

CANADA / JUDGMENT

Grand Sierra Construction Ltd. v. Karras

2001 BCSC 1568

COURT

Supreme Court of British Columbia

DECIDED

8 November 2001

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Source record

2001BCSC1568

Citation: Grand Sierra Construction Ltd. v. Karras et al Date:
20011108

2001 BCSC 1568 Docket:

S011949

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

GRAND SIERRA CONSTRUCTION LTD.
PLAINTIFF

AND:

RONALD M. KARRAS
MICHAEL B. POULSEN
MICRON CONSTRUCTION LTD.
MICRON CONSTRUCTION INC.
FAIRMILE CONSTRUCTION LTD.
THE FAIRMILE CONSTRUCTION GROUP LTD.
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE VICKERS

(IN CHAMBERS)

Counsel for the Plaintiff: S. Griffin

R.B. Fraser

Counsel for the Defendants: R. Easton

S.R. Ross

Date and Place of Hearing: Vancouver, B.C.

October 30, 2001

- [1] This is the plaintiff's application pursuant to Rule 57(1) and section 7 of Appendix B to the Rules of Court, that the costs awarded to the plaintiff in respect of its application heard on May 22, 2001, and decided in the plaintiff's favour by reasons for judgment dated May 28, 2001 be assessed as special costs or, in the alternative, as increased costs.
- [2] The basis for the application for special costs is that the conduct of the defendants on the application, both in respect of their breach of the underlying Order and the serious, unfounded allegations against plaintiff's counsel, is deserving of reproof or rebuke.
- [3] The basis for the alternative application for increased costs is the marked disparity between Scale 3 costs and the actual legal costs, the importance of the matter to the parties, and the reprehensible conduct of the defendants.
- [4] The defendants oppose the plaintiff's application on the following grounds:
 - (a) Special costs are punitive and can only be awarded for reprehensible conduct which can be characterized as "egregious". The defendants engaged in no such behaviour;
 - (b) Increased costs will only be awarded if there is some unusual feature in the case or some misconduct which explains a disparity between special costs and ordinary costs and which in all the circumstances, makes it just to award increased costs. There is no such unusual feature or misconduct in this case;
 - (c) It would be unjust to impose special or increased costs on the defendants when they made their decision not to appeal the underlying order on the expectation that costs would be paid on an ordinary basis.
- [5] Pursuant to Rule 57(1) or its inherent jurisdiction, the court may award special costs. An award of special costs is intended to indemnify a party fully, or at least substantially, for the costs to which it has been put: *Everywoman's Health Centre Society* (1988) et al v. *Bridges et al* (1991), 54 B.C.L.R. (2d) 294 (B.C.C.A.).
- [6] Special costs should only be awarded in cases where there has been some form of reprehensible conduct: *Stiles v. British Columbia (Workers' Compensation Board)* (1989), 38 B.C.L.R. (2d) 307 (C.A.). Reprehensible conduct includes scandalous or outrageous misconduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd. (No. 2)* (1994), 9 B.C.L.R. (3d) 242 (C.A.). See also *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.); *Fullerton v. Matsqui (District)* (1993), 74 B.C.L.R. (2d) 311 (C.A.).

[7] I do not propose to repeat many of the facts set out in the original judgment: *Grand Sierra Construction Ltd. v. Ronald M. Karras et al*, [2001] B.C.J. No. 1106; 2001 BCSC 768. At p. 9 of the judgment I said the following:

This action was launched by the plaintiff to recover lost opportunities and, in particular, any loss it might sustain occasioned by actions of the defendants which might result in it not succeeding in being awarded Project 2G. The action was also about a breach of fiduciary duties and the misuse of confidential information relating specifically to Project 2G.

[8] Project 2G is a project put to tender by Concord Pacific Inc. ("Concord").

[9] On May 1, 2001, Karras wrote to Concord, as follows:

In response to your general inquiry about the 2G pricing, I can offer some comments on the industry at present. As you know we have been obliged to withdraw our original tender. The following is provided as information only and is not intended in any way to relate to Micron's withdrawn tender, and is not intended to constitute the basis for any future tender.

As I recall, the contract price for 4FG was \$4.91 per S.F. based on Concord's scope. Using this rate against a quantity of 765,000 S.F. would produce a price of \$3,756,000. The following issues need to be taken into consideration:

- (1) Recent increases in wages and some increase in material costs amount to (currently) a 10 1/2 % increase in costs. This would add \$394,000.
- (2) Fixed costs present on both 4FG and a smaller job need to be distributed over a smaller amount of square footage. Also the site will only have one or two cranes, and the access is very poor. These factors plus the larger proportion of non-typical formwork make this job more expensive per square foot than a simpler, larger one. One needs to add at least 5% for this: \$188,000.
- (3) 4FG was bid at a time when there was very little work, and very hungry bidders. To achieve a businesslike profit the 4FG should have been 5% higher: \$188,000.

