parties to consider in brief written submissions. Costs of the assessment are usually in the form of special costs: 567 *Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 141; *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459 (Registrar) at paras. 31-34. However, the respondents have elected to claim ordinary costs here in the sum of \$201.60, which I find to be proper or reasonable in all of the circumstances.
- [29] I will sign a certificate of costs in the amount of \$36,726.09. In doing so, I would note a minor mathematical error in the respondents' bills with respect to PST and GST on their originally-claimed fee amount, which I have corrected within this decision. "T.R. Outerbridge, Registrar"

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