

CANADA / JUDGMENT

Kashani v. Dhalla

2002 BCSC 315

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FATEMEH KASHANI
PLAINTIFF

AND:

FATEHALI DHALLA
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE STROMBERG-STEIN

(Re: COSTS)

Counsel for the Plaintiff: In Person

Counsel for the Defendant:

D.J. Taylor

Written Submissions:

Introduction

- [1] On December 14, 2001, I delivered oral Reasons for Judgment following a trial. In summary, in 1998 the plaintiff commenced an action against the defendant in connection with alleged investments of gold bars. The pleadings advanced serious allegations of misconduct against the defendant, including allegations of fraud, misrepresentation, duress, undue influence and breach of trust. At trial, the plaintiff's claims against the defendant were dismissed as devoid of merit on a legal and evidentiary basis. The plaintiff's evidence was found to be vague, uncertain and unreliable. The defendant's counterclaim was allowed. The defendant was awarded costs and the parties provided written submissions.
- [2] The defendant submits that the plaintiff's accusations of fraud and improper conduct were unjust, unfounded and seriously prejudicial to his character and reputation. It is the position of the defendant that apart from the allegations of fraud, the plaintiff's manipulative conduct before and during the trial resulted in unnecessary costs and delay. The defendant argues an award of special costs, or alternatively increased costs, is justified.
- [3] It is the position of the plaintiff that there are no special circumstances in this case which justify the awarding of special or increased costs and there should be an award of ordinary costs.

Issue

- [4] Is the defendant entitled to special costs due to misconduct on the part of the plaintiff in the circumstances giving rise to or in the proceedings; or, is the defendant entitled to increased costs due to a significant disparity between ordinary costs and actual legal costs leading to an unjust result?

Relevant Legal Principles

Special Costs

- [5] The relevant legal principles with respect to special costs arise from Rule 57(3) of the Rules of Court, and various legal authorities including *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 45 B.C.A.C. 222 (C.A.); *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.); *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.); *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1992), 73 B.C.L.R. (2d) 212 (C.A.); *Dusik v. Newton* [1983] B.C.J. 2055 (S.C.); *Sussex Investments Ltd. v. Leskovar* (1981), 30 B.C.L.R. 372 (C.A.); *Young v. Young* (1993), 84 B.C.L.R. (2d) 1 (S.C.C.).
- [6] In *Garcia v. Crestwood Forest Industries Ltd.*, Lambert J.A. considered these authorities and articulated the test at p. 228:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding

special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

- [7] Special costs will be awarded when the court seeks to sanction conduct that is "reprehensible". What constitutes "reprehensible" conduct is, at one end of the scale, extreme misconduct that is "scandalous, outrageous or constitutes misbehaviour". At the other end of the scale, "reprehensible" conduct includes milder forms of misconduct "deserving of reproof or rebuke": *Garcia*; or conduct which "a court seeks to disassociate itself from": *Fullerton v. Matsqui* (1993), 74 B.C.L.R. (2d) 311 (C.A.). Such misconduct may take many forms and includes tactics which intentionally or unintentionally cause delay. Special costs have also been ordered where unjustified allegations have been maintained where there was no basis for them: *Ip v. I.C.B.C.* (1994), 89 B.C.L.R. (2d) 251 (S.C.). "Reprehensible" conduct may arise either in the circumstances giving rise to the action, or in the proceedings: *Hamer-Jackson v. McCall Pontiac Buick Ltd.* (2000), 143 B.C.A.C. 103 (C.A.); application for leave to appeal to the Supreme Court of Canada dismissed without reasons April 5, 2001: [2000] S.C.C.A. No. 501.
- [8] Unfounded allegations of fraud will not automatically justify an award of special costs and the entire course of conduct of the parties and the litigation must be considered. As Newbury J. stated in *Ahluwalia v. Richmond Cabs Ltd.* [1994] B.C.J. No. 1552, B.C.S.C., July 6, 1994, Vancouver No. C927541, at pp. 5-6:

I do not agree with Mr. Ross that *Stiles* should be read as overruling the general principle that the courts may use an award of solicitor-and-client costs to discourage or even punish unfounded charges of fraud. The making of such charges which are unfounded may very well be regarded as "reprehensible". On the other hand, I do not think it follows from the fact that such an allegation has been advanced and failed, that solicitor-and-client costs must necessarily be awarded. One can imagine many instances in which a claim of fraud is advanced bona fide and with good reason, but ultimately fails... The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court.

- [9] However, where the allegations are completely unsupported at law and on the evidence, and are clearly damaging to the reputation of another, as in the case at bar, special costs will be awarded. In *Ip v. I.C.B.C.*, *McKinnon J.* said at p. 253:

An allegation of fraud, wilful misstatements, or other such claims made against a person casts a serious pall over his or her reputation in the community. Very careful consideration must be given by the defendant before making such serious allegations. At the very least, a prima facie case must exist and if it does not then special costs by way of "chastisement" is a reminder to the defendant to exercise better care in the future.

[10] It is appropriate to send a message to the plaintiff to exercise better care because a prima facie case did not exist.

[11] In all the circumstances, it is appropriate to award the defendant special costs.

Increased Costs

[12] It is not necessary to consider the alternative submission on increased costs.

Conclusion

[13] The plaintiff's case was devoid of merit in fact and at law. There was no evidence to support the serious claims advanced by the plaintiff against the defendant. The defendant was subjected to protracted and expensive litigation and these very serious allegations had an adverse impact on the defendant's reputation. There has been "reprehensible" conduct on the part of the plaintiff in the sense of conduct "deserving of reproof or rebuke", or conduct which "a court seeks to disassociate itself from" in the circumstances giving rise to the proceedings, and in the proceedings, which warrant an award of special costs.

[14] The defendant is entitled to special costs.

"S.S. Stromberg-Stein, J."

The Honourable Madam Justice S.S. Stromberg-Stein

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