

CANADA / JUDGMENT

Lucarino v. Rast

2022 BCSC 1019

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1019 Lucarino v. Rast

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lucarino v. Rast,

2022 BCSC 1019

Date: 20220602

Docket: S233849

Registry: New Westminster

Between:

Joe Lucarino

Plaintiff

And

Randall Rast and Iron Horse Truck Transfer Corp.

Defendants

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

G.T. Palm

Counsel for the Defendants:

J.D. Shields

Place and Date of Hearing:

New Westminster, B.C.

April 20, 2022

Place and Date of Judgment:

New Westminster, B.C.

June 2, 2022

Introduction

- [1] This is an application by the defendants for costs following dismissal of the bulk of the plaintiff's claim in a summary trial ruling. The underlying action related to a dispute between the plaintiff Mr. Lucarino and the personal defendant Mr. Rast with respect to a now defunct trucking company, referred to in my earlier ruling as Old Iron Horse. In his notice of civil claim, the plaintiff pled a number of different causes of action, including wrongful dismissal, breach of a shareholder's agreement, passing off of the goodwill, logo, and trade name of Old Iron Horse, defamation, breach of fiduciary duty, and unjust enrichment.
- [2] The plaintiff applied for judgment on all but one of its claims by way of a summary trial. The defendants opposed the application and argued for dismissal of the entire action. In my ruling, I dismissed all of the plaintiff's claims except the claim for defamation, which the plaintiff asserted from the outset was not suitable for disposition by way of summary trial. I found in the ruling that some claims were not properly pled, that others were unfounded or unproven, and that the plaintiff advanced a number of other serious allegations against the personal defendant which were both unproven and untethered to any of the causes of action advanced in his notice of civil claim. The plaintiff has since filed for bankruptcy.
- [3] Against this backdrop, the defendants seek an exceptional remedy, namely special costs payable personally by plaintiff's counsel. The defendants say that the plaintiff's claims were ill-conceived, abusive, peppered with unfounded allegations of impropriety, and bound to fail. The defendants say the manner in which the plaintiff framed and conducted the proceedings is deserving of rebuke by way of special costs. They also say that plaintiff's counsel knew or should have known that the entire action was baseless, and that counsel's conduct, including but not limited to drafting the pleadings, advancing the summary trial application, opposing an adjournment, submitting inadmissible evidence, and failing to recognize various flaws and deficiencies pointed out by opposing counsel along the way, rises to a level of impropriety warranting special costs payable personally.

- [4] Plaintiff's counsel has retained his own lawyer to represent him on this application. Plaintiff's counsel submits that even though the claim failed, there is no basis for making an award of special costs personally against him. Even accepting that the claim was weak, that did not relieve counsel of his obligation to pursue it to the best of his ability. He submits that the courts must be extremely cautious about awarding costs personally against counsel, given counsel's obligation to be courageous in advancing difficult or unpopular cases on behalf of the client, and the obligation to guard the confidentiality of the client's instructions under the rules of solicitor-client privilege. Mere negligence, which is not conceded by plaintiff's counsel, will not suffice. Counsel says the threshold for such a remedy is a very high one, and it is not met in this case.

