

CANADA / JUDGMENT

Mee Hoi Bros. Company Ltd. v. Borving

2020 BCSC 2000

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2000 Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.,

2020 BCSC 2000

Date: 20201216

Docket: S130655

Registry: Vancouver

Between:

Mee Hoi Bros. Company Ltd., Ernest & Twins Developments Inc.,

Ernest Tse Guy Wong, Fiona Wong An-Nee, Jeffes Holdings Inc.,

Fiona Wong An-Nee, Executor of the Will of Joseph Chit-Ming Wong, Deceased, That's Life
Gourmet Ltd. and Thames Realty Corporation

Plaintiffs

And

Borving Investments (Canada) Ltd., Alison Wong Lee Fung Ying, in her capacity as the joint and several trustee in bankruptcy of the estate of Eric Tze Cheong Wong, a bankrupt, Freda Wong, Ying Ming Wong, also known as Michael Wong, Simson Wong, Alison Wong Lee Fung Ying, in her capacity as the joint and several trustee in bankruptcy of the estate of Spencer Tze Tim Wong, a bankrupt, and Ying Ming Wong, also known as Michael Wong, as the trustee for and on behalf of Freda Wong and Simson Wong

Defendants

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Plaintiffs:

R.R.E. DeFilippi

Counsel for the Defendants:

T. Keast, Q.C.

Place and Dates of Trial:

Vancouver, B.C.

November 4-8, 2019

September 28-30, 2020

October 2, 26-27, 2020

November 18-19, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2020

Introduction

- [1] These reasons concern the appropriate course to follow for the determination of the parties' disputes, specifically, whether the parties' competing claims for special costs should be determined before the quantum of a judgment granted in favour of the plaintiff, Fiona Wong, against the defendant, Michael Wong, on February 24, 2016 is determined. Judgment was granted to Fiona Wong for legal expenses pursuant to a settlement agreement made between the parties effective September 12, 2012 ("Settlement Agreement"). In this litigation the parties refer to those expenses as "Contract Costs", and I will do so as well.

Background

- [2] The history of the complex and protracted dispute between the parties is described in detail in my prior reasons for judgment, in particular, those indexed at 2010 BCSC 1824 ("2010 Reasons"), 2017 BCSC 1910 ("2017 Reasons"), 2019 BCSC 542 ("2019 Reasons"), and 2020 BCSC 1999 ("2020 Reasons").
- [3] The parties' current disputes concern the following issues.
- [4] The first issue concerns the appropriate procedure to determine the quantum of the judgment granted to Fiona Wong.

- [5] Determining quantum of the judgment involves the nexus requirement found in clause 14.1 of the Settlement Agreement, i.e., Fiona Wong must establish that the Contract Costs were "incurred as a result of" Michael Wong's breach. The question of whether the Contract Costs were incurred honestly and in good faith will also be considered since it is a term the parties agree is implied to clause 14.1 as a matter of law. In that respect, the merits of Michael Wong's defence that the plaintiffs engaged in bullying and intimidation tactics throughout the litigation, and hence did not incur Contract Costs honestly and in good faith, will be determined.
- [6] The second issue arises from Fiona Wong's claims that she is entitled to Contract Costs for all legal expenses incurred in this litigation, except for those incurred to defend against Michael Wong's counterclaim ("Counterclaim") that was dismissed by Mr. Justice Davies on March 13, 2015. If Fiona Wong is not entitled to recover all of those expenses as Contract Costs, then a further question for determination is whether she is entitled to special costs (as she asserts she is) or ordinary (party-party) costs against Michael Wong pursuant to the Supreme Court Civil Rules [Rules] in respect of any "gaps".
- [7] The third issue concerns the determination of the merits of the plaintiffs' claim for special costs (as opposed to ordinary Rules costs) to defend against the Counterclaim.
- [8] The fourth issue concerns the merits of Michael Wong's claim for special costs against the plaintiffs.
- [9] The fifth issue is to determine the quantum of the judgment for ordinary Rules costs I granted in favour of the defendant, Freda Wong, against the plaintiffs in the 2017 Reasons. The parties have not addressed when the quantum of that award should be determined and these reasons do not address that issue.
- [10] The parties have raised numerous legal and factual issues in respect of their disputes throughout this litigation, including the actual amount that Fiona Wong is entitled to recover on her judgment for Contract Costs.
- [11] I ordered the determination of the parties' disputes to be tried in two different phases. In (oral) reasons for judgment (unreported), issued on October 31, 2016, I set out the issues for determination at the first phase of the trial and described potential issues to be determined thereafter.
- [12] In the 2017 Reasons, I further explained that my reason for dividing the trial into phases was based in part on considerations of proportionality:

