
CANADA / JUDGMENT

Grewal v. Grewal

2013 BCSC 2153

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 2153 Grewal v. Grewal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grewal v. Grewal,

2013 BCSC 2153

Date: 20131126

Docket: S110167

Registry: New Westminster

Between:

Harbans Singh Grewal

Plaintiff

And

Harminder Singh Grewal and

Zora Singh Grewal

Defendants

Before: The Honourable Mr. Justice Crawford

Costs Ruling

Counsel for Harbans Singh Grewal:

D.G. Perry

C. Peana

Counsel for Harminder Singh Grewal:

D. MacAdams, Q.C.

M.A. Misner

Counsel for Zora Singh Grewal:

G.P. Holeksa

R. Germann

Place and Date of Hearing:

New Westminster, B.C.

June 17 and 18, 2013

Place and Date of Judgment:

New Westminster, B.C.

November 26, 2013

Introduction

- [1] These reasons address an application for costs that arise from litigation involving a berry farm the three Grewal brothers (Harminder, Harbans, and Zora) acquired in the fall of 2003. The trial also involved litigation between Harbans and Zora over assets acquired during a joint family relationship from approximately 1990-2006.
- [2] Several other proceedings preceded the trial, and most were conducted before Arnold-Bailey J. who reserved on costs applications in the other proceedings.
- [3] The trial itself took 20 days. On September 2, 2011 after an application to amend pleadings, I gave an oral judgment. Subsequently, further submissions were made regarding the accounting in the berry farm action, and on March 28, 2012, I gave an oral judgement on the accounting.
- [4] Subsequent applications arose regarding settling the judgment, mistrial, costs, and removing the CPL on the berry farm.
- [5] These reasons deal solely with the berry farm action No. S110167.

Harminder's Submissions

- [6] Harminder's solicitor's accounts to date are \$803,823.96. He already obtained an order for special costs against Harbans for Harbans's ill-founded effort to have Mr. MacAdams disqualified for an alleged conflict of interest that was heard in 2008.

- [7] Harinder submits he was the successful party under rule 14-1(9) of the Supreme Court Civil Rules because he defeated Harbans's claim that Harinder held 25% of his registered title interest in the lands for Harbans. Both sides sought an accounting, and Harinder substantially reduced Harbans's accounting claims.
- [8] Harinder notes that, from the outset, he conceded Harbans's claim on the farm machinery and the berry farm sale shortfall. In other words, he argued he was conciliatory.
- [9] Harbans, on the other hand, he argues, was not conciliatory as evidenced by Harbans unsuccessfully seeking a \$458,333.33 credit for the berry plants, and alleging cash sales of \$60,858 that was reduced to \$20,000.
- [10] Additionally, regarding the farm operation, Harbans claimed contributions of \$632,106, and the Court approved \$402,000 - approximately 63% of Harbans's claim but 124% of Harinder's calculation of what he owed Harbans. Harinder noted that Harbans, at para. 14 of the revised statement of claim, made various claims regarding conversion of various items totalling \$130,000. Harinder admitted to some at trial, but most drew no comment from the court.
- [11] Finally, Harinder succeeded on the claim for the extra costs (\$40,000) that Harbans caused the court appointed receiver.
- [12] Thus, Harinder submitted he had substantial success at trial.
- [13] Harinder also sought special costs. He argued that Harbans's conduct was reprehensible and deserving of the Court's reproof. He cited the list of reprehensible conduct that can be found in Walker J.'s judgment *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11. Harinder submitted Harbans' conduct could be found in the findings of the Court:
1. Harbans pursued a meritless claim regarding the land title and was reckless with the truth regarding conversations Harbans had with Harinder regarding the farm ownership - see Reasons for Judgement at paras. 59, 60, 66, 67 - and an alleged conversation with Zora - see Reasons for Judgement at para. 65. Harinder submitted the attempt to remove Mr. MacAdams as his solicitor was also in the same category.
 2. Harbans improperly accused the court appointed receiver of breaching a fiduciary relationship: see Arnold-Bailey J.'s Reasons for Judgment on May 2, 2008, Chilliwack Registry No. S17239 at paras. 37-39.
 3. Harbans displayed a reckless indifference to his claim after the Court repeatedly noted it was manifestly deficient; this comment refers to Arnold-Bailey J.'s comments in December 2007 where she warned Harbans of the dangers in amending his claim to assert a resulting trust and later in a June 2008 judgment commenting on the low probability of success.

