

CANADA / JUDGMENT

Moon Development Corporation v. Pirooz

2016 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

19 January 2016

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2016 BCCA 22 Moon Development Corporation v. Pirooz

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Moon Development Corporation v. Pirooz,

2016 BCCA 22

Date: 20160119

Docket: CA39181

Between:

Moon Development Corporation,

a division of Moon Construction Building Services

c/o Patrick Alan Moon carrying on business as

Moon Development Corporation

Appellant

(Defendant)

And

Robert Parviz Pirooz and Paolo Trasolini

c/o Trasolini Chetner Construction and Development

Respondents

(Defendants)

Before:

Registrar T.R. Outerbridge

Assessment of Special Costs (Moon Development Corporation v. Pirooz,
2015 BCCA 213)

Appellant appearing In Person:

Patrick Allan Moon

Counsel for the Respondent:

D.R. North

Place and Date of Hearing:

Vancouver, British Columbia

December 17, 2015

Place and Date of Judgment:

Vancouver, British Columbia

January 19, 2016

Summary:

Registrar's assessment of special costs. This appeal was made more complex and took more time than usual, primarily due to the appellant's conduct in pursuing the appeal. Held: Special costs assessed at \$45,445.95.

Reasons for Decision of Registrar Outerbridge:

I. Background

- [1] At the heart of this matter lies a rather ordinary breach of contract claim in 2008. On the conclusion of the 18-day Supreme Court trial concerning this claim, the appellant's action was dismissed on 15 June 2011. The within appeal was filed on 13 July 2011. It then took about 39 months to get to a hearing on 30 October 2014, an unusual length of time.
- [2] About two months after the appeal was filed, on 6 September 2011, Mr. Moon brought the first of several chambers applications. The application included, amongst other grounds of relief, a request to limit the contents of transcripts, a request for the respondents to produce documents, an application to produce new evidence, and requests to extend the time to file the appellant's factum, appeal book, and authorities. This application was adjourned, as it became clear that the respondents may not have been properly served.

- [3] The application was reset before Madam Justice Kirkpatrick on 22 September 2011. The Court refused to limit the contents of the transcript and set 1 December 2011 as the deadline for the appellant to file his appeal record, factum, authorities, and transcripts. The appellant's appeal book and appeal record were filed within that time, along with a 12-volume transcript.
- [4] On 16 December 2011, the appellant brought an application seeking to extend time to file his factum before Madam Justice Saunders. The respondents' security for costs application was also heard and adjourned. The appellant was granted until 13 January 2012 to file a factum.
- [5] On 24 April 2012, another application was brought to extend time to file the appellant's factum. Madam Justice Kirkpatrick granted the appellant an extension to that day and the appellant's factum was immediately filed. The respondents' factum followed a month later on 24 May 2012. The Court ordered the appellant to file any application for fresh evidence returnable before the division sat to hear the appeal.
- [6] No further steps were taken for some time thereafter. As a consequence, the appeal fell onto the Court's inactive list in mid-July 2012, as no certificate of readiness was filed within one year of the appeal being commenced.
- [7] The appellant brought an application to remove the appeal from the inactive list on 30 July 2012 before Madam Justice Prowse. At this point, it became clear that the parties were waiting for the trial Court's decision as to whether the respondents would succeed in obtaining an award of costs against Mr. Moon personally.
- [8] Madam Justice Prowse adjourned the application for security for costs and to reinstate the appeal from the inactive list pending the outcome of the costs decision. She instructed the parties to prepare one order that included both the trial decision and the special costs decision in the hope that appeals from both orders could be heard together. This was not to be. Instead, a separate order was entered on 13 November 2012 in the Supreme Court granting special costs against Mr. Moon. An entirely separate appeal was taken from that order and eventually dismissed in chambers on 3 July 2014.
- [9] Due to inactivity, the within appeal was then dismissed as abandoned on 10 January 2013.
- [10] An application was brought by the appellant on 15 November 2013 before Mr. Justice Donald to reinstate the appeal. The respondents were served with the application material that morning and could not properly prepare. At that application, the Court and the respondents had great difficulty discerning the argument the appellant wished to make in support of his application to reinstate the appeal. The application was adjourned to 6 December 2013 and later reset to 19 December 2013.