- [61] The parties have raised numerous legal and factual issues pertaining to their costs dispute. Following the hearing of an interlocutory application on October 31, 2016, I ordered ("October 31 Order") the trial of the parties' remaining disputes to be tried in two different phases, with what were mainly legal issues surrounding the scope and quantum of Fiona's Judgment, her alternative claim for Rules Costs, and the claim for Rules Costs advanced by Freda and Simson to be determined first. My oral reasons are unreported.
- [62] I made that order partly based on considerations of proportionality since the determination of certain legal issues would bear on the nature of any determination of the parties' costs dispute.
- [63] For example, in respect of Fiona's Judgment, if I were to determine that Fiona did not actually incur any contract costs, and that in making an election to pursue them, Fiona waived her right to seek Rules Costs, there would be no need for a lengthy hearing inquiring into the quantum of legal fees recoverable by Fiona as contract costs (and no need for Fiona and the plaintiffs' law firm to produce privileged documents). There would also be no need to conduct an assessment to determine Fiona's alternative claim for Rules Costs. All of her claims would be at an end.
- [64] Another example of proportionality concerns the plaintiffs' assertion that Michael's claim for special costs has been foreclosed as a result of Fiona's Judgment. If that defence to Michael's claim for special costs prevails, then there would be no need to conduct an enquiry into the merits and to assess the potential quantum of his claim.
- [13] In the 2017 Reasons, I ordered the parties to attend at a case conference to provide submissions concerning the specific issues to be determined in the second phase of the trial ("Phase Two"), which they ultimately did. On April 5, 2019, and consequent on the 2019 Reasons I issued the same day, I ordered ("April 5 Order") the issues for determination in Phase Two were whether:
- (a) Fiona Wong is entitled to special costs against Michael Wong in respect of any steps taken in the action for which she is not entitled to recover Contract Costs;
 - (b) Fiona Wong is entitled to special (as opposed to ordinary Rules) costs to defend the Counterclaim; and
 - (c) Michael Wong is entitled to an award of special costs against any one or more of the plaintiffs in respect of any steps taken during the course of the action.
- [14] The April 5 Order was also based on considerations of proportionality: 2019 Reasons at paras. 30-34. The parties agree that although the order was entered, it was a mid-trial order and capable of variation such that I am not functus officio.
- [15] Phase Two of the trial commenced on November 4, 2019, but was adjourned before it completed when the plaintiffs advised of their intention to apply for reconsideration of the 2017 Reasons.

- [16] Following the adjournment of Phase Two of the trial, I became aware of decisions from the Court of Appeal which raised the possibility that would be an error to proceed to determine the competing claims for special costs at Phase Two per the April 5 Order: *Loft v. Nat*, 2014 BCCA 108; *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346, *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26; *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020).
- [17] Those cases were not cited to me during the hearing that led to the April 5 Order and the 2019 Reasons. I made counsel aware of the cases and sought submissions from them concerning the procedure to follow. They provided written and oral submissions concerning the appropriate procedure to following during the hearing of the plaintiffs' reconsideration application.
- [18] The reconsideration application was argued in October 2020.
- [19] The parties continue to make accusations against each other of ongoing reprehensible conduct in the litigation (levelled as recently as during the hearing of the reconsideration application).

Reconsideration of the 2019 Reasons

- [20] The legal principles and authorities concerning reconsideration of reasons for judgment and orders are described in paras. 12-13 of the 2020 Reasons.
- [21] Reconsideration may be exercised, inter alia, on the judge's own reconsideration of the record where it is clear the law has been misapplied or where there is a change in circumstances or the law since the judgment was issued, such that it is probable that a miscarriage of justice would occur if reopening were not permitted and reopening will probably change the result.
- [22] Upon reviewing the above-noted decisions of the Court of Appeal, I became satisfied that my determination in the 2019 Reasons to consider the claims for special costs at this juncture must be reconsidered in order to avoid a misapplication of the law and be contrary to the interests of justice.

Analysis

- [23] I will begin with a summary of the principles discussed in the cases noted in para. 16.
- [24] A successful plaintiff, such as Fiona Wong, who establishes liability against another and obtains a remedy is entitled to ordinary Rules costs for the whole of the action, even where the plaintiff did not recover the quantum it sought. Likewise, a defendant who obtains a dismissal of a plaintiff's case is entitled to ordinary costs. Substantive success is typically not issue- or matter-dependent where the case does not involve multiple causes of action. There may be instances, however, where a different result is ordered, such as where the successful party is found to have taken an inordinate amount of time in respect of an

issue(s) or engaged in reprehensible conduct so as to deny it an award of costs: Loft at paras. 46-47; Sze Hang at para. 90; Rule 14-1(1), (9); Loft at paras. 46-49; Sze Hang at para. 90.

