

CANADA / JUDGMENT

Lam v. Macdonald

2020 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

23 January 2020

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2020 BCSC 89 Lam v. Macdonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lam v. Macdonald,

2020 BCSC 89

Date: 20200123

Docket: S179617

Registry: Vancouver

Between:

Ivy Lam

Plaintiff

And

Robert Macdonald, Strata Council of BCS2044,

Macdonald Commercial Real Estate Services Ltd.

Defendants

Before: Master Elwood

(In Chambers)

Reasons for Decision

The Plaintiff appearing in person:

Ivy Lam

Counsel for the Defendant, Robert Macdonald:

D. Garand

Place and Date of Hearing:

Vancouver, B.C.

December 20, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2020

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I. INTRODUCTION

[1] This is an assessment of special costs awarded to the defendant, Robert Macdonald, against the plaintiff, Ivy Lam, on an appeal from a previous assessment of costs in these proceedings.

II. BACKGROUND

[2] Ms. Lam is the owner of a residential unit in a mixed-use condominium building called the Hudson. Mr. Macdonald is a member of the strata council of the Hudson. Ms. Lam brought this action as a self-represented litigant against Mr. Macdonald, the strata corporation of the Hudson and a property management company, alleging, essentially, breach of fiduciary duty.

- [3] In oral reasons for judgment indexed as 2018 BCSC 281, Madam Justice Warren struck out the notice of civil claim in its entirety. In doing so, Madam Justice Warren declined to declare Ms. Lam a vexatious litigant or award special costs to the defendants, but cautioned that it was a "close call" on both questions, stating that costs at scale B should be enough to moderate Ms. Lam's behaviour:
- [81] As I have already explained, I am not persuaded that Ms. Lam's motives were improper or that her claim amounted to an abuse of process. The fact that her Notice of Civil Claim was defective is not in itself a reason for awarding special costs. Unfortunately, there is evidence of bullying and badgering by Ms. Lam, which has included an extremely unreasonable volume of emails to representatives of the parties and their counsel. Nevertheless, I have somewhat reluctantly concluded that this is not enough to characterize her conduct as sufficiently reprehensible to warrant special costs, in part because much of the bullying and badgering has arisen in her regular dealings with the Property Management Company and not specifically in the context of this litigation.
- [82] However, as with my conclusion on the vexatious litigant application, I wish to make clear that this is a close call. In other words, Ms. Lam should consider herself warned that a continuation of this kind of bullying and badgering conduct, if linked to further litigation, may well lead to an award of special costs.
- [83] The defendants will have their costs against Ms. Lam assessed at scale B. Given the time that has been spent on this matter, even assessed at scale B, this award is likely to have a significantly moderating effect on Ms. Lam's behaviour. (emphasis added)
- [4] Ms. Lam appealed the order of Madam Justice Warren, but missed the deadline to file the appeal record. Madam Justice Saunders dismissed an application by Ms. Lam on September 28, 2019, to extend the deadline, finding that the appeal was doomed to fail.
- [5] An assessment of the defendants' bills of costs in B.C. Supreme Court was set for hearing on October 22, 2018. Between October 7 and October 21, 2018, Ms. Lam sent a number of e-mails to Mr. Macdonald threatening continued litigation if he did not waive his entitlement to costs.
- [6] The defendants' bills of costs were assessed by Registrar Nielsen, who reviewed each relevant tariff item and ordered that some be amended. The final bill of costs was \$14,469.79, inclusive of taxes and disbursements. Following the hearing, Ms. Lam sought to appear again before Registrar Nielsen. Her requests were denied.
- [7] Ms. Lam appealed the assessment of costs to a judge of this Court. Rule 23-6 required the parties to exchange written statements of argument in advance of the appeal. Ms. Lam's written argument did not address the amounts awarded by Registrar Nielsen. Instead, Ms. Lam sought to challenge the costs order itself and re-argue aspects of the claims dismissed by Madam Justice Warren.