All these factors together produce a quote of at least \$4,526,000. A motivated bidder could consider a significant reduction in item 3 because of factors such as a strong desire to work with you and your team on this project. Please call if you have any more questions.

[10] The plaintiff on this application says this communication between Karras and Concord was part of the defendants' continuing pursuit and negotiation of Project 2G, contrary to the terms of the Order.

[11] Counsel for the defendants argues that there was nothing in the Order of April 12, 2001 which enjoined the defendants from communicating with Concord about Project 2G. He says that given that Concord had other projects on the drawing board it only made sense for Karras to answer the queries of Concord in respect of Project 2G. His purpose was to assist Concord in the assessment of bids that had already been received. In his submission

Concord developed a strategy to abandon the tender process and make a specific offer to the plaintiff. He says the strategy was that of Concord alone, as opposed to his client, and it is that strategy that resulted in the litigation. Karras sought the advice of counsel and was told that if Concord made a proposal to him he should first ask if an identical proposal had been made to the plaintiff. He followed that advice which, as it later turned out, was based on an interpretation of the Order which the court declined to support.

- [12] The material before me does not lead inevitably to the conclusion that Karras wilfully ignored the court order he had earlier agreed to. If he believed communications with Concord were wrong then such communications would not have been reduced to a written document which would be subject to later disclosure. His conduct in continuing contact with Concord is open to at least two interpretations. On one interpretation he was merely looking after his long term business interests and was, in no way, involved in the negotiation of Project 2G. On affidavit material and without the benefit of cross-examination I would not be prepared to conclude the conduct of Karras warrants an order for special costs.
- [13] The hearing of the plaintiff's application took place on May 22, 2001.
- [14] On the application, the defendants took the position that under the Order of Paris J., "awarded" the contract for Project 2G only meant "offered" the contract and that after the plaintiff had been offered a contract for Project 2G, Micron could accept that same contract.
- [15] They were not content simply to seek an interpretation of the Order. Counsel for the defendants filed affidavit material and made an argument which urged the court to conclude that counsel for the plaintiff had deliberately misled the court when speaking to the consent order before Paris J.
- [16] On this application counsel for the defendants argued there should be no doubt by anyone that the result of the negotiations leading to the making of the court order was that two experienced counsel left the court room of Paris J. with quite different understandings of the meaning of that negotiated order. I agree with that submission. But that is not what was advanced at the hearing. Instead, counsel filed evidence and advanced argument to the effect that counsel for the plaintiff had deliberately misled the court when speaking to the Order of April 12, 2001.
- [17] Such an assertion was unsupported by the evidence. It was conduct in the course of the proceedings that cannot be condoned and might well lead to an order for special costs. However, it was the conduct of counsel that has led to this application for special costs. In my view, counsel's bad judgment should not leave his client in a situation where he is ordered to pay special costs. In all of the circumstances I am not prepared to make such an order.

- [18] Given the positions taken by the defendants and the importance of the issue to both parties, the application was very expensive. Under the tariff, the plaintiff would be entitled to costs totalling approximately \$4,200, inclusive of approximately \$3,200 for disbursements and taxes. The plaintiff's actual expenses in respect of the application were \$63,240.77, inclusive of fees of \$51,960.50, disbursements of \$3,742.27 and taxes of \$7,538. The defendants' actual fees were \$32,248.44, not including disbursements or taxes.
- [19] In this case the plaintiff is entitled to an award of increased costs. I conclude that an award of ordinary costs would lead to an unjust result. Such an order would provide the plaintiff with less than two percent of actual fees. This disparity alone justifies an award of increased costs: *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.); *Monenco Ltd. v. Commonwealth Insurance Co.* (1999), 64 B.C.L.R. (3d) 307 (C.A.). In addition, the matter was of great significance to the parties.
- [20] In *378903 B.C. Ltd. v. Canada Post Corporation* (1995), 15 B.C.L.R. (3d) 130 (S.C.), Melnick J. held that increased costs should not be imposed on a defendant prejudiced by the passing of the appeal period and lack of knowledge of a party's intentions to seek such costs. In my view, Melnick J. did not intend to lay down a rule of general application such that notice of intention to seek increased costs must be given before the appeal period expires in all cases. Such a general rule would be contrary to the discretionary nature of costs and contrary to S. 7(1) of Appendix B to the Rules of Court which reads:

Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2). (emphasis added)

- [21] I am not prepared to find that the failure to file an appeal was in any way motivated by a consideration of the issue of costs to be paid to the plaintiff.
- [22] In all of the circumstances it would be fair and appropriate to order that increased cost fixed at 70 percent of special costs be paid by the defendants to the plaintiff. Such costs are to be taxed by the registrar if the parties are unable to reach an agreement.

"D.H. Vickers, J."

The Honourable Mr. Justice D.H. Vickers

These Reasons for Judgment were released from the Vancouver Registry on November 9, 2001 and are date stamped accordingly.

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Prepared on 29 October 2026 · Esheria