Facts and Procedural History

- [5] The plaintiff Mr. Lucarino filed his notice of civil claim against the defendants Mr. Rast and Iron Horse Truck Transfer Corp. (referred to in my reasons for judgment on the merits as "New Iron Horse") on 19 November 2020. I will not go through the entire contents. The causes of action are summarized above. I will simply highlight some of the more severe or controversial allegations in the plaintiff's claim, specifically, allegations that the personal defendant Mr. Rast: (i) "unlawfully and in bad faith blackmailed" the plaintiff Mr. Lucarino, (ii) conducted himself in a manner that was "malicious, reprehensible, and high handed", (iii) maliciously forced the plaintiff out of their jointly owned company, Old Iron Horse, (iv) changed the locks to the business premises and disposed of the plaintiff's belongings, (v) inflicted emotional distress on the plaintiff, and (vi) breached an unspecified fiduciary duty owed to the plaintiff.
- [6] The defendants Mr. Rast and New Iron Horse filed a response to civil claim on 23 December 2020. In it, they denied the plaintiff's claims, and in doing so pointed out certain standing issues and other deficiencies in the plaintiff's pleadings. Among other things, the defendants pointed out that some of the plaintiff's claims could only be properly brought against Old Iron Horse, and other claims could only properly be brought by way of a derivative action commenced by or on behalf of Old Iron Horse.
- [7] On 31 May 2021, counsel for the defendants sent a letter to plaintiff's counsel outlining a number of weaknesses in the plaintiff's legal position. Counsel for the defendants proposed a consent dismissal, without costs to any party, and reserved the right to bring the offer to the attention of the court for the purposes of any subsequent determination of costs. The plaintiff did not accept the offer.
- [8] On 11 June 2021, the plaintiff filed and served a notice of application for summary trial. The application was originally returnable on 29 June 2021, but it was later adjourned, on application by the defendants, and over the plaintiff's objection. The application ultimately proceeded to hearing before me on 22 and 23 September 2021.

- [9] Without reviewing the entire contents of the plaintiff's summary trial application, I would summarize the more colorful allegations as follows. Among other things, the plaintiff alleged that the personal defendant Mr. Rast: (i) "stole" the plaintiff Mr. Lucarino's shares in Old Iron Horse, (ii) wrongfully terminated Mr. Lucarino's employment contract in a manner that was "harsh, insensitive, and in bad faith", (iii) took accounts, cash, other assets, and corporate goodwill of Old Iron Horse, for his benefit, (iv) changed the security code for the business premises and disposed of the plaintiff's property, and (v) "misled" and made false representations to Old Iron Horse's clients. The plaintiff's notice of application also asserted that "nothing in the pantheon of Canadian law" justified Mr. Rast's conduct. Finally, it was asserted that the plaintiff had been left in such a dire financial state that if he was unsuccessful in his summary trial application, the defendants would be left with "at best a hollow judgment for costs".
- [10] As noted, the summary trial application came before me for hearing on 22 and 23 September 2021. On 1 October 2021, I gave oral reasons for judgment dismissing all of the plaintiff's claims with the exception of the defamation claim, which the plaintiff had hived off and had not included in his summary trial application. In dismissing the balance of the claims, I found, among other things, that: (i) significant portions of the plaintiff's affidavit materials were inadmissible hearsay, speculation, or opinion evidence, (ii) some of the assertions of fact in the plaintiff's affidavit materials were inconsistent with his examination for discovery evidence, or otherwise unreliable and unsubstantiated, (iii) the plaintiff had made improper reliance on without prejudice communications, (iv) the plaintiff's materials included serious allegations of dishonesty, akin to fraud, that were untethered to any actual cause of action pleaded by the plaintiff, (v) some of the plaintiff's legal arguments were irrelevant, did not go to any of the causes of action in the notice of civil claim, or were otherwise fatally flawed, (vi) the plaintiff did not have legal standing to advance some of the causes of action alleged (specifically passing off), and further that the defendants could not in law be liable in respect of other causes of action (specifically wrongful dismissal), and (vii) the plaintiff made allegations of theft and misappropriation of property, without ever having plead an underlying cause of action such as conversion or detainment. I further found that the plaintiff's claims were unsubstantiated and not proven on the affidavit evidence included within the summary trial record. I concluded the reasons by stating that the parties could schedule another appearance before me to speak to the issue of costs.
- [11] On or about 21 December 2021, the plaintiff Mr. Lucarino filed for personal bankruptcy.
- [12] On 15 February 2022, the defendants filed the current application for an order of special costs to be assessed personally against plaintiff's counsel. (I should note that the original application response of the defendants in response to the summary trial application included a claim for special costs, but as noted above I declined to deal with the issue of costs in my initial ruling, without full submissions from the parties). I should also point out that the current notice of application names the plaintiff's counsel as the sole respondent. The defendants explain that "no claim can be advanced against the plaintiff given his

insolvency filing".

