

CANADA / JUDGMENT

Freeman v. SFU & Black

2001 BCSC 787

COURT

Supreme Court of British Columbia

DECIDED

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Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RICHARD JAY FREEMAN
PLAINTIFF

AND:

SIMON FRASER UNIVERSITY
AND
ALAN G. BLACK
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE DAVIES

Counsel for the Plaintiff: C.E. Hinkson, Q.C.

Counsel for the Defendants: P. Gilligan-Hackett

Date and Place of Hearing: Written Submissions

Vancouver, B.C.

INTRODUCTION

[1] This is an application by the plaintiff for special costs or alternatively increased costs related to a summary judgment order.

BACKGROUND

- [2] On December 10, 1999, pursuant to Rule 18A, I found that the plaintiff was entitled to judgment in the amount of \$131,726.13 against the defendant, Simon Fraser University (SFU). The judgment was for disability payments owing under a Long Term Disability Policy (the Policy) arising from the plaintiff's employment with SFU.
- [3] I also ordered:
- (a) that SFU disclose to the plaintiff the cost-of-living rates applicable to disability payments pursuant to the Policy, from April 1, 1997 to the trial date;
 - (b) that the determination of the plaintiff's entitlement to an award of damages based on applicable cost-of-living rates, together with interest payable thereon, would be adjourned until the cost-of-living rates were disclosed;
 - (c) that SFU disclose to the plaintiff the amount that had been withheld for income tax purposes and other withholdings in the normal course pursuant to the Policy from April 1, 1997 to September 30, 1999;
 - (d) that the determination of the plaintiff's entitlement to monies that were withheld for tax purposes, pursuant to the Policy from April 1, 1997 to September 30, 1999, would be adjourned pending further submissions following receipt of all disclosure ordered;
 - (e) that court order interest would be paid to the plaintiff on the net amount of the judgment; and
 - (f) that it would be inappropriate to determine the questions of aggravated or punitive damages pursuant to Rule 18A and those matters would be adjourned to the trial list.

ISSUES

- [4] The plaintiff has now applied for an order that the costs of his Rule 18A application and the costs of this application be assessed as special costs. The plaintiff says an award of special costs is required because the defendants' conduct in the litigation was "scandalous, outrageous or reprehensible". Alternatively, the plaintiff seeks increased costs.
- [5] The defendants have submitted that the parties enjoyed mixed success on the issues determined by the summary trial so that the parties should each bear their own costs. Alternatively, the defendants submit that since not all of the plaintiff's claims have yet been resolved costs should be determined in the cause. In the further alternative, they argue that the defendants' conduct is not deserving of rebuke and that an award of ordinary costs would not be unjust and should therefore be awarded.

DISCUSSION AND ANALYSIS

- [6] I do not agree that the parties experienced mixed success on the Rule 18A application. I find that the plaintiff was substantially successful against SFU. He recovered disability benefits over the course of two years, in the sum of \$131,726.13. He also obtained further orders allowing for the calculation of further entitlement under the Policy.
- [7] While the defendants have urged me not to award any costs of the litigation to date, they have acknowledged that the court has jurisdiction to award costs for part of a proceeding under Rule 57(15). I am also satisfied that I may do so, notwithstanding that the plaintiff did not bring his application for costs under that specific sub-rule and notwithstanding that all matters arising from my Rule 18A orders may not yet have been resolved.
- [8] I have considered *Gotaverken Energy Systems Ltd. v. Cariboo Pulp & Paper Co.* (1995), 9 B.C.L.R. (3d) 340 (S.C.) upon which the defendants have relied. I have decided that, notwithstanding the statement by Vickers J. in that case that "applications to apportion costs should not become regular features of litigation", Rule 57(15) should be applied in this case.
- [9] I have made that determination not only because the Rule 18A application was one upon which the plaintiff was substantially successful but also because it brought to an end or made it possible to bring to an expedient end all of the major substantive issues arising in relation to the Policy except those concerning the discrete issues of aggravated and punitive damages.
- [10] I turn then to my determination of the appropriate cost order concerning the proceedings to date.

