
CANADA / JUDGMENT

McKnight v. Hutchison

2019 BCSC 1405

COURT

Supreme Court of British Columbia

DECIDED

21 August 2019

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2019 BCSC 1405 McKnight v. Hutchison

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McKnight v. Hutchison,

2019 BCSC 1405

Date: 20190821

Docket: S063172

Registry: Victoria

Between:

Donald Dale McKnight

Plaintiff

And

John Michael Hutchison and 574316 B.C. LTD.

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment on Costs

The Plaintiff, appearing in person:

D.D. McKnight

Counsel for the Defendants:

J.M. Hutchison, Q.C.

Place and Date of Written Submissions of the Plaintiff:

Victoria, B.C.

June 25 and July 15, 2019

Place and Date of Written Submissions of the Defendant:

Victoria, B.C.

July 10, 2019

Place and Date of Judgment:

Victoria, B.C.

August 21, 2019

Introduction

- [1] The lamentable history of this litigation is set out in my reasons for judgment that are indexed at 2019 BCSC 944, and I will refrain from repeating them here. Those reasons were the second set of substantive reasons that I produced in this case. The first set of substantive reasons were indexed at 2015 BCSC 1886. In those reasons I dismissed the plaintiff's claim against the corporate defendant.
- [2] In the litigation before me, the plaintiff sought equitable compensation for the defendants' alleged breach of fiduciary duties, damages for alleged conversion, as well as punitive damages. He also sought an order that any awards made be reduced by any amounts that he was found to owe the partnership, after taking into account advances made by the plaintiff for the benefit of the partnership, including payments of interest on a U.S. dollar loan and income tax paid on monies held in trust for the partnership. In addition, he sought an order that the defendants could set off certain expenses, specified in the order that arose from my reasons indexed at 2015 BCSC 1886.
- [3] At para. 186 of the reasons indexed at 2019 BCSC 944 I summarized the result of the litigation between the personal parties as follows:

186 In summary:

- a) Pursuant to Grist J.'s finding that Mr. Hutchison must account for his secret profits, the amount Mr. Hutchison owes the partnership is \$476,258.59.
- b) Mr. Hutchison should have billed \$88,472.05 for work performed prior to the dissolution of the firm. By failing to bill this work, and delaying in collecting the accounts he did bill, he breached his fiduciary duties to the partnership.

- c) Mr. Hutchison is liable under the tort of conversion for the wrongful interference of Mr. McKnight's funds. Mr. Hutchison must pay \$32,255.66 plus the consequential loss of these funds to the partnership.
 - d) I award to the plaintiff in this case the sum of \$150,000 for punitive damages.
 - e) With respect to interest:
 - i. For the amount withheld from the partnership, net of the set off that I determined, the interest will run from the date of the termination of the partnership that I have determined; November 8, 1999;
 - ii. On the fees and disbursements that I have determined should have been billed and collected, but were not, the interest will run from May 8, 2000, which is six months following the termination of the partnership;
 - iii. The plaintiff's claim for conversion was not pleaded until December 11, 2018. In the result, interest will not run on this head of damages until the date that the claim was made; and
 - iv. On the punitive damages award, interest will run on this award from November 8, 2009.
 - f) With respect to costs, the plaintiff proposed, and I agree that the entitlement of the parties to costs should await these reasons for judgment. Now that they are available, I will permit the plaintiff two weeks to file written submissions, not to exceed 15 pages in length, with respect to costs, and the defendants will have two weeks thereafter to file their submissions with the same 15 page limit. The plaintiff will have one week thereafter to file any written reply, not to exceed five pages in length. The parties need not file briefs of authorities, but must include full citations and paragraph references for any authorities that they rely upon.
- [4] Having received the parties written submissions as to costs, I will set out my decision and the reasons therefore below.