- [13] Plaintiff's counsel, Mr. Sheard, retained his own lawyer to represent him on this application. Mr. Sheard filed an affidavit setting out his position. In it, Mr. Sheard avers that: (i) he is unable to give evidence as to the instructions he received from Mr. Lucarino in the course of the proceedings, due to the constraints of solicitor-client privilege, (ii) he was somewhat constrained in the options he could pursue in prosecuting the case due to the plaintiff's impecuniosity, and he tried his best to manage and conclude the case in as cost-effectively and timely a way as he could, and (iii) at no point did he personally believe the action was frivolous, vexatious, or abusive of the court's process, nor did he believe that it was contrary to his duties as an officer of the court to pursue the claim.

Analysis

Preliminary Observations

- [14] I begin the analysis by pointing out an unusual feature of this case, namely that the defendants are seeking a costs award only against plaintiff's counsel, and not against the plaintiff himself. This makes a certain amount of financial sense, given that the plaintiff is now under bankruptcy protection. However, it also has several important implications for the merits of this costs application.
- [15] First and most obviously, since the plaintiff was not named as a respondent and not given notice of this application, the court cannot make an order of costs against him, at least at this stage of the proceedings, based on the current application before the court. If I am to make a costs order in this matter, at this point it can only be made against plaintiff's counsel personally, upon the showing of a proper basis for doing so under the Supreme Court Civil Rules [Rules] and the applicable legal principles. I should add a further caveat here, that Mr. Justice Coval earlier granted an adjournment application brought by the defendants, and left the question of costs on that application to a later time. In theory, the defendants would still be able to pursue costs against the plaintiff personally in respect of that step in the proceedings, although they would have to do so on proper notice to the plaintiff. I am not dealing with that aspect of things in this ruling.
- [16] Second, there is a much subtler but equally important implication of the manner in which the defendants have chosen to proceed with this application. This is not a case where the defendants have sought to recover costs against both the plaintiff and the plaintiff's counsel, leading to a situation where the plaintiff then alleges impropriety against his own counsel, which would in turn give rise to a waiver of solicitor-client privilege. In the case at bar, plaintiff's counsel is operating under the constraints of solicitor client privilege, and he is therefore unable to give evidence in this application as to the advice he gave, or any instructions he received from the plaintiff that might shed light on the manner in which the plaintiff's case was pled or prosecuted.

Nature of the Costs Claim Advanced by the Defendants

- [17] The defendants were almost entirely successful in the summary trial and would clearly be entitled to costs in the normal course of events. The two unique features of the particular application that warrant attention are: (i) the claim for special costs, and (ii) the claim for an order of costs against plaintiff's counsel personally. I will address each of these in turn.
- (i) Special Costs
- [18] The court has authority to award special costs under R. 14-1(1) of the Rules, and also as an aspect of the court's inherent jurisdiction to control its process: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea] at paras. 25-26. By either route, such a remedy is reserved for "exceptional cases": *Westsea* at para. 34.
- [19] The threshold for awarding special costs is "reprehensible conduct" on the part of one of the parties. The concept of "reprehensible conduct" is said to encompass not only "scandalous or outrageous" conduct, but also "milder" forms of misconduct that are "deserving of rebuke": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57.
- [20] Special costs are intended to be "punitive in nature", hence the reference to conduct that is "deserving of rebuke": *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 ["Mayer"] at para. 8 (reversed on other grounds in *Mayer v. Mayer*, 2012 BCCA 77). In *Mayer*, Mr. Justice Walker set out the following list of circumstances or categories of conduct that might be said to justify an award of special costs: (a) where a party pursues a meritless claim and is reckless with regard to the truth; (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty; (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient; (d) where a party made the resolution of an issue far more difficult than it should have been; (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party; (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit; (g) where a party brings a proceeding for an improper motive; (h) where a party maintains unfounded allegations of fraud or dishonesty; and (i) where a party pursues claims frivolously or without foundation.
- [21] In the case at bar, one could not say that the plaintiff somehow sought to abuse a financially superior position to improperly or pressure or financially burden the defendants as contemplated in category (e) of Walker J.'s list. Nor is there any evidence that the plaintiff's claim was brought for an improper purpose as contemplated in para. (g). However, there are features of this case that fit into most if not all of the other categories described in *Mayer*. The plaintiff's claims were found to be meritless, and there are features of the claims that appear to have been pled and pursued recklessly without regard to the truth and without foundation, per categories (a) and (i) in *Mayer*. The plaintiff's claims include allegations of dishonest conduct akin to fraud, and those allegations were maintained throughout the

