
CANADA / JUDGMENT

Hundal v. Border Carrier Ltd.

2012 BCSC 2196

COURT

Supreme Court of British Columbia

DECIDED

13 November 2012

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2012 BCSC 2196 Hundal v. Border Carrier Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hundal v. Border Carrier Ltd.,

2012 BCSC 2196

Date: 20121113

Docket: S089125

Registry: Vancouver

Between:

Najam Hundal

Plaintiff

And

Border Carrier Ltd., Sukhdev Singh Bains, and Royal City Trucking Ltd.

Defendants

And

Karachi Transport Ltd.

Defendant by Counterclaim

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment on Costs

No one appearing for the Plaintiff:

Counsel for the Defendants:

P.K. Shergill, Q.C.

R.K. Dhaliwal, A/S

Place and Date of Hearing:

Vancouver, B.C.

November 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

November 13, 2012

- [1] THE COURT: In reasons for judgment delivered March 28, 2012, 2012 BCSC 447, I ordered costs to the defendants and gave leave to the parties to speak to the issue of special costs.
- [2] The hearing of the trial took 22 1/2 days. The plaintiff, Najam Hundal, sued his former business partner, Sukhdev Bains, in oppression, conspiracy and unjust enrichment for allegedly taking over their trucking company, Border Carrier, and diverting its assets. I found that, to the contrary, Mr. Hundal had walked away from Border Carrier when Mr. Bains told Mr. Hundal he wanted him to live up to his obligations under their shareholder agreement.
- [3] When Mr. Hundal walked away he left Mr. Bains with the unenviable task of dealing with the Workers' Compensation Board and Revenue Canada, and winding up the company, among other things.
- [4] The sole issue before me today is whether the defendants are entitled to special costs rather than party-party costs at Scale B, which is the norm. In the alternative, the defendants seek double costs based on an offer made to settle two months before trial for a payment of \$10,000 from Mr. Bains' and the defendants' to Mr. Hundal.
- [5] Before turning to these issues, I note that Mr. Hundal did not appear on this application, although notified by the registry by email of the date and hearing. The application was set earlier in the year and the defendants consented to an adjournment at the request of Mr. Hundal. That adjournment occurred shortly after he filed a notice of intention to act in person in June 2012.
- [6] I delayed the commencement of the hearing for 15 minutes and then proceeded with the hearing in Mr. Hundal's absence, it being apparent that he has chosen not to attend today.

- [7] Special costs may be awarded in cases involving public interest test cases in order to encourage access to justice. In private law matters such as the one before me, they are awarded as a punitive measure to deter litigants from engaging in reprehensible conduct in the frivolous and unmeritorious prosecution or defence of claims.
- [8] Special costs are an exception to the general rule that party-party costs are to be awarded to the successful litigant.
- [9] Reprehensible conduct is conduct deserving of rebuke or reproof and need not be scandalous or cause outrage. I rely on *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), a decision of our Court of Appeal.
- [10] I have no difficulty concluding that an award of special costs should be made in this case. Mr. Hundal made allegations against Mr. Bains that included misappropriation and diversion of assets, profits, corporate opportunities and other monies of Border Carrier for his own personal gain, transferring or diverting assets, monies, contracts and business opportunities, entering into loan agreements and other contracts with the defendant and others for an improper purpose, wrongfully and without lawful excuse paying dividends, bonuses, salaries and other monies to himself and Royal City without consent or approval.
- [11] In closing submissions these allegations were characterized even more strongly as the defendant Bains diverting \$468,000 in Border Carrier receivables to Mr. Bains' own company, the defendant Royal City, and a claim that Mr. Bains had fabricated over \$1 million in expenses in the financial statements of Border Carrier for 2008. Mr. Hundal claimed aggravated and punitive damages for the conduct outlined in the claim.
- [12] On the facts of this case these claims were entirely without merit. Mr. Hundal could only have commenced these proceedings with an improper motive. As in *Paz v. Hardouin* (1995), 25 B.C.L.R. (3d) 201 (C.A.), a decision of the Court of Appeal, the allegations are of a kind that would cast a serious pall over Mr. Bains' reputation in his ethnic community and in the trucking industry.
- [13] In the case at bar the plaintiff made serious unfounded allegations, of oppression, conspiracy, unjust enrichment and allegations amounting to criminal conduct. He further acted maliciously in filing a CPL against Mr. Bains' home which was done for an improper purpose.
- [14] It is not enough for Mr. Hundal to say he was angry and suspicious and believed on some level that he had been wronged by Mr. Bains. As the Court of Appeal noted in *Hannan v. Methanex Corp.* (1998), 46 B.C.L.R. (3d) 230 (C.A.), Mr. Hundal had a responsibility as a litigant to only bring claims that had a reasonable prospect of success. I would add that this obligation required him, at a minimum, to assess the merits of his claims as discovery unfolded. The defendants' produced roughly 30,000 documents. Examination for discovery was comprehensive. The forensic accounting report relied on by the plaintiff was at most an identification of some apparent anomalies which Mr. Bains was able to address in a fairly