The Positions of the Parties

- [5] The plaintiff seeks orders that:
- (a) the defendants pay special costs of the action from the date of commencement of this action until the conclusion of the defendants' reconsideration application;
 - (b) the defendants pay "uplift" costs at Scale C of Appendix B of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], from the conclusion of the reconsideration hearing through to and including the filing of my supplementary reasons for judgment indexed at 2016 BCSC 137, and dated January 29, 2016;
 - (c) the defendants pay all disbursements necessarily or properly incurred by the plaintiff in this action, including all hearing fees and transcripts; and

- (d) all costs awards made to the plaintiff be paid out of partnership funds currently held in trust by the plaintiff.
- [6] The personal defendant contends that the result of the litigation between himself and the plaintiff was a mixed success, and that any cost award should be ordinary costs at Scale B of Appendix B of the Rules.

Discussion

(a) The Necessity of the Litigation

- [7] The plaintiff contends that the genesis of this action was the personal defendant's unwillingness to amend his pleadings in the action before Mr. Justice Grist that is referred to in para. 186 in my reasons for judgment indexed at 2019 BCSC 944, and set out above.
- [8] I am unable to accept that as a basis for awarding costs in this case. Even if the personal defendant had amended his pleadings as the plaintiff says he should, the plaintiff would still have faced the obligation to prove the claims that he advanced against both of the named defendants in the style of cause, necessitating the same or similar evidence and arguments. While the ultimate result might have come about sooner, I am unable to see that the issues between the parties would have differed with the amendments that the plaintiff says ought to have been made, or that the case would have taken on a less confrontational or adversarial complexion.

(b) Attempts to Resolve the Litigation

- [9] The plaintiff asserts that he attempted to settle the issues between himself and the defendants, but received no response to his efforts to do so. He also contends that he sought a resolution of the issues by way of mediation, which the personal defendant ignored, and that the conduct of the personal defendant in denying him access to file material belonging to their partnership thwarted his ability to make an offer to settle.
- [10] Accepting, for the sake of argument, that each of these assertions is correct, I am unable to agree that they can or should be factored into the analysis of the entitlement or obligation to pay costs in this action.
- [11] The settlement offer was an effort to resolve only some of the issues between the parties, not the issues in their entirety, and was not pursued by the plaintiff when he received no response from the personal defendant.
- [12] While the defendants ought to have responded to the notice to mediate served by the plaintiff, it was open to the plaintiff to pursue mediation further, and he did not do so. Given the inability of the parties to resolve much, if anything, before me, I am persuaded that mediation did not offer any real prospect of success, and would simply have added to the costs of the dispute between them. In the result, I do not see the failure to pursue mediation as a loss to the plaintiff that assists him with respect to costs.

[13] Insofar as the file material is concerned, the plaintiff has pointed to no settlement offer, even when it was produced, so I am not persuaded that earlier production would have brought about a settlement offer that could affect the outcome on costs in the case.

(c) Rule 14-1

[14] Subrules 14-1(1) and (9) of the Rules provide, in part, that:

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

(a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;

(b) the court orders that

(i) the costs of the proceeding be assessed as special costs, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[15] In *Connor Estate*, 2017 BCSC 1341, Mr. Justice Kent held at paras. 10-12 that:

10 Rule 14-1 addresses costs. Subrule 14-1(1)(9) provides that, generally speaking, "costs of a proceeding must be awarded to the successful party unless the court otherwise orders".

11 Success has been equated to "substantial success". In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, the court held that, as a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute, considered globally.

12 Offers to settle are not considered in determining substantial success. That is because substantial success is determined by comparing the positions taken by the parties at the trial or the hearing against the end result. The position taken by a party at this later date may be substantially different than that set out in any earlier offer to settle.

[16] The plaintiff contends that he achieved substantial success in this case, by obtaining an order that the personal defendant pay his capital account deficit, account for the secret profits that he obtained, pay damages for his breach of fiduciary duty at roughly 80% of the amount sought by the plaintiff, pay damages to the partnership for conversion, and pay punitive damages.