4. Harbans's actions made resolving matters far more difficult, and he cited mid-2007 court applications over the farm management: resisting the receiver's appointment; the delay from September to December 2007 as Harbans changed counsel; the December 7, 2007 application to adjourn the petition proceedings; filing materials late or not at all; filing applications to disqualify the opposing solicitor in mid-2008; and ignoring judicial warnings regarding the prospect of success.
 5. Harbans was in a financially superior position and litigated to try to impose a financial burden on Harminder and Zora notwithstanding the warnings about his case's weakness, and that arbitration was far more expeditious and cheaper.
 7. Harbans was litigating for an improper motive, namely: he sought to obtain the berry farm at a lower price; he used the receiver's sale to attempt to buy the berry farm using his son's name; he unnecessarily placed a CPL on the berry farm; and he deliberately attempted to delay selling the berry farm in light of falling land prices in 2008.
- [14] Counsel noted Arnold-Bailey J had yet to deal with Harbans's proceedings and the claim for special costs in Chilliwack action No. S17239.

Zora's Submissions

- [15] Zora's arguments replicated many of Harminder's arguments save that Zora paid Harbans substantially less. Zora submitted the final order represents less than 15% of the claims Harbans advanced against Zora, and Zora admitted the amounts Harbans recovered at trial.
- [16] Therefore, Zora argues he was substantially successful, both at trial and in the accounting.
- [17] Regarding Zora's legal expenses, a certificate of fees for services between March 20, 2008 and June 30, 2008 was \$105,268.38. Zora's unbilled fees, disbursements and taxes were approximately \$763,000, and thus, Zora's total legal expenses are approximately \$921,000.
- [18] Zora noted that because the three actions were simultaneously tried, separating the action's costs was difficult.
- [19] Regarding allocating the expenses between the three actions - S110167 (berry farm), S120621 (Harbans's claim against Zora for the Ridgeway House); and S112878 (Zora's claim against Harbans in partnership and trust) - Zora treated the first and last actions as having the same three main issues:
- a) Harbans's claim that Zora and Harminder held their berry farm interest in trust for Harbans;
 - b) Harbans's claim for additional payments in the accounting; and
 - c) Zora's claim against Harbans based on partnership and trust.
- [20] He argued approximately equal time was dedicated to each issue at trial.

- [21] Zora submitted his legal expenses from February 2009 to January 9, 2010 (at the end of trial) were approximately \$535,000, and his expenses since then were approximately \$225,000.
- [22] Between February 2009 and January 2010, Zora submitted that his legal expenses for the berry farm action S110167 were \$357,000. For the subsequent period, his legal expenses were \$50,000. So his total is \$407,000.
- [23] Zora submitted a bill of costs for three actions would be \$53,430 on Scale B. But if an award was made, he sought costs being awarded on a Scale C basis pursuant to Appendix B, s. 2(2) (c) - i.e., the scale of more than ordinary difficulty being appropriate after considering the items the Court listed in *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 6 [Slocan].
- [24] Slocan listed the following factors: trial length; complexity of issues; number and complexity of pre-trial applications; whether the action was hard fought with little or nothing conceded along the way; the number and length of discovery examinations; the number and complexity of expert reports; and the effort required to collect and prove facts.
- [25] Additionally, Zora sought a 1.5 times increase pursuant to s. 2(5) of Appendix B - i.e., because of unusual circumstances, awarding costs on the usual scale would be grossly inadequate or unjust. The litigation cost was a significant factor, and Harbans made it more complex than might have been expected. Of course, the tariff and the actual legal expenses are different.

Harbans's Submissions

- [26] Harbans's initial position was that costs should not be determined until the proceeding ended, and final reasons had not been provided. In any event, Harbans submitted he was the successful party. Finally, he argued the Court should not exercise its discretion to award costs against the successful party, let alone special costs.
- [27] Harbans submitted special costs are an unusual remedy, and, in the defendant's case, should only be awarded if Harbans's claim proved unfounded. If the Court was providing additional reasons in the berry farm case, then the current application was premature.
- [28] Regarding the successful party, Harbans submitted he had been successful in light of *Fotheringham v. Fotheringham*, 2001 BCSC 1321 where the Court set out the following framework to determine substantial success and to assess costs: (1) focus on the matters in dispute, (2) assess the weight or importance of those matters to the parties, (3) globally determine all matters in dispute to find which party substantially succeeded overall, and finally (4), if one party substantially succeeded, whether the winning side should be deprived of their costs and thus each side then bears their own costs.