proceedings and never supported by any admissible evidence, as contemplated in categories (b) and (h) in Mayer. The plaintiff appeared to show reckless indifference to the lack of merit in his claims, and pursued them in a manner in which they were bound to fail, even after fatal deficiencies were pointed out in opposing counsel's correspondence, as per paragraphs (c) and (f) in Walker J.'s list.

- [22] I stress that this was not merely a weak case that failed on the merits for a simple lack of proof. If that were all that occurred, the defendants would have an entitlement to tariff costs under the Rules, but there would be no basis for a special costs order intended to rebuke the unsuccessful litigant. Rather, this is a case where some of the key claims were ill conceived and could never have succeeded by way of an action brought by this plaintiff against these named defendants. The claims also included allegations of impropriety akin to fraud, supported by nothing more than speculation and various forms of manifestly inadmissible evidence. It is no excuse that that plaintiff was impecunious and lacked the means to remedy the deficiencies or proceed in a different manner. Indeed, the plaintiff drew attention to his impecuniosity, suggesting that if the claim failed the defendants would get nothing but a dry judgment on costs. This leads me to conclude that the plaintiff was prepared to pursue allegations of serious impropriety against the opposing party with reckless abandon, on the theory that he had little to lose if his claim failed.
- [23] Given the absence of improper motive, malice, or deliberate abuse of the court's process, I would not characterize the conduct in issue in this case as "scandalous" or "outrageous" within the meaning of the costs jurisprudence. I nonetheless find the conduct of the plaintiff's case as I have described it above to be "reprehensible", albeit on the milder end of the spectrum discussed in the case law. I find that the manner in which the plaintiff's case was conducted is deserving of rebuke by way of an order for special costs.
- [24] As explained above, because the defendants did not name the plaintiff as a respondent in this application, and because the plaintiff was not given notice of the application, it would not be appropriate to order special costs against the plaintiff himself. However, both parties submit, and I agree, that a finding that the plaintiff's case was conducted in a "reprehensible" manner would be a basis for at least considering an order for special costs against plaintiff's counsel. In other words, no one before me is advancing the technical argument that the pre-requisite to an order of costs against counsel is that there must first be a formal order of costs made against the plaintiff generally. One might construct such an argument on the wording of Rule 14-1(33)(c), but that would be an exceedingly technical argument and no one advanced that position before me. I should say, even if the text of subparagraph (c) were read technically to include such a requirement, there would probably still be authority to consider special costs against counsel under Rule 14-1(33)(d), which refers to "any other order" that the court considers just, or even pursuant to the court's inherent jurisdiction. The remaining issue is whether there is a basis for requiring counsel to pay costs personally on the facts of this case.