- [17] The personal defendant points out that the declaration for dissolution of the partnership sought by the plaintiff was dismissed, as was his claim for the appointment of a receiver. The plaintiff's claim that the personal defendant pay the plaintiff's capital account, the plaintiff's claim regarding the partnership's estate and corporate files, and his claim against the corporate defendant were also dismissed.
- [18] I do not regard the refusal of a declaration for dissolution of the partnership as going against the plaintiff. That refusal was due to the timing of events in the litigation, and was unnecessary given the order for a winding up of the partnership, which favoured the plaintiff.
- [19] Nor am I persuaded that the "traditional" approach, as described by Alison R. Manzer in *A Practical Guide to Canadian Partnership Law* (Toronto: Thomson Reuters, 2017) (loose-leaf revision, 2018), whereby the costs of accounting and winding up procedures are charged to a partnership should be applied. The author herself commented at page 4-28.12 the traditional approach applies "[i]n the absence of special circumstances, such as misconduct or negligence, costs of an accounting among partners are payable out of the assets of the partnership".
- [20] The reason that the partnership had to be either wound up or dissolved was due to the misconduct of the personal defendant, and I find that the circumstances of this case would be an exception to the traditional approach to the costs of accounting and winding up procedures.
- [21] In my view, the refusal to appoint a receiver did not benefit either party, and in fact, in all likelihood saved each the expense that would have been associated with such an appointment.
- [22] The dismissal of the plaintiff's claim that the personal defendant pay the plaintiff's capital account is of little real benefit to the personal defendant, as the other payments that I have ordered him to make to the partnership, if made, should result in the plaintiff recovering his capital account from funds paid by the personal defendant.
- [23] I do not see the treatment of the partnership's estates and corporate files as benefiting either of the personal parties.
- [24] The dismissal of the plaintiff's claim against the corporate defendant is a rather pyrrhic victory for the personal defendant as the corporate defendant had no apparent means to make payments to the plaintiff and its joint representation by the personal defendant created no additional effort on his part, nor any additional effort on the plaintiff's part. I order that there be no costs with respect to the proceedings against the corporate defendant.

- [25] The personal defendant described as neutral the outcome of the plaintiff's claim for use of the partnership's assets, my reference to the Registrar, the claim for directions of the winding up of the partnership, the consideration of the defendant's payment of accounting charges, and a determination of the use of the partnership funds by each of the personal parties.
- [26] I view the order respecting use of assets as an interim order that now accrues to the benefit of the plaintiff.
- [27] The reference to the Registrar was a necessary step in the litigation that was not as productive as I had hoped for, but ultimately benefitted the plaintiff.
- [28] The parties did obtain the direction of the court that the partnership be wound up pursuant to the Partnership Act, R.S.B.C. 1996, c. 348. That direction will be of benefit to both parties, but given that the plaintiff is in a positive position with respect to his capital account, and the personal defendant is in a negative position, this direction will be of benefit to the plaintiff.
- [29] I am not persuaded that the consideration of the defendant's payment of accounting charges or a determination of the use of the partnership funds by each of the personal parties are issues that generated any real burden on either side in this case, and see no reason to place any weight thereon with respect to costs.
- [30] I reject the claim of the personal defendant that the storage costs he incurred for the storage of the partnership files during the litigation warrants an order of costs in his favour, either in whole or in part.
- [31] In the result, I am satisfied that although he did not enjoy the recovery of all of the claims he advanced, the plaintiff did achieve substantial success in this case, entitling him to an order for his costs.

(d) Special Costs

- [32] While the plaintiff is correct in his assertion that special costs can be awarded for both compensatory and disciplinary reasons, it is my view that the personal defendant ought not to be twice penalized for the same conduct.
- [33] The plaintiff relies upon comments made respecting special costs at paras. 135 and 136 in my decision in *Stewart v. Stewart*, 2019 BCSC 985. Those comments were:

135 Special costs are reserved for cases where the conduct of a party is scandalous, outrageous or reprehensible in the course of litigation, and is deserving of punishment or rebuke: see *Nazmdeh v. Spraggs*, 2010 BCCA 131; and *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177.