- [29] Accordingly, Harbans submitted he was successful in establishing that Harminder and Zora were liable on the accounting and that he was entitled to substantive compensation. He submitted that he was awarded a substantial amount of damages, in the accounting, for contributing to the berry farm's operation, and those damages were awarded pursuant to his arguments and evidence. Therefore, he was the successful party.
- [30] Harbans submitted that to award costs to the unsuccessful parties, such exercises of discretion are exceptionally rare and only appropriate in cases where the facts and issues were of significant public importance: see *Walker v. Brown*, 2013 BCSC 204 at para. 90. Harbans submitted this case, namely a commercial dispute between three brothers, was of no such importance.
- [31] Alternatively, Harbans submitted that if he was not found to be the successful party, the Court should rule that no party was successful rather than characterizing the defendants as the successful party. Consequently, each side should bear its own costs.
- [32] In answering the defendants' allegations that Harbans's decision to advance a trust claim against the farmland was reprehensible behaviour and doomed to fail, Harbans submitted that this characterization was erroneous. Harbans advanced a claim that the farmland was a partnership asset, or alternatively, that Harminder and Zora held their interests in a resulting trust for Harbans. Harbans argued the evidence demonstrated the farmland was a partnership asset because: the partnership account was used for the farm purchase; the farm credit loan was obtained by using the brothers as borrowers and their spouses as guarantors; and finally, Harbans deposited money into the partnership account and used it to complete the purchase on September 4, 2003. Thus, the argument that the farmland was a partnership property had a reasonable basis and therefore was not an unmeritorious claim that was doomed to fail.
- [33] Harbans noted Harminder and Zora did not escape judicial criticism. Harbans noted the Court rejected Zora's argument that he and his wife had a half-interest in each of the properties at issue between Harbans and Zora.
- [34] Also, Zora and Harminder took unreasonable and inflexible positions. Harbans noted Harminder opened the case taking the position he did not owe Harbans anything for the contributions Harbans made to the farm operations, but Harminder conceded that point before the trial ended. If Harminder had made this concession when the trial started, substantial cost and time could have been saved.
- [35] Finally, Harbans submitted that Harminder and Zora had identical interests; therefore their costs should be limited to a single set of costs rather than two separate sets of costs: see *Wong v. Lee*, 2011 BCSC 107 at paras. 15-16.

Discussion

- [36] During the trial, all parties made serious accusations against the other regarding the farm's operation, particularly as between Harbans and Harminder. Additionally, Harminder and Zora failed to comply with the CPL order's requirement to report the income and expenses of the farm operations.
- [37] The two principal issues I need to consider are substantial success and special costs. I do so in light of the trial largely consisting of three portions: (1) Harbans's claim that a resulting trust or oral agreement would displace the face of the title showing the three brothers as the farm's equal owners; (2) the accounting issue that arose because Harbans was the primary funder of the farm's ongoing operations up to mid-2007; and (3) the claims between Harbans and Zora over their joint family properties due to the relationship breakdown between them.
- [38] Harbans pursued Harminder and Zora over his contribution to the farm's operations. Without his contributions from 2005- 2007, there might not be a berry farm to fight over. Over time, his contributions were much larger, and I cannot forget that he was contributing to the joint family economic unit with Zora until the relationship broke down in late August 2006.
- [39] Harbans's claim regarding a trust or oral agreement appears to have been a belated thought that his previous actions or conduct do not support. His change in legal tactics drew Arnold-Bailey J.'s warning in late 2007 and again in mid-2008 regarding the dangers of pursuing what she viewed as a meritless claim. Yet, Harbans continued.
- [40] When I look at the overall trial and the issues relating to the berry farm's ownership, operation and accounting, I find Harbans and Zora had substantial success. They won the berry farm ownership issue. I found no basis for Harbans's evidence regarding the oral agreements. Indeed, I note that when Mr. Gill set-up the partnership agreement, it was only for the farm operation.
- [41] I turn then to whether I should award special costs on that aspect. I accept Harminder's argument that Harbans pay special costs, but only relative to the time spent on the claim Harbans made regarding a trust or oral agreement.
- [42] Although I have not specifically reviewed the trial time in detail, on reviewing my daily trial index, approximately two-thirds of the trial time was spent on the farm issues but the larger part related to the farm's operations and accounting; the evidence of contributions; and cross examinations of the various parties' contributions.
- [43] The other one-third of the trial relates to the joint family economic unit of Harbans and Zora and dividing their joint assets, and I have dealt with that elsewhere.

- [44] Turning back to the berry farm issues and the argument over the title and the accounting, I would ascribe one-third of the berry farm trial to the issue over the title and two-thirds to the accounting - i.e., about 20% of the total trial draws a special costs award.
- [45] Regarding the berry farm accounting, I conclude that Harminder and Zora were the successful parties because they succeeded in substantially reducing Harbans's claims and outright defeating a number of other claims - e.g., the berry plant's value. To that portion of the claim, Harbans and Zora are entitled to costs at Scale C, due to the length of trial, the factual complexities, the hard fought issues and the effort required in the collection and proof of facts.

"The Honourable Mr. Justice Crawford"

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