

CANADA / JUDGMENT

G.W.G. Woodcrafters Ltd. v. Bourque

2023 BCSC 484

COURT

Supreme Court of British Columbia

DECIDED

29 March 2023

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2023 BCSC 484 G.W.G. Woodcrafters Ltd. v. Bourque

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.W.G. Woodcrafters Ltd. v. Bourque,

2023 BCSC 484

Date: 20230329

Docket: S-131644

Registry: Kelowna

Between:

G.W.G. Woodcrafters Ltd.

Petitioner

And

Rene Bourque dba OK Region Towing,

Viking Ventures Ltd. and All Other Occupants of

Lot 1 District Lot 2195 Osoyoos Division

Yale District Plan EPP98830

Respondents

Corrected Judgment: The cover page of this judgment

was corrected on April 26, 2023

Before: The Honourable Justice Ahmad

Reasons for Judgment on Costs

Counsel for the Petitioner:

J. Burgess

Counsel for Respondent, Rene Bourque dba OK Region Towing:

D.K. Lo

Written submissions of the Respondent:

January 19, 2023

Response written submissions of the Petitioner:

February 2, 2023

Rebuttal written submissions of the Respondent:

February 10, 2023

Place and Date of Judgment:

Kelowna, B.C.

March 29, 2023

A. Introduction

- [1] In 2011, Rene Bourque, doing business as OK Region Towing ("Mr. Bourque"), leased property owned by G.W.G. Woodcrafters Ltd. (the "landlord") located in Summerland, British Columbia (the "leased property") for the purpose of conducting his towing business.
- [2] Relying on ss. 18-21 of the Commercial Tenancy Act, R.S.B.C. 1996, c. 57 [CTA], the landlord commenced these petition proceedings against Mr. Bourque seeking a declaration that his tenancy had been terminated, that Mr. Bourque continued to wrongfully hold possession of the leased property, and for a writ of possession.
- [3] In reasons for judgment indexed at G.W.G. Woodcrafters Ltd. v. Bourque, 2022 BCSC 2228, (the "Petition Reasons"), I concluded that the leased property was, in fact, comprised of three separate areas, referred to in the Petition Reasons as the Lenzi Lot, the Cedar Lot, and the Cedar Building, the latter of which was used by Mr. Bourque as his living accommodation. I also concluded that although leased at the same time for business purposes, those areas were leased under separate agreements.
- [4] On that basis, I concluded that the lease of the Cedar Building was properly governed by the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA], not the CTA, and, accordingly, dismissed the petition as it pertained to the Cedar Building.

- [5] I also concluded that the Lenzi Lot and the Cedar Lot were governed by the CTA and that, to the extent that Mr. Bourque continued to occupy those areas, the landlord was entitled to the relief sought in the petition.

B. Issues and Positions of the Parties

- [6] Mr. Bourque submits that the primary issue to be determined at the hearing of the petition was whether the CTA governed his tenancy of the Cedar Building. Having succeeded on that issue, he submits that he is entitled to costs. Given the conduct of the landlord's witnesses, including its principals, Milton Gorman and Marilyn Eddison, he argues that a portion of those costs should be assessed as special costs.
- [7] The landlord argues that having obtained the declarations and writ of possession in respect of the Lenzi Lot and the Cedar Lot, it achieved substantial success and, accordingly, it is entitled to costs. It also argues that the assessment of Mr. Bourque's claim for costs against it should be balanced against Mr. Bourque's conduct in the proceeding.

C. Discussion and analysis

1. Who was the successful party on the petition?
- [8] The usual costs rule is that the successful party is awarded its costs. Except in specifically enumerated situations, those costs are to be assessed as party and party costs, the quantum of which are to be determined by the Registrar: Rule 14-1(1)-(5), Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules].
- [9] In this case, both parties claim to have been successful on the petition and therefore say they are entitled to costs. For the reasons that follow, I find that Mr. Bourque achieved substantial success on the petition. He is entitled to costs.
- [10] Although the three areas that comprised the leased property were originally leased to Mr. Bourque together, the composition of the leased property changed when the landlord unilaterally sold the Lenzi Lot in May 2017, and then when it fenced off the Cedar Lot in November 2017, depriving Mr. Bourque of the use of those two areas: Petition Reasons at paras. 41, 42, and 85.
- [11] While the landlord ultimately obtained the declarations and the writ of possession it sought in respect of the Lenzi Lot and the Cedar Lot, there was no dispute that those lots were leased for commercial purposes or that Mr. Bourque was no longer entitled to those portions of the leased premises after they were unilaterally taken from him.
- [12] The primary issue in dispute revolved almost exclusively around the lease of the Cedar Building and, in particular, whether the lease of that portion of the leased property was governed by the CTA, as the landlord asserted, or by the RTA, as Mr. Bourque asserted. Almost the entirety of the petition hearing was consumed by evidence and argument regarding the residential or commercial nature of the Cedar Building.