- [25] In Sze Hang, Mr. Justice Goepel points out that different considerations apply to determining substantial success where the litigation involves more than one cause of action:
- [91] Different considerations, however, arise when the litigation concerns multiple causes of action. In such cases, the more flexible "substantial success" test will usually be more appropriate. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [92] While the "substantial success" formula is particularly well suited to family cases when the court has to wrestle with several separate and distinct causes of action, the principles in *Fotheringham* may be applicable in any case in which there are multiple causes of action.
- [26] The case at bar, however, concerns a singular cause of action, i.e., for breach of contract. As a result, as the Court of Appeal reiterated in *Cottrill*, the successful party is presumptively entitled to ordinary Rules costs for the whole of the action:
- [18] Pursuant to R. 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. In cases involving a single cause of action the successful party is the plaintiff who establishes liability under that cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Loft v. Nat*, 2014 BCCA 108 at para. 46. The fact that Ms. Cottrill obtained a judgment in an amount less than sought, is not, by itself, a proper reason to deprive her of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 at para. 43.
- [19] In this case Ms. Cottrill sued for damages for breach of her employment contract. She succeeded in her claim and unless the court otherwise orders, she is entitled to the costs of the action notwithstanding that she recovered an amount less than that sought.
- [27] As such, having obtained judgment against Michael Wong and having the Counterclaim dismissed, Fiona Wong is presumptively entitled to ordinary Rules costs. However, she is not entitled to Rules costs for those matters where she is entitled to Contract Costs since that would result in double compensation.
- [28] The analysis changes in light of the parties' competing claims for special costs.

[29] Special costs are punitive in nature and are awarded for reprehensible conduct as manifested in the litigation. The award is not premised upon sentiment (such as antipathy) or intention that is not manifested in conduct. The test for special costs is articulated in the oft-cited case of *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242, 119 D.L.R. (4th) 740 (C.A.) at para. 17 where Mr. Justice Lambert, speaking for the majority, said following his detailed review of the authorities:

[It] is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[Emphasis added]

[30] Those remarks were cited by the Court of Appeal with approval in its more recent decision of *Gichuru v. Smith*, 2014 BCCA 414 at para. 78.

[31] Determining entitlement to an award of special costs engages an analysis of the nature of the impugned conduct in the litigation and its effect on the case.

[32] Thus, Fiona Wong's entitlement to pursue recovery of Contract Costs and those of all of the plaintiffs to defend against the Counterclaim to an award of special costs award must be established from the conduct of Michael Wong in the litigation. The same applies to Michael Wong's entitlement to an award against the plaintiffs; it is established from the plaintiffs' conduct in the litigation. Any evidence of their intention towards each other (e.g., which may be contained in privileged communications disclosed during the hearing to determine the quantum of Fiona Wong's judgment for Contract Costs or, if Michael Wong succeeds in obtaining an award for special costs, the assessment of those costs) that is not manifest in conduct in the action is irrelevant to the analysis.

[33] Where an award of special costs is made, it is for the whole of the action, unless the court orders otherwise: *Sze Hang* at para. 81.

[34] In *Sze Hang*, Goepel J.A. said at paras. 81, 83:

[81] I turn first to the award for special costs for 10 days of the trial. Special costs are typically awarded when there has been some form of reprehensible conduct by a party which the court determines should be subject to rebuke: *Young v. Young*, [1993] 4 S.C.R. 3 at 134. While special costs are usually awarded for the whole of a proceeding, it is open to a judge to make a partial award of special costs if he or she is of the view that it would be disproportionate to award special costs for the entire proceeding: *Gichuru v. Smith*, 2014 BCCA 414 at para. 91.

[83] I would note that there are numerous cases which have awarded special costs for a number of days of trial. For precision and clarity, I think that such awards would be better expressed by awarding a percentage of trial costs as special costs. For example, in this case, 10 days represented 38.5% of the total trial. I would amend the costs order and direct that the plaintiff recover 38.5% of its special costs of trial.

[Emphasis added]

[35] However, there is no general rule that the party awarded special costs is also entitled to special costs for the assessment. The holding in *Hornby Apartment* (paras. 137-141) is that where the order is silent, the default is to special costs for the assessment as well.