- [8] Mr. Macdonald took the position in response that Ms. Lam was abusing the appeal process by knowingly advancing meritless arguments for an improper purpose, namely to impose further legal proceedings and expenses on Mr. Macdonald in furtherance of the underlying dispute.
- [9] Ms. Lam revised her statement of argument prior to the hearing. She also requested an adjournment of the appeal.
- [10] The defendants prepared a joint application record which was larger than usual for an assessment appeal, but necessary given the nature of the proceedings and the positions taken by Ms. Lam.
- [11] The appeal was heard on February 15, 2019 by Mr. Justice McEwan. His Lordship dismissed the appeal in oral reasons for judgment and awarded special costs of the appeal to Mr. Macdonald, inclusive of any registrar's hearing to assess special costs.
- [12] Ms. Lam continued to correspond with Mr. Macdonald's counsel on various matters following the hearing of the appeal. She also sent e-mails to the Chief Justice of the Supreme Court on matters relating to the conduct of this case.
- [13] On July 15, 2019, the parties appeared at a pre-hearing conference for this assessment. Registrar Nielsen made a number of procedural orders which required Mr. Macdonald's legal counsel to provide Ms. Lam access to its bills and documentation in support, and Ms. Lam to advise counsel of what she took issue with and why. Ms. Lam provided two sets of objections to the law firm's bills.
- [14] This hearing first came on before Master Muir on September 20, 2019. It was adjourned because Ms. Lam did not have a complete copy of one of the affidavits. Following the hearing, counsel conferred with Ms. Lam to ensure that she had complete copies of all of the materials.
- [15] On this assessment, Mr. Macdonald has put in evidence the invoices from his legal counsel for November 2018, and February, June, July and August of 2019. The first two invoices cover preparation for and attendance at the appeal from the assessment of Registrar Nielsen. The latter three invoices cover preparation for this assessment, including the attendance at the pre-hearing conference before Registrar Nielsen.
- [16] There is some overlap between these matters and the Court of Appeal proceedings and a Civil Resolution Tribunal proceeding brought by Ms. Lam. Counsel for Mr. Macdonald states that she has "backed out" the items that do not relate to the assessment appeal from the claim of special costs. In addition, counsel has reduced some of the time spent reviewing correspondence from Ms. Lam.
- [17] Counsel has also reduced the photocopy disbursements to 65% of the amount invoiced to account for the overlap with the Civil Resolution Tribunal proceeding.

[18] The total amount claimed as special costs is \$13,336.07, of which \$11,333.30 is legal fees.

III. ANALYSIS

[19] The Court of Appeal explained the function of special costs recently in *Tanious v. The Empire Life Assurance Company*, 2019 BCCA 329, as follows:

[49] Special costs provide a much greater degree of indemnity than party and party costs. However, while there may be a close relationship between actual legal expenses and special costs, they are not necessarily the same. In fairness to the losing party who must pay the special costs, the successful party is entitled only to those fees and disbursements that were proper or reasonably necessary to conduct the proceeding. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at para. 28 (S.C.), *aff'd* 73 B.C.L.R. (2d) 212 (C.A.), Justice Bouck stated that a special costs assessment will usually amount to about 80 to 90 per cent of an assessment of a similar bill reviewed under the Legal Profession Act, S.B.C. 1998, c. 9.

[50] Rule 14-1(3)(b) sets out a non-exhaustive list of factors for a registrar to consider in undertaking a special costs assessment. These include the complexity of the proceeding, the amount involved and the conduct of any party. When a judge fixes special costs under Rule 14-1(15), he or she must consider the same factors: *Gichuru* at paras. 85, 91, 102.

...

[53] [Special costs] address the results and conduct of the parties in the course of litigation and are generally awarded where there has been some form of reprehensible conduct: *Young v. Young*, [1993] 4 S.C.R. 3 at 134-135; *Marchen* at para. 69. In these circumstances, their purpose is to censure and deter litigation misconduct, not to compensate the plaintiff. Pre-litigation misconduct is not to be considered in determining whether special costs should be awarded for purposes of censure because there are other suitable mechanisms of censure that apply: *Smithies Holdings* at para. 134.

[20] Rule 14-1(3) of the Supreme Court Civil Rules governs the assessment of special costs. It provides that "a registrar must allow those fees that were proper or reasonably necessary to conduct the proceeding". Rule 14-1(3) requires that the registrar "consider all of the circumstances", including the following:

- (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
- (ii) the skill, specialized knowledge and responsibility required of the lawyer;
- (iii) the amount involved in the proceeding;
- (iv) the time reasonably spent in conducting the proceeding;
- (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

[21] In *Gichuru v. Smith*, 2014 BCCA 414, the Court of Appeal affirmed that, on an assessment of special costs, only those costs which are objectively reasonable are recoverable: see paragraphs 104, 105, 119 and 155 to 156.

A. Complexity, Difficulty or Novelty

[22] The appeal from the assessment by Registrar Nielsen was not complex or difficult, nor were the issues novel. The matter was complicated somewhat by the overlapping proceedings and frequent and lengthy correspondence by Ms. Lam. However, it remained a straightforward assessment appeal. To the extent she raised any argument that Registrar Nielsen erred, Ms. Lam's appeal was very weak on its merits.