- [11] The application to reinstate the appeal was finally heard before Madam Justice Bennett on 19 December 2013 and was reserved. In reasons indexed at 2014 BCCA 64 (Chambers) released on 17 February 2014, Madam Justice Bennett reinstated the appeal and dismissed two applications for stays of proceedings brought contemporaneously by the appellant.
- [12] On 10 June 2014, an application was brought by the appellant requesting the production of further evidence, production of documents and permission to file an amended factum and notice of appeal. These applications were dismissed, except for the application to file an amended factum and amended notice of appeal, which was adjourned. A certificate of readiness was filed on 14 July 2014.
- [13] The appeal was heard on 30 October 2014 and dismissed that day. Following supplemental submissions made February 27 and March 20 and 27, 2015, the within award of special costs was made on 13 May 2015, which awards these costs personally against Mr. Moon, as principal of the appellate corporation and person who conducted the appeal.

II. Legal Principles

- [14] Rule 61(2) of the Court of Appeal Rules governs costs assessed as special costs. The rule states the registrar must allow "those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate." In exercising that discretion, a non-exhaustive list of circumstances in Rule 61(2) are considered:
- a) the complexity of the proceeding and the difficulty or novelty of the issues involved,
 - b) the skill, specialized knowledge and responsibility required of the solicitor,
 - c) the amount involved in the proceeding,
 - d) the time reasonably expended in conducting the proceeding,
 - e) any party's conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding,
 - f) the importance of the proceeding to the party whose bill is being assessed and of the result obtained, and
 - g) the benefit, to the party whose bill is being assessed, of the services rendered by the solicitor.
- [15] There are other principles that guide an assessment of special costs, which I canvassed in *McKnight v. Hutchison*, 2014 BCCA 472 (Registrar) at para. 20. I apply those principles to this assessment.

A. Complexity of Proceeding, Difficulty, or Novelty

- [16] This appeal was made more difficult and complex than necessary. One of the main reasons for this was the large amount of time spent by the respondents and the Court dissecting the appellant's arguments, which were often lengthy, intricate, and difficult to understand.
- [17] As Madam Justice Prowse observed on 30 July 2012, this appeal was densely packed with potential grounds of appeal that were in need of refinement along with a fairly substantial body of evidence. With the exception of the well-prepared submissions for this assessment, it does not appear that any such refinement was undertaken by the appellant.
- [18] At the hearing of the appeal, Mr. Justice Frankel described the appellant's factum and application to adduce fresh evidence as "incoherent and incomprehensible" (2014 BCCA 426 at para. 8). One purpose of a factum is to give the opposing party notice of legal arguments and evidence that will be relied upon at the hearing of the appeal. There is a saving of time and expense for the respondents, allowing a more focused reply rather than speculative preparation for every potential argument.
- [19] In this appeal, the filing of the factum, and indeed, many court documents by the appellant, provided the respondents with little of this advantage. Having reviewed the record, I accept the respondents' position that the appellant would often serve documents which simultaneously made arguments, sought orders, and proffered evidence. Not infrequently, items would be crossed-out and initialed with handwritten addendums. The chronology of proceedings in part one of these reasons intentionally omits other unfiled material with which the respondents had to contend.
- [20] While it is understandably difficult for a self-represented party to refine and focus legal arguments, there is a significant cost to employing an approach that requires an opposing party to absorb filings seeking multiple grounds of relief, pointing haphazardly to large bodies of evidence, and intermingling unproven facts with other evidence and argument. In many cases, the respondents necessarily had to engage in an expensive effort to address the many possible directions such filings could be taken in hearings and submissions.

B. Skill, Specialized Knowledge and Responsibility

- [21] The lead counsel on this appeal was Mr. Dean Davison, who was called to the bar in British Columbia in 2005. His associate, Ms. Dale North was called to the bar in British Columbia in 2010. They both practice in the areas of corporate and commercial law.
- [22] Mr. Davison's average hourly rate during the course of this appeal was just over \$250, whereas Ms. North's was less. I am satisfied that these rates were average to below average for solicitors of equivalent experience and appropriate given the issues in this appeal.

- [23] As outlined by this Court in its reasons indexed at 2014 BCCA 426, this appeal was complicated by allegations against the respondents of fraud and perjury. This layer of complexity required additional skill and responsibility to defend.

C. Amount Involved

- [24] In the Court below, the appellant was ordered to pay \$1,000.00 in damages arising from the breach of contract. This award pales in comparison to the \$87,349.62 in special costs awarded in the Supreme Court against Mr. Moon, but that matter was not addressed by this Court on appeal.