(ii) Costs Awarded Personally Against Counsel

- [25] The court's authority to make order of costs against counsel personally, like the authority to award special costs, can be found both in the Rules and in the Court's inherent jurisdiction to control its own process. In British Columbia, awards for costs against counsel are contemplated in Rule 14-1(33)(c) and, as I said above, also potentially under Rule 14-1(33)(d).
- [26] I confess to some uncertainty about the underlying rationale or purpose for an award of costs against counsel personally. On the one hand, plaintiff's counsel says such awards can be justified as compensation to the successful litigant, on the theory that improper conduct of counsel can add to the overall complexity and cost of the proceedings. There is strong support for this approach in the leading case of *Young v. Young*, [1993] 4 S.C.R. 3 [Young] at p. 135. On the other hand, counsel for the defendants says that where special costs are sought against counsel, and the relevant threshold of counsel misconduct is met, the punitive rationale for an award of special costs against the litigant is by necessary implication extended to the conduct of counsel. This approach also finds some support in the case law. See *Nuttall v. Krekovic*, 2018 BCCA 341 [Nuttall] at para. 26. I see good sense in both approaches.
- [27] In the end, I need not resolve the philosophical debate to decide this particular case. Whatever the underlying rationale for such awards, the case law is clear that judges are required to be "extremely cautious" in awarding costs personally against counsel. As McLachlin J., as she then was, put it in *Young* at p. 136, "A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with [the] fundamental duties of his or her calling". There are two discrete "fundamental duties" of counsel that are relevant in this regard. I will briefly discuss each of them in turn.
- [28] One of the relevant duties of counsel is to guard the confidentiality of the client's instructions under the rubric of solicitor-client privilege: *Young* at p. 136. This duty can in many instances hamstring a lawyer responding to a costs application in fully explaining the conduct of the litigation, and his or her own role in it. For example, consider a situation where the lawyer advises the client to settle or resolve a weak claim, but the client declines to act on that advice, and instead instructs the lawyer to proceed. Of course, a lawyer is expected to exercise some degree of independent judgment in his or her conduct, but that does not mean the lawyer can settle or abandon the case when the client will not give those instructions. In such instances, there is something to be said for the lawyer continuing to act, even where the case is thought to be weak. And of course, a lawyer in this situation will not be in a position to provide the court with an unbridled explanation of his or her conduct in a subsequent costs application, unless the client waives privilege. There may be many other instances where the lawyer is constrained in what can be said about the client's instructions and their implications for the conduct of the case. This is certainly a reason to be cautious in considering whether an order for counsel to pay costs personally would be justified.

- [29] The other relevant duty of counsel is to "bring forward with courage even unpopular claims": Young at p. 136. Even the most difficult clients with the most challenging of legal positions are entitled to legal representation. There are of course legitimate professional and ethical limits on the manner in which counsel may present a case, but the law should certainly not discourage counsel from acting with courage even when representing the most unpopular client with the weakest of arguable cases. In view of these interests, courts are rightly concerned about the possible chilling effect of orders requiring counsel to pay costs personally in the event that the client is unsuccessful in the result.
- [30] For both of the reasons I have just reviewed, the threshold for exercising the power to award costs against lawyers is high. Such orders should only be made in "very special circumstances": Nuttall at paras. 28-29. The conduct in issue must be truly "reprehensible", and is limited to cases of dishonest or malicious misconduct, or alternatively cases of serious abuse of the judicial system: Walsh v. Muirhead, 2020 BCCA 225 at para. 34.
- [31] Mere mistake, error in judgment, or even negligence, is not enough to justify an order of costs against counsel: Nuttall at para. 29; Walsh at para. 34. Rather, there must be convincing evidence of "a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system": Nuttall at para. 28; Walsh at para. 34, both citing Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26 at para. 27.
- [32] Applying that standard in the case at bar, I am satisfied that plaintiff's counsel did not act with any degree of dishonesty, malice, or intentional misconduct. I accept counsel's unchallenged averment that he did not subjectively believe his client's claim to be frivolous, vexatious, or wholly without merit. Counsel for the defendants says this is not relevant, since the threshold of "reprehensible" conduct is not limited to cases involving mala fides. That may well be true, but it does not make the statements of plaintiff's counsel irrelevant. Counsel has averred that he personally did not believe his client's claim to be frivolous or vexatious, and there is no basis in the evidence for calling that assertion into question. On the record before me, this takes the question of mala fides off the table entirely.
- [33] That leaves for consideration whether the conduct of plaintiff's counsel involved a "serious abuse of the judicial system". As I understand the case law, this category is not limited to intentional dishonesty or mala fides. It can and does extend to professional misconduct involving a "marked and unacceptable departure" from the standards expected of all individuals in the justice system.
- [34] In deciding whether that high threshold is met here, I take into account that plaintiff's counsel is constrained by solicitor-client privilege and therefore cannot explain what advice he gave and what instructions if any he received from Mr. Lucarino. I must also be mindful of a ruling that would have a chilling effect on the obligation of counsel to continue to represent difficult clients, and to plead and argue challenging cases.