- [13] Ultimately, I accepted Mr. Bourque's position that the RTA applied and the landlord's petition was dismissed in respect of that primary issue.
- [14] Given the declarations that were made with respect to the Lenzi Lot and the Cedar Lot, I cannot conclude that Mr. Bourque was entirely successful on the petition. However, "success" for costs purposes has long been defined to mean substantial success, and a party does not have to be wholly successful to be entitled to costs: *Gichuru v. Purewal*, 2019 BCSC 951 at paras. 9-13.
- [15] Given the focus of the petition and hearing, I am satisfied that Mr. Bourque was substantially successful on the petition. Accordingly, he is entitled to party and party costs in accordance with Rule 14-1.
- [16] The remaining issue to be determined is whether Mr. Bourque is entitled to special costs for any portion of the proceeding.
2. Is Mr. Bourque entitled to special costs?

Background

- [17] The lease of the property was made pursuant to a verbal agreement made between Mr. Bourque and Mr. Gorman on behalf of the landlord in 2011. Mr. Gorman continued to deal with Mr. Bourque in respect of the lease until 2017 when Ms. Eddison took over management of the landlord corporation, G.W.G. Woodcrafters Ltd.
- [18] Mr. Gorman and Ms. Eddison swore affidavit evidence in support of the landlord's petition. Counsel for Mr. Bourque requested that Mr. Gorman attend for cross-examination, but counsel for the landlord refused that request, insisting that Mr. Bourque make an application for Mr. Gorman to do so.
- [19] In response, Mr. Bourque filed an application to transfer the petition to the trial list, citing among other things, the conflicting evidence regarding the terms of the lease and Mr. Gorman's failure to subject himself to cross-examination.
- [20] Mr. Bourque gave his oral evidence and was cross-examined on his evidence, as contemplated by s. 21(2) of the CTA. After Mr. Bourque's evidence was completed, the landlord then advised that it would call Mr. Gorman to give oral evidence in reply. He did so by way of MS Teams. Given this change in approach by the landlord, Mr. Bourque did not proceed with his application to convert the petition to the trial list.
- [21] On the re-direct examination of Mr. Gorman, it was discovered that Ms. Eddison was present in the room with Mr. Gorman, but outside of the view of the camera, and had surreptitiously prompted Mr. Gorman with responses to questions asked of him. It was later discovered that the same conduct occurred on Mr. Gorman's cross-examination as well.

- [22] Despite their physical proximity in the room and despite the audio recording that clearly disclosed Mr. Gorman being prompted with evidence, Mr. Gorman initially denied any interaction with Ms. Eddison or even knowing that she was in the room with him. Both witnesses denied any inference with Mr. Gorman's evidence. I concluded that those denials were demonstrably false.
- [23] The circumstances of the manner in which Mr. Gorman gave evidence with Ms. Eddison's prompting and their attempts to explain their conduct are set out in detail at paras. 50-64 of the Petition Reasons.
- [24] I rejected both individuals' evidence in which they attempted to explain Ms. Eddison's presence with Mr. Gorman as fanciful and incredible. On the basis of their conduct and their evidence, I rejected all of their affidavit and oral evidence in its entirety: Petition Reason at 66-67.

Analysis

Is Mr. Bourque entitled to special costs?

- [25] Special costs will be warranted where a litigant has engaged in conduct that is "reprehensible", a word of wide meaning that encompasses scandalous or outrageous conduct, but also includes "milder forms of misconduct" that are "deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (BC CA) at para. 17.
- [26] As noted by Mr. Justice Walker in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8 [Mayer], "[t]he purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence."
- [27] However, dishonest testimony alone is insufficient to warrant an order for special costs, and "[t]here must be something more egregious in the impugned conduct for it to be considered reprehensible": *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284 at para. 26; *Mayer* at paras. 12-13.
- [28] Despite that limitation, there is no dispute that an order for special costs will be warranted where the Court finds that there has been a deliberate attempt to mislead it through contrived, concocted, or fabricated evidence: *Webber v. Canadian Aviation Insurance Managers Ltd.*, 2003 BCSC 274 at para. 14. In *Webber*, the Court did not accept the evidence of two of the witnesses because that evidence conflicted with the surrounding circumstances and the conduct of those witnesses in the relevant circumstances. The opposing party argued that the evidence submitted was intentionally misleading, but the Court could not conclude that the witnesses were deliberately attempting to mislead it by contriving, fabricating, or concocting evidence. Accordingly, there was no basis on which to award special costs: at paras. 17-18.