SPECIAL COSTS

- [11] In *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.), Esson C.J.S.C. (as he then was) held that entitlement to special costs is to be determined upon the principles that were formerly applied in awarding solicitor-client costs. He followed Lambert J.A. in *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) in which Lambert J.A. stated (at page 311):

...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 make such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.

- [12] In *Leung*, Esson C.J.S.C. also stated (at page 315):

..."reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

[13] Those words were then adopted by Lambert J.A. in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) where he said (at page 299):

...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.

[14] The plaintiff has submitted that since the Policy is an insurance contract and therefore one of "utmost good faith", the actions of the defendants in delaying the plaintiff's receipt of disability benefits under the Policy should be rebuked by an award of special costs.

[15] I do have some concerns with respect to the manner in which SFU defended the plaintiff's claims in this litigation. I am troubled by the difficulty he encountered in relation to the simple issue of obtaining a copy of the Policy and by other issues which either delayed or unnecessarily complicated resolution of the question of his entitlement to disability benefits. A review of some of the correspondence exchanged by the parties prior to the Rule 18A application illustrates my concerns.

[16] In June 1997, the plaintiff wrote to Brenda Taylor of Manulife (who administered the Policy on behalf of SFU) requesting a copy of the Policy. Ms. Taylor informed the plaintiff on July 11, 1997, that the text of the Policy was the property of SFU and that a copy could be obtained from the defendant Alan Black. On August 25, 1997, the plaintiff wrote to Mr. Black requesting a copy of the Policy.

[17] On August 29, 1997, Mr. Black informed the plaintiff that before providing the plaintiff with a copy of the Policy, SFU required to know the purpose of his request. The plaintiff then reiterated his request and Mr. Black informed him that he would only provide the plaintiff with a copy of the Policy on the direct instructions of Dr. Gagan, the Vice-President Academic of SFU. The plaintiff then wrote to Dr. Gagan and finally obtained a copy of the Policy (of which he was at all times a beneficiary) which had until then been withheld from him.

[18] There was also delay and confusion surrounding Manulife's request for Dr. Freeman's complete medical records. That delay and confusion further exemplifies the manner in which these proceedings progressed.

[19] By letter dated June 3, 1999, from Ms. Taylor to the plaintiff's counsel, Mr. Hinkson, Manulife requested the plaintiff's complete medical records from April 1, 1997. That request was apparently made to assess whether Dr. Freeman was medically entitled to benefits under the Policy.

[20] Mr. Hinkson replied on June 7, 1999, indicating that Dr. Freeman had already established his disability with Manulife through another Manulife policy held by Dr. Freeman for the same period. He also asked why it took Manulife so long to request these records. In her reply of July 19, 1999, Ms. Taylor wrote:

We apologize for the delay. However, due to the legal issues on this file, we must consult with Simon Fraser University and/or Mr. Patrick Gilligan-Hackett, legal counsel for Simon Fraser University. Mr. Gilligan-Hackett has recently moved and has only recently been able to review the issues you have raised.

[21] The "legal issues on this file" referred to by Ms. Taylor apparently related to ongoing employment disputes between the plaintiff and SFU.

[22] I fail to see, however, how inquiries by Manulife for the purpose of determining the plaintiff's medical status required the involvement of either SFU or its legal counsel.

[23] I am satisfied that the plaintiff did suffer delay and inconvenience as a result of lack of communication, the limited role of Manulife as the administrator of the Policy and the linkage of outstanding legal issues regarding the plaintiff's employment with SFU to the determination of unrelated medical issues. The question then becomes whether that delay and inconvenience arising from the defendants' conduct mandates an award of special costs.

[24] Without in any way addressing whether the plaintiff may in future establish that the defendants' conduct might justify an award of punitive or aggravated damages, I am not satisfied by the material before me that the conduct of the defendants in dealing with the plaintiff's claims was "reprehensible" in the sense required to attract special costs. I make that determination notwithstanding that the defendants' conduct involved the administration of an insurance contract.