- [35] Of course, there are limits to this reasoning. Whether acting on instructions or not, counsel should never knowingly advance positions that are untenable in law, so lacking in merit, or so disruptive of the process as to amount to an abuse of the judicial system. Nor can a client's instructions be an excuse for intentional non-compliance with the rules of pleadings, affidavit drafting, or admissibility of evidence. As explained in *Borowski v. Stefanson*, 2013 SKQB 133 at para. 11, counsel "have a well known duty to act as a filter to eliminate improper and inadmissible material", and it is not the duty of counsel to "indulge" the client or serve as the client's "mouthpiece". In the same vein, I agree with counsel for the defendants that a client's lack of financial resources affords no justification for ignoring practice standards.
- [36] Taking all of this into account, I accept that there were errors in the pleadings, that the quality of the affidavit evidence was poor, that there was hyperbole in the written submissions, and that the plaintiff's case was seriously lacking in evidentiary support. Despite all of this, I cannot find that counsel's conduct involved a marked and unacceptable departure from the standards expected of legal professionals in our justice system.
- [37] I have given serious consideration to the inclusion in the plaintiff's pleadings of an assertion that the plaintiff was so financially destitute as to make any award of costs against him a "hollow judgment". Certainly it was imprudent to include such a assertion in the pleadings. There may be situations where such a statement might be regarded as a form of improper leverage against the opposing party. However, in this particular case I view the statement as a gratuitous and awkward attempt to explain why the plaintiff had chosen to put all of his eggs into the basket of a summary trial application. I do not find this one statement, whether viewed alone or in conjunction with all of the other complaints raised by the defendants, to bring the matter into the category of "reprehensible" counsel conduct, warranting rebuke by way of an order of special costs against counsel personally.

(iii) Alternatives to an Award of Special Costs

- [38] The defendants submit that in the event the if plaintiff's counsel is not ordered to pay special costs, he should be ordered to pay costs in some other form, including tariff costs awarded at Scale B, or at Scale C based on increased difficulty, or double costs based on the plaintiff's unreasonable refusal to accept the offer to settle.
- [39] The text of Rule 14-1(33), which refers to conduct of counsel that "has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect, or some other fault", appears to have "expanded the scope of conduct which might support a costs order against a lawyer": Nuttall at para. 35. Thus, it appears that there is no requirement to show "serious misconduct" in order to obtain an order for tariff costs against a lawyer under Rule 14-1(33), for example in circumstances where costs have been thrown away or wasted due to counsel's conduct. However, even this "lower standard" must be "exercised with restraint", "in rare or exceptional circumstances": *Nazmdeh v. Spraggs*, 2010 BCCA 131 at paras. 103-104, cited with approval in Nuttall at para. 35. In other words, the

standard of conduct required to support such a costs order against counsel is lower than the standard required for an order of special costs, but the principle of restraint continues to operate.