- [29] In this case, not only did I reject the evidence of Mr. Gorman and Ms. Eddison, I concluded that both individuals deliberately attempted to mislead the Court with contrived or concocted evidence. As an exacerbating factor, when first given the opportunity to disclose Ms. Eddison's presence in the room, in his response to a question asked directly by the Court, Mr. Gorman "doubled down" on his deceit by attempting to attribute the whisper that was, in fact, Ms. Eddison, to the fact that he was in an office building: Petition Reasons at para. 64.
- [30] Their deliberate attempts to mislead the Court falls squarely with the category of cases described in Webber and warrants an order for special costs.
- [31] Significantly, their misleading evidence was not the only or first example of Mr. Gorman and Ms. Eddison's dishonesty with the Court. The first was the surreptitious manner in which Ms. Eddison prompted Mr. Gorman's evidence in the first place, both hiding from the camera and whispering so as to conceal her voice. Both the surreptitious nature of this conduct and the fact that they subsequently attempted to distance themselves from it indicates that both knew of the dishonest nature of their actions.
- [32] As I noted at para. 66 of the Petition Reasons, the Court's ability to make just and fair decisions is dependent on the integrity of the fact finding process. Mr. Gorman and Ms. Eddison's blatant disregard for that process undermines the ability of the Court to find the truth. Their grasp of the importance of the fact finding process, and perhaps even the truth itself, was demonstrably lacking.
- [33] In my view, their conduct deserves censure and warrants special costs. As the Court concluded in *Chu v. Chu*, 2001 BCSC 1648 at para. 6, I am also satisfied Mr. Bourque deserves to be made whole for the additional and unnecessary expense he has been subjected to as a direct result of the landlord's witnesses' reprehensible conduct.
- [34] In its written submissions, the landlord concedes that Ms. Eddison's interference with Mr. Gorman's testimony was a "serious error". However, it submits that any award of costs against the landlord should be limited on two bases. It argues that the impugned conduct was limited only to the 43-minute period in which transcript of the proceedings indicated existence of the prompted evidence. It argues that any award of costs against the landlord should reflect that limited time period relative to the full period of time over which Mr. Gorman gave evidence.
- [35] Secondly, the landlord argues that any indemnity for additional time and expenses should be balanced against Mr. Bourque's conduct, including the applications made to compel Mr. Gorman's attendance for cross-examination, which, it argues, added to the complexity, time, and expense of the litigation.
- [36] I do not accept either of the landlord's submissions on this issue.

- [37] First, the transcript of the proceedings was limited to the portion of the proceedings in which the Court noted the conduct. It did not include other periods of time in which Mr. Gorman provided evidence. I cannot conclude that Ms. Eddison prompted Mr. Gorman's evidence at times other than as disclosed in the transcript that was obtained. However, the period of time during which the impugned conduct was detected was sufficient to reject all of Mr. Gorman's evidence, making review of the entire period for any further evidence of misconduct unnecessary.
- [38] Secondly, I do not accept that Mr. Bourque's attempts to compel Mr. Gorman's attendance for cross-examination was unnecessary or inappropriate. Given Mr. Gorman's involvement in the negotiation of the verbal lease and his 6-year history of dealing with Mr. Bourque, his evidence was crucial for the determination of the central issue. The conflicting nature of his and Mr. Bourque's evidence made it reasonable for Mr. Bourque to take the steps he did to compel Mr. Gorman's attendance for cross-examination.
- [39] While the landlord was certainly entitled to compel Mr. Bourque to apply for cross-examination, in my view, the efforts to resist cross-examination prolonged and complicated these proceedings. That, too, led to additional legal costs incurred by Mr. Bourque to prepare an unnecessary application to convert the petition to the trial list. This wasted considerable court time that could have been used to hear and determine the merits of the issues in dispute.
- [40] Although not reprehensible, the landlord's conduct on this issue also supports the exercise of the Court's discretionary authority to award increased or special costs in unusual circumstances where the usual scale would be grossly inadequate or unjust: *National Hockey League v. Pepsi-Cola Ltd.*, 1995 CanLII 2613 (BC CA) at paras. 30-33, 2 BCLR (3d) 13 (C.A.).

D. Disposition

- [41] For the foregoing reasons, I conclude that Mr. Bourque is entitled to:
- a) special costs, to be assessed as actual legal costs, of all preparation and attendances for the portion of the proceedings comprised of:
 - i. the continuation of Mr. Gorman's cross-examination and re-direct examination on April 14, 2022;
 - ii. Ms. Eddison's and Mr. Gorman's cross-examination and re-direct examination on June 17, 2022; and
 - iii. this application;
 - b) special costs, to be assessed as one-fifth of actual legal costs, of the preparation and attendance for his closing submissions; and
 - c) except as set out above, costs of the petition at Scale B in accordance with Rule 14-1.

"Ahmad J."

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Prepared on 28 October 2026 · Esheria