[36] Assessing the plaintiffs' entitlement to an award for special costs arising from Michael Wong's pursuit of his dismissed Counterclaim should be determined at the same time as the other competing claims for special costs since the costs of defending the Counterclaim may be viewed holistically. In *Sze Hang*, Goepel J.A. said that it may not be appropriate in every case to apply the general rule that the costs of a counterclaim should be treated separately from the main action:

[96] In this action, the claim and counterclaim were mirror images of each other. They were completely intertwined. Although in many cases, it may be appropriate to determine the costs of a counterclaim separately from the main action (*Litt v. Gill*, 2016 BCCA 288), this is not one of those cases. While the Strata Corporation obtained judgments for a breach of the signage bylaw and the costs of the clean-up, it was ordered to repay \$55,284 to the Owners for the wrongful fines imposed in breach of the open for business bylaw. In the circumstances, with respect, I am of the view that neither party can be said to have been substantially successful. Given that result, the trial judge should have ordered that each side pay their own costs, other than the special costs for 10 days of trial. I would so order.

[37] Those comments are particularly apt in the case at bar since part of Fiona Wong's claim concerning Michael Wong's alleged reprehensible conduct includes his continued pursuit of a meritless Counterclaim.

[38] There are various possibilities if either or both Fiona Wong or Michael Wong (or both) establish their claims of reprehensible conduct. These examples immediately come to mind:

- (a) In spite of Fiona Wong's presumptive entitlement to ordinary Rules costs against Michael Wong resulting from her success in obtaining judgment against him for Contract Costs, she could be denied some or all of an award of ordinary Rules costs if she engaged in reprehensible conduct: see, e.g., *Loft* at para. 49.
- (b) An award of special costs could be limited in respect of discrete conduct and may or may not include the assessment of any special costs award.
- (c) If Fiona Wong and Michael Wong both establish the other engaged in reprehensible conduct, their awards could be offset against each other: see, e.g., Rule 14-1(17).

- (d) Or, if Fiona Wong and Michael Wong each establish their claims of reprehensible conduct, one or the other, or both, could be mulcted in costs: see, e.g., Loft at paras. 49-50; Sze Hang at paras. 81-83, 97.

Determination

- [39] I have concluded that it would be an error to proceed to consider the competing claims for special costs at this juncture, or for that matter, entitlements to ordinary Rules costs, prior to the determination of the quantum of Fiona Wong's judgment for Contract Costs, for the following reasons.
- [40] First, the appropriate time to consider whether an award(s) for special costs should be made – and if it is, whether it should be for the whole of the action or for discrete conduct in the litigation – is at the end of the case, when all other issues, including Michael Wong's bullying and intimidation defence, have been determined. His defence raises for consideration the implied term to clause 14.1 of the Settlement Agreement, i.e., the requirement that Contract Costs must be incurred honestly and in good faith, which in turn, could impact upon the merits of the parties' competing claims for special costs.
- [41] Second, based on their conduct to date, I find it likely that the parties will continue to accuse each other of ongoing reprehensible conduct in respect of new matters, through to the conclusion of the determination of the quantum of Fiona Wong's judgment for Contract Costs, which negates any consideration of proportionality at this juncture. There is no economy to the parties or the Court in considering successive claims for special costs at different times as the case progresses to conclusion.
- [42] Third, the April 5 Order speaks of, in part, determining claims for special costs concerning "steps taken in the whole of the action". In light of the approach to assessing costs in the authorities cited above, this would include conduct in relation to the determination of the quantum of Fiona Wong's judgment for Contract Costs.
- [43] Thus, the various possible outcomes to awards for special costs, including those discussed above, can only be determined at the end of the case, i.e., following the determination of the quantum of Fiona Wong's judgment for Contract Costs.
- [44] Accordingly, the April 5 Order should be varied to provide that determination of all claims for Rules costs, including the parties' competing claims for special costs, shall be determined following the determination of all remaining substantive issues in the case, including the determination of the quantum of Fiona Wong's judgment for Contract Costs.
- [45] As a consequence of the analysis in my 2020 Reasons concerning the interaction between Rule 18-1 of the Supreme Court Civil Rules and the LPA, I direct that determination of the quantum of Fiona Wong's judgment for Contract Costs proceed first.

[46] Counsel should arrange through Vancouver Trial Scheduling to appear in front of me to provide submissions concerning the manner and time frame in which that inquiry shall occur and any directions to be given to the registrar.

"Walker J."

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