- [40] Both of the rationales or reasons for restraint discussed in the case law, namely: (i) the duty of counsel to protect the confidentiality of instructions under the rules of solicitor-client privilege, and (ii) the duty of counsel to vigorously represent the client, auger for a cautious approach in considering any form of costs order against counsel personally.
- [41] In the absence of a waiver of privilege and evidence from the plaintiff himself that counsel was off on a "frolic" and acted without instructions in taking a particular litigation step, I see no basis in the record before me for holding counsel personally responsible for particular steps that added complexity or cost to the proceedings.
- [42] For example, without evidence to show that Mr. Lucarino wanted to settle but his counsel refused to accept instructions, or pressured him not to do so, or gave seriously flawed advice as to the strength of the case, I do not see any basis in the record for holding counsel personally responsible for refusing the settlement offer. As noted in *Ridehalgh v. Horsfield*, [1994] 3 All ER 848 (C.A.) at p. 863, "[i]t is rarely if ever safe to assume that a hopeless case is being litigated on the advice of the lawyers involved". Even allowing for the fact that this comment was made in the context of a legal system where barristers are constrained in deciding when and for whom they will act or not act, it still resonates in the case at bar. Indeed, these remarks bear some correspondence to the reasoning in *Kent v. Waldock*, 2000 BCCA 357 at para. 21, and *Young v. Young*, 1990 CanLII 3813 (B.C.C.A.) at p. 119, a decision which was later upheld by the Supreme Court of Canada.
- [43] Similarly, the failure to rectify alleged deficiencies in the pleadings could easily have been a product of counsel's inability to obtain instructions to do so. While the initial flaws in the pleadings might be easier to lay at counsel's feet, it is difficult to hold counsel entirely responsible for the failure to rectify the pleadings after the opposing party identified deficiencies. I must be weary of speculating on this without evidence, but the fact is that because plaintiff's counsel is subject to the constraints of solicitor-client privilege, he is unable to offer a full explanation of his conduct. This makes it very difficult to hold counsel personally responsible, even for a failure to rectify pleadings, in the absence of evidence that counsel was off on a "frolic" of his own as discussed for example in *Jampolsky v. Shattler*, 2010 BCSC 408 at para. 23.
- [44] The same can be said of the plaintiff's conduct in filing and proceeding to hearing of the summary trial application. On its face, this course of conduct appears to have been a product of the plaintiff's limited resources and legal options for a hearing of the merits of his claim. The plaintiff swore an affidavit in support of the summary trial application, from which it can be inferred that he instructed his counsel to bring the application. Beyond this, it is not possible to peer beyond the curtain of privilege to determine how the decision was made to proceed with the summary trial application, and what role counsel played in that

decision.

- [45] I accept that at least some responsibility - probably much of the responsibility - for the plaintiff's reliance on inadmissible evidence in the summary trial application could be laid directly at the feet of plaintiff's counsel. Counsel are responsible for knowing and respecting the rules regarding proper content of affidavits, and the rules relating to admissibility of evidence. However, I do not consider that this aspect of the case alone is enough to justify an order of costs personally against counsel. Inclusion of legally inadmissible evidence in an application record is obviously wrong but unfortunately not as "rare" or "exceptional" as it should be. Indeed, as I noted in the summary trial ruling, there was a certain amount of inadmissible evidence and speculative assertion in the defendants' affidavit evidence, although the ultimate implications of that are different because the defendants were not the moving parties and did not bear the burden of proving the case.
- [46] In conclusion, even accepting as the Court of Appeal judgment in Nuttall suggests that Rule 14-1(33) expands the scope of conduct that would justify an order of costs against counsel beyond the "reprehensible conduct" standard discussed in the special costs jurisprudence, I am not satisfied that any particular aspect of counsel's conduct in this case led to any additional or wasted costs to the opposing parties in this litigation. I therefore reject the plea of the defendants for an order requiring plaintiff's counsel to pay double costs, or enhanced costs, or even basic party and party costs for any part of these proceedings.

Postscript

- [47] When I delivered these reasons orally in court, counsel for the defendants stressed that because the plaintiff has filed for bankruptcy, any effort to obtain a costs order against him would be stayed until the conclusion of the bankruptcy process. Thus, the defendants were seriously constrained in their ability to pursue their application for costs against the plaintiff himself. In these circumstances, counsel asked that I specify that the decision on this application is made without prejudice to the right of the defendants to seek costs against the plaintiff himself, if or when the stay of proceedings arising from the plaintiff's bankruptcy is lifted. I acceded to that request.

Conclusion

- [48] The application for an order of costs against plaintiff's counsel is dismissed, without prejudice to the right of the defendants to apply for an order of costs against the plaintiff himself, on proper notice to the plaintiff.

"Riley J."

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