

CANADA / JUDGMENT

LeRoy v. TimberWest Forest Corp.

2020 BCSC 1811

COURT

Supreme Court of British Columbia

DECIDED

25 November 2020

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2020 BCSC 1811 LeRoy v. TimberWest Forest Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: LeRoy v. TimberWest Forest Corp., 2020 BCSC 1811 Date: 20201125 Docket: S14836 Registry: Duncan Between: Rebecca LeRoy and Ted LeRoy Plaintiffs And TimberWest Forest Corp., TimberWest Holdings Ltd., TimberWest Forest Company, David Whiteley, Paul McElligott, Beverlee Park Defendants Corrected Judgment: The text of the judgment was corrected on the cover page on December 3, 2020. Before: The Honourable Madam Justice Forth Reasons for Judgment re Costs Counsel for the Plaintiffs: A. Crabtree Counsel for the Defendants: J.S. Yates Written Submissions of the Plaintiffs Received: September 30, 2020 Written Submissions of the Defendants Received: August 31, 2020 Place and Date of Judgment: Duncan, B.C. November 25, 2020

Introduction

- [1] In 2019, the parties were before me for a nine-week trial involving the plaintiffs' claim that the defendants fraudulently and deliberately conspired to destroy Ted LeRoy Trucking ("TLT") by causing it to go bankrupt; see my reasons indexed at 2020 BCSC 978 (the "Reasons"). The plaintiffs were unsuccessful and their claim was dismissed.
- [2] At paragraph 627 of the Reasons I stated: The claims are dismissed. In respect to costs, I ask that the defendants consider the significant losses that these plaintiffs have sustained. If the defendants decide to pursue costs, the defendants may make written submissions on costs within 60 days of release of this decision. The plaintiffs will have 30 days to reply in writing to those submissions. If anything new arises in the plaintiffs' submission, the defendants have 14 days to respond.
- [3] On August 31, 2020, the defendants made submissions on the issue of costs. They submit that both double costs from the date of their formal offer to settle and special costs are justified, but they seek only an award of party and party costs on Scale C.
- [4] The plaintiffs' submissions, dated September 30, 2020, accept that there are cost consequences flowing from the judgment, but submit that there is no basis to deviate from the general practice of awarding costs to the successful party on Scale B.

- [5] The defendants did not submit a response to the plaintiffs' reply.
- [6] The only issue for me to address is whether the defendants are entitled to their costs at Scale C. For the reasons set out below, I find that the defendants are entitled to costs at Scale C.
- Applicable Law
- [7] Rule 14-1(9) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], provides:
- [9] Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [8] Subrule 12 does not apply since it deals with interlocutory applications.
- [9] Appendix B of the Rules addresses party and party costs, and provides direction to the court on what scale should be awarded. Section 2 of Appendix B provides:
- (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.
- (2) In fixing the scale of costs, the court must have regard to the following principles:
- (a) Scale A is for matters of little or less than ordinary difficulty;
- (b) Scale B is for matters of ordinary difficulty;
- (c) Scale C is for matters of more than ordinary difficulty.
- (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether an issue is of importance to a class or body of persons, or is of general interest;
- (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- [10] The value of each unit under Scale B is \$110 and under Scale C is \$170.
- [11] The court has developed a series of factors to guide its discretion in determining the appropriate scale:
- a. the length of trial;
- b. the complexity of the issues involved;
- c. the number and complexity of the pre-trial applications;
- d. whether or not the action was hard-fought with little or nothing being conceded along the way;

