

CANADA / JUDGMENT

GEA Refrigeration Canada Inc. v. Chang

2022 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

24 March 2022

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2022 BCCA 107 GEA Refrigeration Canada Inc. v. Chang COURT OF APPEAL FOR BRITISH COLUMBIA Citation: GEA Refrigeration Canada Inc. v. Chang, 2022 BCCA 107 Date: 20220324 Docket: CA45068 Between: GEA Refrigeration Canada Inc. Respondent (Plaintiff) And Kin Hung (Jeffrey) Chang, Aihua (Alex) Chen, Justin Lai, Xiao (Mary) Hua Wu, Guang Hao (Frank) Xu, and FPS Food Process Solutions Corporation Appellants (Defendants) And Chen Yoiet (Andrew) Chu, Josephine Leung, Xiao Fan Qu, and Cam Man Wong (Defendants) Corrected Judgment: The text of the judgment was corrected on the cover page on November 29, 2022. Before: The Honourable Mr. Justice Groberman The Honourable Mr. Justice Fitch The Honourable Mr. Justice Hunter Supplementary Reasons to GEA Refrigeration Canada Inc. v. Chang, 2020 BCCA 361, Vancouver Docket CA45068. Counsel for the Appellants: J.R. Shewfelt Counsel for the Respondent: M.C. Stacey B. Clarke Place and Date of Hearing: Vancouver, British Columbia November 6 and 7, 2018 Place and Date of Judgment: Vancouver, British Columbia December 14, 2020 Written Submissions on Costs received: February 16, March 2 and 8, 2022 Date of Supplementary Judgment: March 24, 2022 Supplementary Reasons of the Court Summary: The respondent succeeded on the appeal, and applied for increased costs, or, in the alternative, for costs on scale 3. Held: The respondent is entitled to costs on scale 2. The matter was of "more than ordinary difficulty", but not of "unusual difficulty or importance". There is no basis for awarding increased costs under Rule 60 of the Court of Appeal Rules. Supplementary Reasons for Judgment of the Court:

- [1] The respondent was the successful party on this appeal, and now applies for increased costs, or, in the alternative, for costs on scale 3. We are of the view that the circumstances of this case do not call for an order for increased costs, and the appropriate scale of costs is scale 2. The Issues on the Appeal
- [2] The individual appellants were former employees of GEA Refrigeration Canada Inc. ("GEA"), a designer and manufacturer of hygienic industrial freezers. The trial judge found that they improperly used GEA's engineering drawings and other confidential information to design products for sale by FPS Food Process Solutions Corporation ("FPS") in competition with GEA. FPS profited by competing in the hygienic freezer market much earlier than it would have had it designed its freezers legitimately. The judge awarded GEA damages of \$7,137,087 against FPS. She founded the award on the "springboard doctrine", assessed on the basis that

FPS should disgorge its profits for a period of approximately four years from the commencement of its operations. She found the five individual appellants to be jointly and severally liable with the corporation for \$3,630,000, based on profits lost by GEA as a result of their tortious breaches of confidence and of express and implied confidentiality provisions of their employment contracts. She awarded punitive damages against Mr. Chang and Mr. Lai, in the amount of \$75,000 each. Finally, the judge granted GEA an order awarding it special costs of the trial.

- [3] The appeal to this Court dealt, in large part, with questions of fact, and particularly the judge's finding that the defendants possessed and used confidential information that belonged to the plaintiff. There were also issues of fact in connection with the quantum of the compensatory damages claim against the individual defendants. We found that the judge's findings of fact were open to her and upheld them.
- [4] The primary issue of law addressed on the appeal was that of the length of the springboard period -- both the date at which it should commence and the date at which it should terminate. While our reasoning differed somewhat from that of the trial judge, we upheld her findings with respect to the duration of the springboard period.
- [5] A final issue that arose on the appeal was whether the Court should unseal the reasons for judgment in the British Columbia Supreme Court. We considered that that issue ought to be heard, in the first instance, by that court. Of our own motion, however, we made an order unsealing this Court's file, apart from the trial transcripts and appeal book. The Application for Costs on Scale 3
- [6] While the respondent's primary argument is that increased costs should be ordered in this case, such an order depends on a finding that an award of ordinary party and party costs would be unjust. We will begin, therefore, by considering the question of the appropriate scale of ordinary costs.
- [7] Section 2 of Appendix B of the Court of Appeal Rules establishes the different costs scales: 2
 - (1) If a party is entitled to costs, the costs must be assessed under Scale 1 unless the court or a justice otherwise orders.
 - (2) In fixing the scale of costs, the court or a justice must have regard to the following principles:
 - (a) Scale 1 is for matters of ordinary difficulty;
 - (b) Scale 2 is for matters of more than ordinary difficulty or importance;
 - (c) Scale 3 is for matters of unusual difficulty or importance.
 - (3) In fixing the appropriate scale under which costs will be assessed, the court or a justice may take into account the following:
 - (a) whether a difficult issue of law, fact or construction is involved;

- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
 - (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- [8] The appeal in this matter was not of merely ordinary difficulty. While the legal issues were not particularly difficult, the factual issues were challenging. The reasons for judgment did not permit a simple exposition of the facts. We commented on the difficulties at para. 74 of the reasons for judgment:
- [74] The trial was a complex one, lasting several weeks. The reasons for judgment are lengthy, painstakingly analysing the evidence of each witness, and making numerous findings of fact and credibility. A review of the reasons is challenging. The judge did not provide a concise, linear summary of her chain of reasoning. Further, some of her conclusions are expressed in language that can be interpreted more broadly than appears to have been intended.
- [9] The complexity of the record and the need to delve deeply into the evidence in order to clarify and justify the judge's factual findings made this appeal one of more than ordinary difficulty. We are not, however, persuaded that the appeal was one of "unusual difficulty". Appeals, by their very nature, tend to raise issues of some complexity. While this appeal was more difficult than a typical appeal, it is not uncommon to see cases of similar or greater complexity.
- [10] In terms of the importance of the appeal, we are aware that the amounts in issue on the appeal were considerable, and that there were also issues going to the commercial reputations of the parties. It was, therefore, a case of significance to them. The main legal issue addressed, however -- the proper methodology to apply to the springboard doctrine -- is of limited general importance, and would not justify an award of costs on an elevated scale.
- [11] In the result, it is our view that the appropriate scale of costs for this appeal is scale 2.
- [12] Section 3(1) of Appendix B establishes a rate of \$80 per unit for scale 2 costs, a rate 1/3 higher than the amount established for scale 1 costs. The Application for Increased Costs
- [13] Rule 60 of the Court of Appeal Rules is as follows: 60 (1) If, because an offer to settle is made or for any other reason, the court or a justice determines that there would be an unjust result if costs were assessed under Scales 1 to 3 of section 3 (1) of Appendix B, the court or justice, at any time before the assessment has been completed, may order that costs be assessed as increased costs.
- (2) If costs are ordered to be assessed as increased costs, the registrar must fix the fees that would have been allowed if an order for special costs had been made under Rule 61 (1), and must then allow 1/2 of those fees, or a higher or lower proportion as the court or justice may order.

- [14] GEA's argument in respect of increased costs includes arguments surrounding the sealing and unsealing of court files. I will discuss the sealing orders separately, below. For now, it is sufficient to say that GEA's position on those applications was not meritorious, and its efforts on those applications should not result in any increase in the scale of costs to which it is entitled, much less should they entitle it to an award of increased costs.
- [15] With respect to the more general issue of increased costs, this Court discussed factors that might make an award of such costs appropriate in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176 ["Cobble Hill"]:
- [10] Relevant considerations include substantive and procedural complexity and a significant disparity between actual and recoverable costs under the relevant tariff .
- [11] Increased costs have been awarded where the issues raised in the appeal were complex; the issues extended beyond the immediate interests of the parties; the conduct of the parties unnecessarily lengthened the proceeding by, for example, raising spurious issues; where there was significant disparity between actual costs and recoverable costs, although this alone is not determinative; and any other factor that, together with these factors, would have resulted in an injustice to the successful parties . [Emphasis added.]
- [16] As we have indicated, we are not of the view that the issues raised in the appeal were of unusual complexity, nor did they extend beyond the immediate interests of the parties. Whatever might be said about the proceedings at the trial level, there is no suggestion that the conduct of the appellant on the appeal served to unnecessarily increase the costs.
- [17] GEA says that the discrepancy between the costs it can recover under the tariff and the amount that it has paid to defend this appeal makes it unfair to award costs under the tariff. Its evidence is that it expended \$379,280.97 in defending the appeal. In contrast, its draft bill of costs on scale 2 totals only \$22,872.46.
- [18] It is not our task to determine, on this application, whether the full amount of GEA legal expenses could be justified. Equally, we are not called upon to assess the bill of costs under the tariff. It is sufficient, for the purposes of this application, to note that there is, on any reasonable view, a large discrepancy between the amount that GEA has been required to pay in respect of the appeal, and the amount that it will be able to recover under the tariff.
- [19] That situation, however, is not unusual. The tariff does not, in most cases today, come close to compensating parties for the costs of prosecuting or defending an appeal. That reflects policy choices in the enactment of the tariff, and is not, in and of itself, "unfair". As this Court said in *Cobble Hill*, standing alone, a discrepancy between the amount expended on an appeal and the amount that might be recoverable will not ordinarily suffice to justify an award of increased costs.
- [20] We are not persuaded that an award of costs on scale 2 would be unfair to GEA. The Relevance of the Sealing Issue