136 In *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, Mr. Justice Lambert, speaking for the court, concluded:

... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized 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.

(see also *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 29).

[34] The plaintiff contends that the personal defendant's pre-litigation conduct, his taking secret profits amounting to fraud, breach of fiduciary duty, conversion of funds, groundless allegations respecting the plaintiff, non-disclosure of documents and information, breach of court orders, efforts to mislead the court, and conduct that prolonged the litigation are all factors that warrant an order for special costs.

[35] The finding that the personal defendant took secret profits was one made in previous litigation between the parties by Mr. Justice Grist. I do not consider that it is a factor that should affect any award of costs in the proceedings that were heard by me.

[36] Similarly, the matters between the parties that were considered by Mr. Justice Halfyard should not be revisited with respect to costs in the case heard by me.

[37] In my directions to the Registrar, and in my own assessment of the accounts that the personal defendant did, or ought to have rendered and collected, I addressed his non-disclosure of documents and information.

[38] The plaintiff referred me to paragraphs 170-171 in the decision of Mr. Justice Edwards in *Golden Capital Sec. Ltd. v. Holmes et al*, 2003 BCSC 1265:

170 There is no definitive statement of law to date regarding the relationship of awards of punitive damages and special costs in terms of the same pre-litigation and litigation process conduct of a defendant. This has led the authors of *McLachlin and Taylor, British Columbia Practice*, Vol. 2, 2nd ed., looseleaf at 57 - 81.3, to state:

It is not clear whether conduct giving rise to the cause of action can be punished by both punitive damages and by special costs, in the absence of continuing misconduct during the course of the litigation.

171 The converse of this statement is obvious: where the misconduct continues during the course of litigation, the conduct giving rise to the cause of action can be punished by both punitive damages and by special costs. Thus, special costs can be ordered in addition to punitive damages where reprehensible pre-litigation conduct is combined with reprehensible conduct during the litigation process. See *International Forest Products Ltd. v. Higgs*, [1997] B.C.J. No. 745 para. 12 (S.C.).

[39] In the same decision, Edwards J. discussed what he described as "the double penalty" where both punitive damages and special costs are sought. At paras. 172-176 he wrote:

172 In *Shipp v. Tremblay*, [1998] B.C.J. No. 2088 (S.C.), Macaulay J. considered the relationship between an award of punitive damages and an order for special costs and stated at para. 2:

Where, as here, the conduct justified punitive damages, care must be taken to avoid the appearance of double punishment for the same behaviour.

173 In order to deal with the issue of "double penalty", Meiklem J. in *Verleg v. Angeloni*, [1993] B.C.J. No. 1762] at para. 13 decided:

The case at bar did of course involve fraud and would fall within the exceptions to the general rule set out in *Nygard* so that even without the finding of misbehaviour in the conduct of litigation, special costs would be justified. In that event however, to avoid double penalty for the same misconduct, there should be an award of special costs less the amount ordered for punitive damages, thus avoiding an unfair penalty to the defendant.

174 However, in *J & P Gourmet House Ltd. v. Li*, [1993] B.C.J. No. 2459 (C.A.), Hollinrake J.A., when faced with Meiklem J.'s solution to the issue of "double penalty", wrote at para. 6:

With respect to the appellants' position that the punitive damages should be deducted from the increased costs, we were referred to [Verleg], a decision of Mr. Justice Meiklem. In my opinion, that case is distinguishable on the facts before us. As I read the reasons for judgment of Mr. Justice Melnick in the case before us he awarded punitive damages on the basis of the conduct of the appellants with respect to the facts giving rise to the cause of action and the law suit itself.

175 Therefore, where there is reprehensible pre-litigation conduct and conduct during the lawsuit itself, the issue of "double penalty" is not a relevant consideration, thus there is no need to deduct punitive damages from special costs.