straightforward manner at trial.

- [15] The plaintiff quite simply failed to come to terms with the manifest deficiencies in his claim at an early stage in the proceedings. In the words of the Court in *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900, that failure represents reckless indifference to the legitimate interests of the defendant.
- [16] In my view, having considered the factors identified by Madam Justice Southin in *Interclaim Holdings Limited v. Down*, 2002 BCCA 632, [Down] this is an appropriate case to exercise my discretion under Rule 14-1(15) to fix costs and disbursements in a lump sum amount. The three methods for assessing lump sum special costs are described in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914: first actual legal costs; second, a percentage of actual legal costs often at 80 to 90% of the actual legal fees incurred as assessed, and third, \$5,000 for a half day plus disbursements and taxes, also known as the "rough and ready" approach. That sum was increased to \$5,800 to factor in inflation by Madam Justice Gropper who noted in *Morriss v. Prism Properties Inc.*, 2011 BCSC 615, that the number used in *Down* was set in 2002 dollars.
- [17] Using the first method, the actual fees were \$180,658. Ninety percent of that would be \$162,592; and 80% would be \$144,526.
- [18] Using the rough and ready approach, but using the \$5,000 from *Down*, the fees would be \$225,000. The latter measure provides some indication that the actual fees charged by Mr. Bains' counsel in this case are within the reasonable range.
- [19] Having considered the three methods and in particular the fact that these costs are not going to be assessed, nor will disbursements be assessed as would usually be the case, I have determined that setting a lump sum at 80% is the appropriate way to proceed. I will ask counsel to check these numbers, but based on the numbers that I have calculated, the fees will be set at \$144,526, disbursements in full at \$38,764.63, and taxes at 80% of the actual taxes, so \$20,649.48. The total would be \$203,940. I round that up to 204,000.
- [20] I have not dealt with the alternative argument of double costs but I will note for the record that the offer that was made in my view is one that ought reasonably to have been accepted. If this were not a case in which an award of special costs was appropriate, I would have awarded double costs. Since double costs are less than special costs, I need not address this argument more fully.
- [21] Thank you, Ms. Dhaliwal, for your submissions. I am not sure if you were the one who prepared the submissions -- you were. They were thorough, very well done and you presented the arguments clearly. So I thank you for your thoroughness and the manner in which the submissions were delivered.
- [22] I want to say to you, Mr. Bains, that as your counsel will no doubt tell you, special costs are very much the exception. They are substantially higher than what is normally awarded. And while they will not cover entirely your actual legal costs, they come quite close to it. I have

come to the decision that I have come to, the 80%, taking into account all of the history of this litigation, Mr. Hundal's circumstances, the manner in which he proceeded, the expert advice he received and so on. So I have taken into account a large number of factors in coming to that number, including as I have noted in particular, the fact that none of these costs and fees are going to be subjected to the rigour of an assessment by the registrar.

The Honourable Madam Justice L.A. Fenlon

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