- e. the number and length of examinations for discovery;
 - f. the number and complexity of expert reports; and
 - g. the extent of the effort required in the collection and proof of the facts. (Slocan Forest Products Ltd. v. Trapper Enterprises Ltd., 2010 BCSC 1494 [Slocan] at para. 6)
- [12] These factors are not exhaustive. Not all factors will be present in each case and the court can take into account other considerations: Monument Mining Limited v. Balendran Chong & Bodi, 2013 BCSC 179 [Monument Mining] at para. 6. The question for me to decide is whether this matter was of "more than ordinary difficulty", in which case costs should be awarded at Scale C. Position of the Parties
- [13] The defendants submit that the following factors weigh in favour of an award of costs at Scale C:
- a. The trial occupied 43 days;
 - b. Testimony from 16 fact witnesses and three experts, along with over 1,000 documents included in the Common Book of Documents;
 - c. The number and complexity of the factual and legal issues;
 - d. The plaintiffs' conduct in the litigation increased the costs incurred by the defendants;
 - e. The number of pre-trial applications, particularly in respect to the plaintiffs' document production;
 - f. The trial was hard-fought with few concessions made by the plaintiffs;
 - g. Six examinations for discovery were conducted, each for two days, and for Mr. LeRoy for three days; and
 - h. Extensive efforts were made to collect the evidence necessary to prove the facts alleged in the plaintiffs' case, including the defendants' document production, of approximately 60,000 documents, and the production of documents in the hands of third parties obtained via multiple court applications.
- [14] The plaintiffs concede that their claim was pursued vigorously, particularly because of the findings of fact made in the Munns decision (see paras. 130 to 133 of those reasons: 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2014 BCSC 2433). They assert that the individual defendants changed their evidence after the defendants' opening submissions.
- [15] The plaintiffs argue that the defendants' document production was deceptively voluminous and included duplicate and irrelevant documents, thereby increasing the plaintiffs' cost of review.
- [16] The plaintiffs submit that the following factors weigh in favour of an award of costs at Scale B:

- a. While the factual matrix of the case was voluminous, the core legal issues were all argued on the basis of well-settled law and established legal principles;
 - b. While many pre-trial applications were made, many were resolved without the need for a hearing or were not seriously contested. In addition, while two summary trial applications were filed by the defendants, one of those applications was unsuccessful and the other was abandoned. The number of pre-trial applications is not determinative: *Monument Mining at para. 6 and 566935 BC Ltd. dba West Coast Resorts. v. Allianz Insurance Company of Canada*, 2005 BCSC 1759 [566935 BC Ltd.] at para. 20;
 - c. The plaintiffs vigorously pursued the matter, however this was warranted by the plaintiffs' losses and impacts to their lives. The fact the parties were tenacious does not make the proceeding more than ordinarily difficult: *Monument Mining at para.13*;
 - d. The length of the discoveries were in accordance with the time limitations in the Rules; and
 - e. The expert evidence was limited to three reports, which were not inordinately complicated and did not require a significant amount of the court's time.
- [17] The plaintiffs argue that this case falls within the upper range of ordinary difficulty, but is not one that, in its totality, merits costs on Scale C.

Analysis

- [18] I am satisfied that this case exemplifies the type of proceeding that comes well within the category of "more than ordinary difficulty", meriting costs at Scale C.
- [19] The plaintiffs' submission respecting the Munns decision (at para. 14 above), and that the findings in that decision provided a sufficient basis to pursue the allegations to trial, have no sway whether costs at Scale C should be awarded. That argument may have had some relevance if the defendants were seeking double costs because the plaintiffs' rejected their offer to settle, but the defendants are not proceeding on this basis. Length of Trial
- [20] This trial lasted 43 days, with five days devoted to submissions. The parties' written submissions collectively were hundreds of pages with reference to numerous case authorities. A trial of this length supports a finding of more than ordinary complexity: *Slocan at para. 9; Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1907 at para. 20. Complexity of Issues
- [21] During the course of the trial, the factual foundation of the plaintiffs' claim spanned approximately a decade, with Mr. LeRoy testifying for approximately seven days in direct and three days in cross-examination. The factual issues included a detailed direct and cross-examination of a number of witnesses and numerous documents in order to understand what the plaintiffs described as TimberWest's "subdivision plan" and "Bill 13 Strategy". There was extensive evidence led on the logging industry, including evidence relating to logging contracts, Bill 13 rights, labour issues, seniority lists, stumpage, the logging process,

harvesting volume, and harvesting plans. In addition, the financial viability of both TimberWest and TLT was thoroughly examined, with banking officials being called as witnesses and through the examination of hundreds of pages of documents. The financial history of TLT was examined from the early 2000s to September 2008, when it declared bankruptcy.