B. Skill, Specialized Knowledge and Responsibility

[23] Mr. Macdonald's counsel of record in these proceedings is William McLachlan, a senior member of the Bar. However, counsel on the assessment appeal was Danielle Garand. Ms. Garand was called to the Bar in 2013. Her areas of practice are family law and general civil litigation. Although Ms. Garand has less experience than Mr. McLachlan, I consider her level of call and lower billing rate appropriate for the assessment appeal.

[24] Ms. Lam's lack of familiarity with court procedures as a self-represented litigant added responsibility to Ms. Garand's role as counsel, which Ms. Garand discharged appropriately in my view.

C. Amount Involved

[25] Registrar Nielsen allowed costs of just under \$15,000. Although important to Mr. Macdonald, the amount involved in the appeal was a modest sum. The special costs claimed nearly equal the amount involved.

D. Time Reasonably Expended

[26] The pre-bills of Mr. Macdonald's counsel add up to 50 hours of preparation and attendance at an assessment appeal that required approximately one hour of actual hearing time. Mr. Macdonald's counsel has reduced that time to 36 hours for the purposes of the special costs claim. However, the time expended still seems, on its face, a lot of time for a one-hour appeal. Some further context is required.

- [27] As stated, the Rules required written statements of argument from the parties. This required Mr. Macdonald's counsel to review Ms. Lam's written submission and respond in writing prior to the hearing. Ms. Garand needed to summarize the history of the litigation, set out the standard of review, defend the assessment and provide the basis for the claim to special costs. I have reviewed the respondent's written argument; it is very comprehensive. I expect that it was helpful to the chambers judge on the appeal.
- [28] The time spent by Mr. Macdonald's counsel on preparation for the appeal included legal research of the law on exceptions to settlement privilege. This is because the evidence on which Mr. Macdonald sought special costs included e-mails from Ms. Lam marked "without prejudice". Mr. Macdonald took the position those e-mails were not protected by any settlement privilege. The time to research this position was objectively reasonable, in my view.
- [29] The invoices also include legal research and consideration of whether to have Ms. Lam declared a vexatious litigant in the appeal proceeding. I do not consider this line of inquiry objectively reasonable given the limited nature of an appeal from the registrar and Madam Justice Warren's decision that Ms. Lam was not a vexatious litigant in the underlying proceedings. However, the time spent on this issue was relatively minor.
- [30] Mr. Macdonald's counsel prepared thoroughly for the appeal. Although this is commendable, I consider the total time spent on the written argument and preparation for the hearing somewhat more than objectively reasonable, given the relatively straightforward nature of the issues involved.

E. Conduct that Tended to Shorten or Lengthen the Proceedings

- [31] Ms. Lam's conduct clearly tended to lengthen the proceedings. The extensive written communications, some of the positions she took and arguments she advanced that were irrelevant all made the proceedings longer.

F. Importance of the Proceeding; Benefit to the Defendant

- [32] As stated, the assessment appeal was important to Mr. Macdonald. The costs he was awarded pursuant to the order of Madam Justice Warren were important to offset his legal expenses in the protracted dispute with Ms. Lam. The appeal proceedings benefitted him by affirming the assessment and giving rise to his entitlement to special costs of the appeal.

G. Rule 1-3

- [33] Rule 1-3 of the Supreme Court Civil Rules provides that:

Object

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
- (a) the amount involved,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [34] Although I have found that the amount involved was modest and the issues involved straightforward, I nonetheless find that the conduct of the assessment appeal by Mr. Macdonald and his counsel was consistent with the object of the Rules and the concept of proportionality.
- [35] From the outset of this litigation, and continuing through the assessment appeal, the volume of correspondence and submissions by Ms. Lam has been a challenge for Mr. Macdonald and the court. Ms. Lam's e-mails and submissions have rarely related to the actual issues in the litigation. They have often been repetitive and unnecessary. This unfortunately drove up the length and cost of the proceedings for all involved. Mr. Macdonald's resort to a request for a special costs award was a proportionate response to the circumstances.

IV: CONCLUSION

- [36] Having considered all of the circumstances, I would award \$9,000 to Mr. Macdonald as special costs pursuant to the order of Mr. Justice McEwan.
- [37] Mr. Macdonald is also entitled to special costs of this assessment. To avoid further proceedings, I would assess those additional costs summarily at \$1,000.

"Master Elwood"

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