- [21] In its submissions on costs, GEA places considerable emphasis on arguments made in respect of the sealing of the file. The sealing of the file, however, was not an issue on the appeal itself, but rather an issue on a discrete motion made to a judge in chambers. The chambers judge referred the motion to the division hearing the appeal. We heard the motion at the conclusion of the appeal hearing, but it was not intimately connected with any of the arguments on the appeal. It is difficult to understand how the arguments made on that limited application could drive the award of costs on the appeal generally.
- [22] Further, regard must be had to the positions and procedures adopted by GEA in respect of the sealing of the file. An analysis of the way the issue arose, and of the arguments presented by GEA leads us to the conclusion that the arguments on the sealing of the file should have no bearing on the issue of costs.
- [23] In the trial court, GEA applied for and received an order sealing the entire file. Its rationale for seeking the order was to prevent public disclosure of confidential commercial information. The order that GEA obtained, however, appears to be far broader than was necessary. The entire file of the British Columbia Supreme Court was sealed, including, remarkably, its reasons for judgment. Those reasons did not include any commercially sensitive information. GEA did not, at any time before the hearing in this Court, seek an order from the Supreme Court to limit the sealing order.
- [24] When the appeal was brought to this Court, the file was sealed on an interim basis to allow the parties time to make an application for a more permanent sealing order. Neither side made a timely application for a sealing order, however, and the interim arrangement for sealing the file expired.
- [25] Approximately one month before the appeal hearing, counsel realized that the file was no longer sealed, and the appellants applied to have the entire Court of Appeal file sealed. GEA did not oppose the application, agreeing before the chambers judge that it was appropriate. Concurrently, however, it asked the chambers judge for an order unsealing the reasons for judgment in the trial court. Given the uncertainty as to whether a judge in chambers (or, indeed, this Court) had jurisdiction to make an order unsealing parts of the British Columbia Supreme Court file, the judge referred the motion to the division hearing the appeal.
- [26] At the outset of the hearing of the appeal, the Court, of its own motion, raised the issue of whether the broad sealing order that applied to this Court's own file was appropriate. At the conclusion of the second day of the hearing, the parties were asked to address that issue, together with the issue of whether we should order the reasons for judgment in the trial court to be unsealed.
- [27] In the end, we considered that any application to vary the British Columbia Supreme Court's order sealing its file should be brought, in the first instance, to that court. In our reasons for judgment, we ruled that this Court's file should not remain sealed, apart from the transcripts and appeal book, which include confidential information. Thus, while the reasons for judgment of the Supreme Court remain sealed in its file, they are freely available to the

public from this Court's file. The judgment of this Court, which is published, also contains a summary and several quotations from the trial judgment.

- [28] In our view, the problem with the sealing order in the Supreme Court was one of GEA's own making. It was the party that sought the very broad sealing order, and it did not, up to the time of the hearing in this Court, seek to vary that order. The problem was compounded when it did not oppose the order sealing this Court's own file.
- [29] GEA's motion to have the chambers judge unseal the British Columbia Supreme Court's file was an ill-advised one. As we held in our reasons for judgment, the unsealing of the Supreme Court's file should, in the first instance, be a matter for that court. We note that the Supreme Court of Canada subsequently adopted a similar position in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33.
- [30] GEA did obtain some relief when this Court unsealed parts of its own file, including the appeal record containing the trial judgment. That relief, however, came as a result of the Court questioning the breadth of the sealing order that both parties had acquiesced to in this Court. We are not convinced that GEA's role in that motion would justify any enhanced or increased costs award.

Conclusion

- [31] In the result, we are satisfied that the appropriate award of costs on the appeal is an award of costs on scale 2.
- [32] While GEA was not successful in its arguments for costs on scale 3 or for increased costs, it has enjoyed substantial success on the motion for costs beyond scale 1 costs, and is entitled to the costs of this application. "The Honourable Mr. Justice Groberman" "The Honourable Mr. Justice Fitch" "The Honourable Mr. Justice Hunter"

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Prepared on 29 October 2026 · Esheria