176 In this case there is both pre-litigation conduct in the form of conspiracy to commit fraud which I have already found deserving of rebuke by way of punitive damages and conduct of some of the conspirators in the course of the litigation which is deserving of rebuke by way of special costs.

[40] While solicitor and client costs were awarded to both plaintiff's in addition to awards for punitive damages in *Huff v. Price*, [1988] B.C.J. No. 64 (S.C.), rev'd on other grounds at 76 D.L.R. (4th) 138, and to the plaintiff in *Dixon v. British Columbia Transit*, [1995] B.C.J. No. 2465 [Dixon], the awards were made without any consideration of the authorities that were later discussed by Edwards J.

[41] In *Dixon*, Mr. Justice Hamilton followed the decision of Mr. Justice Cumming in *Fullerton et al v. Matsqui (District) et al* (1992), 74 B.C.L.R. (2d) 311 (C.A.) who expressed the rule with respect to special costs in these terms at page 318:

Special costs, or solicitor and client costs, are therefore awarded when a court seeks to disassociate itself from some misconduct.

[42] My award of significant punitive damages was made, as I described it in 2019 BCSC 944 at para. 185 "to address the conduct of the defendant during and following the termination of the partnership", including the defendant's breach of fiduciary duty, conversion of funds, and breach of court orders.

[43] In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, Mr. Justice Goepel, writing for the court held at para. 134 that:

Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate. There are other suitable mechanisms to censure pre-litigation conduct.

[44] I am of the view that the conduct of the parties during the litigation does not entitle either to special costs, and that an award of special costs, in addition to the award to the plaintiff for punitive damages, would penalize the personal defendant twice for his pre-litigation conduct.

[45] I am not persuaded that either of the personal parties cloaked themselves in glory in the case before me, and each engaged in conduct that prolonged the litigation. While the personal defendant made unwarranted allegations against the plaintiff, in my reasons indexed at 2019 BCSC 944, I found, among other concerns, that the plaintiff attempted to relitigate matters previously judicially determined.

[46] In the result, I decline to order special costs to the plaintiff.

(e) Scale of Costs

[47] Section 2(5) of Appendix B of the Rules states:

If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

[48] To support his claim for costs on other than the ordinary scale, the plaintiff relies upon the factors listed by Mr. Justice R. D. Wilson in *Mort v. Saanich School District No. 63* (Saanich), 2001 BCSC 1473 at para. 6:

- (a) The length of the trial;
- (b) the complexity of the issues involved;
- (c) the number and complexity of 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 Experts' Reports; and
 - (g) the extent of the effort required in the collection and proof of facts.
- [49] While both the hearing conducted by the Master, and the latest hearing before me were protracted, the fault for that cannot be entirely visited upon the personal defendant. I decline to order costs at Scale C.

Payment of Costs

- [50] The plaintiff sought an order that he be paid out of partnership funds that are currently held in trust by him. In my reasons indexed at 2015 BCSC 1886, I found at para. 44 that the priority of payment from the funds and assets of the partnership should be paid in accordance with the Partnership Act. Only once those entitled to payment under the Partnership Act have been paid, should the partnership funds be used to pay the plaintiff's costs in this action in priority to any other payments due or owing to either the plaintiff or the defendant, based on the plaintiff's partnership interest, pursuant to para. 44(d) of those reasons.

Conclusion

- [51] In summary, I order the following:
- a) the order sought by the plaintiff for special costs is dismissed;
 - b) the personal defendant is ordered to pay the plaintiff's costs at Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009, from the conclusion of the reconsideration hearing through to and including the filing of my supplementary reasons for judgment indexed at 2016 BCSC 137, and dated January 29, 2016; and,
 - c) all costs awards made to the plaintiff be paid out of partnership funds currently held in trust by the plaintiff.

"The Honourable Chief Justice Hinkson"

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