- [22] The issues to be decided included the contractual interpretation of a release, the Bill 13 Regulation and Bill 13 Contract, and the claims of fraud, deceit, and conspiracy. The conspiracy claim alleged that the defendants had engaged in both predominant purpose conspiracy and unlawful means conspiracy. As set out at para. 479 of the Reasons, the plaintiffs' argued the defendants engaged in the following unlawful acts to cause TLT's insolvency:
- a. fraudulently refusing to permit TLT to carry out work under the contracts and unlawfully shutting down operations;
 - b. fraudulently interfering with TLT's lending relationship with RBC and misrepresenting the value of the Bill 13 Contract to RBC;
 - c. making fraudulent and defamatory statements about Mr. LeRoy and TLT;
 - d. delaying, refusing to discuss or failing to negotiate rate adjustments in good faith, including by requiring TLT to provide audited financial statements, ignoring the Perforex study and unilaterally fixing rates;
 - e. fraudulently misrepresenting the true intentions and consequences of the implementation of the subdivision plan in respect of TLT; and
 - f. filing a false affidavit sworn by Mr. Whiteley.
- [23] The factual matrix that had to be explored at trial surrounding each of these allegations was detailed and complex.
- [24] In addition to the defendants' defence that there was no conspiracy, the defendants also questioned the cause of TLT's financial demise, and extensive evidence was led on TLT's weak financial condition and the circumstances it faced from 2005 until its bankruptcy in 2008.
- [25] A fundamental part of the plaintiffs' case was aimed at discrediting three of the individual defendants, respecting not only the reliability of their evidence but also their integrity. This effort, in my view, went much further than in an average case of ordinary difficulty.
- [26] Although not dealt with in the Reasons, the damages posed a further level of complexity. The factual basis of the plaintiffs' claim (in their amended notice of civil claim filed August 25, 2017) consisted of 172 paragraphs. They sought damages on behalf of TLT of no less than \$150 million or disgorgement of profit by TimberWest of approximately \$957 million. At the time of closing submissions the plaintiffs' claim for disgorgement was in the range of \$300

million. The plaintiffs' expert evidence primarily focused on issues of damages, and canvassed issues relating to the valuation of harvesting and road construction contracts, the cost of parts and equipment, the valuation of log sort contracts, the potential gross revenue TLT could have achieved assuming contract renewals, and the fair market value of equipment and machines. The defendants' expert evidence qualified the economic gain or loss to TimberWest arising from the Compromise Agreement and the fair market value of TLT, and projected TLT's income from TimberWest, amongst other opinions.

- [27] In my view, the scope of the legal issues that had to be addressed and the complexity of the factual matrix clearly brings this case past the realm of more than ordinary difficulty.
- Number and Complexity of Pre-Trial Applications
- [28] Numerous pre-trial applications were filed between March 2015 and December 2018: 14 applications by the plaintiffs and 12 applications by the defendants. Some of the applications were granted or went by consent, others were dismissed, and some were left unresolved.
- [29] The plaintiffs direct me to Monument Mining, where there were eight pre-trial applications, and 566935 BC Ltd. where there were also eight pre-trial applications, of which only two proceeded to a hearing (at para. 18). In both of those cases the trial judges concluded that eight applications was not enough to warrant an award of costs at Scale C. There were many more pre-trial applications in the case at bar. The nature and number of pre-trial applications pushes this matter out of the category of ordinary difficulty. Effort in the Collection and Proof of Facts
- [30] I further find that there was a great deal of effort that went into the collection and proof of facts. Those efforts went beyond the defendants' document production and pre-trial applications to compel the plaintiffs to produce documents, but included various applications to obtain documents from third parties, including RBC, PricewaterhouseCoopers Inc., Hayes Stewart Little & Co., and bcIMC. The defendants secured over 2,000 documents from these third parties.
- [31] The Common Book of Documents and the other exhibits tendered at trial consisted of more than 28 binders with well over 1,000 pages. The extensive document production in this matter further supports the position that this case passes over the threshold of a Scale B type case. Number of Examinations
- [32] Many examinations took place. Six examinations for discovery and five pre-trial examination of witnesses were conducted. Together, these examinations took place over 18 days.
- [33] In my view, the number of examinations for discovery, and the days this took, combined with the number of pre-trial examinations is a factor mitigating in favour of Scale C.

Conclusion

- [34] I concluded my 628 paragraph Reasons with the comment that this was a "factually complex and legally challenging case", and that remains my view.
- [35] Taking all the circumstances into account, I am satisfied that the defendants are entitled to costs at Scale C. "Forth J."
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