[25] I find that although SFU and Manulife, as its agent, were responsible for unnecessary delays in the processing of the plaintiff's disability insurance claim and for unnecessarily complicating some issues, the evidence now before me does not establish misbehaviour or misconduct in the litigation process sufficient to justify reproof or rebuke of SFU by an award of special costs. The defendants' conduct is, however, relevant to the issue of whether increased costs are appropriate.

INCREASED COSTS

[26] *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.) establishes that the discretion to award increased costs exists where, after consideration of all the circumstances, the court determines that an award of ordinary costs would lead to an unjust result.

- [27] Further, *Rieta v. North American Air Travel Insurance Agents Ltd.* (1998), 52 B.C.L.R. (3d) 114 (C.A.) stands for the proposition that there must be special importance, difficulties or complication associated with the litigation or the conduct of a litigant to justify an order for increased costs.
- [28] The plaintiff submits that, based upon ordinary costs on Scale 3, he would be entitled to taxable costs of approximately \$800 for his successful summary trial application. He has deposed that he was, in fact, billed over \$25,000 plus taxes and disbursements for legal services rendered to December 17, 1999, pursuant to a contingency fee agreement and that if that agreement had not been in effect, he would have paid more fees. The plaintiff submits that such a disparity is unjust, arises from the complexity of the litigation and the defendants' conduct, and justifies an award of increased costs.
- [29] As I have noted, the plaintiff's employment circumstances and existing legal issues with SFU delayed and complicated what should otherwise have been relatively straightforward insurance litigation. Those delays and complications were exacerbated by the plaintiff's difficulties in obtaining a copy of the Policy and the apparent lack of effective co-ordination between Manulife and SFU in processing his claims. Those circumstances required Dr. Freeman and his counsel to make extensive ongoing inquiries, at obvious inconvenience and expense, in order to obtain payment of the benefits due under the Policy.
- [30] I am satisfied that, in the totality of the circumstances, an award of ordinary costs for the expenses incurred by the plaintiff in his litigation up to and including the summary trial would lead to an unjust result. I find that an award of increased costs against SFU based upon 60 percent of special costs up to the date of and including the summary trial and in relation to the finalization of those matters which have been now been resolved because of the directions given and the disclosure then ordered, will appropriately compensate the plaintiff.
- [31] I am not, however, satisfied that the award of increased costs should be based upon the contingency fee arrangement between the plaintiff and his solicitors. As was stated by Hutchinson J. in *Brimacombe v. Mathews*, [1999] B.C.J. No. 3009 (S.C.) (QL) (at paragraph 19):

A contingency fee contract is not, I hold, a basis on which to determine special costs in order to determine increased costs. Contingency fee contracts are justified on the basis that what a lawyer misses on the swings, he picks up on the roundabouts, and thus, do not provide an objective measure of special costs. The swings and roundabouts can be too far removed from the central objective of determining special costs. In this regard, I point to the words of Low J. in *Krangle (Guardian ad litem of) v. Brisco* (1998), 25 C.P.C. (4th) 134 at 139, where at paragraph 19 he says the following:

The fees [i.e. contingent] paid by the plaintiffs to their counsel represent only the work done for the plaintiffs by their counsel under contract. They do not amount to an objective measure of special costs to enable the court to determine, roughly at least, the extent of the gap between ordinary costs and special costs.

[32] Assessment of increased costs on the basis of the contingency agreement in this case would be further inappropriate because I do not know the extent to which services rendered under the contingency fee agreement relate to matters other than those for which I have determined that increased costs are now payable.

[33] The determination of the quantum of the plaintiff's increased costs now ordered shall accordingly be based upon 60 percent of special costs as assessed by the Registrar in the usual manner. As noted in *Brimacombe*, in assessing those costs, the Registrar will no doubt keep in mind the plaintiff's actual costs based on the contingency agreement. The Registrar shall not, however, consider any costs incurred by the plaintiff solely in relation to the prosecution of any still unresolved issues. The costs of those issues should be addressed when they arise.

[34] The plaintiff shall have his costs of this application against SFU based upon Scale 3.

"B.M. Davies, J."

The Honourable Mr. Justice B.M. Davies

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