D. Time Reasonably Expended

- [25] I accept the respondents' submission that issues presented in this appeal required more time to review and respond to than an average appeal. In making this finding, I am cognizant that there was a period of time where the parties were awaiting the entry of the Supreme Court costs order and may have been unsure whether those appeals would be joined. Some delay was necessarily incurred which was not the fault of either party.
- [26] Time records show that Mr. Davison billed 56.1 hours and Ms. North billed 42.2 hours during the conduct of this appeal. There was also a small amount of time expended by another junior lawyer, Mr. Carl May, at a much lower hourly rate of about \$130. Legal assistants recorded 64.6 hours. The legal assistants were involved in a number of tasks from the drafting of affidavits to the conduct of basic legal research. I comment further on these charges below.

E. Conduct of the Parties

- [27] The appellant's conduct in increasing the complexity of the appeal lengthened the proceeding unnecessarily. As observed above, there was a period of time where neither party bore the responsibility for certain delays.

F. Importance of the Proceeding to the Respondent

- [28] I accept the argument of the respondents that this appeal was important to the respondents primarily because of the damage that was being done to their reputations as a result of the improper allegations of fraud and perjury. The need to thoroughly defend such allegations was of significant importance to the respondents and required them to vigorously pursue the complete dismissal of the appeal.

G. Benefit of Services Rendered to the Respondent

- [29] The respondents enjoyed complete success on the appeal, including obtaining an award of special costs.

III. The Respondents' Bills

- [30] The appellant makes several objections to the respondents' bills in this appeal. I deal with some of those remaining objections below.

A. Legal Assistants' Time

- [31] The appellant argues that there is duplication of effort on the bill between lawyers and legal assistants. He argues that work of a "secretarial nature" ought not to be recoverable on an assessment of special costs. In support of this proposition, he cites *S.R. v. A.R.*, 2004 BCSC 353 (Registrar), a decision that disallowed secretarial overtime as a recoverable disbursement.
- [32] Time that is purely secretarial in nature ought not to be included on a bill, as those charges are overhead. Such charges include "preparing bills, photocopying, filing, word processing, 'working on the file', and receiving instructions": *Wainwright Estate, Re*, 2011 BCSC 962 (Registrar) at para. 19.
- [33] This Court has deducted time that is purely secretarial in nature in the context of an assessment of special costs: see *Bronson v. Hewett*, 2014 BCCA 514 at paras. 46 - 47. Having reviewed the bills in this case, there are some purely secretarial entries, including the assembly and reorganization of documents, but most involve the delegation of legal work to a team of support staff billing out at a much lower hourly rate. This sort of delegation results in significant costs savings from tasks that might otherwise be done by lawyers. Where the time entries are appropriate, such delegation ought not to be discouraged. I make a nominal deduction of \$500 in costs and \$50 in disbursements in relation to these tasks, inclusive of tax.

B. Blending of Tasks

- [34] There were several entries on the bills relating to the special costs application in the Supreme Court, including for the preparation of garnishing orders and certain entries relating to the appeal. Entries that relate to the preparation, enforcement and execution on a Supreme Court order cannot be recovered as part of this assessment. They are, however, of a nominal amount and I would reduce the bill by \$500 in costs and \$100 in disbursements to account for these tasks, inclusive of tax.

C. Security for Costs Application Brought but not Argued

- [35] The respondent prepared, but did not eventually pursue, an application for security for costs. There may be circumstances where it is appropriate to make a deduction for an application that is prepared but not pursued: see e.g. *Hockhold v. Gerbrandt*, 2016 BCCA 5 (Registrar) at para. 52. In this appeal, however, it was entirely reasonable to prepare this application, given the costs to which the respondent was being put. Though no benefit was obtained because the application was not pursued, I am still of the view that these costs were proper or reasonably necessary and the disbursements were necessary and properly

incurred. I decline to make any deduction in this regard.

D. Goods and Services Tax (GST) on Fees and Disbursements

- [36] The appellant argues that the costs award in this assessment ought not to attract GST (or HST) because the respondents would be eligible for an input tax credit under the Excise Tax Act, R.S.C. 1985, c. E-15. The appellant argues the respondents would receive a form of "double recovery" given this tax benefit, having received a refund of the taxes originally paid on legal fees.
- [37] Although not strictly applicable to a special costs assessment, I am guided by the language in Rules 63(4) - (5) of the Court of Appeal Rules which provide that if a tax is payable by a party in respect of legal services or disbursements, the registrar must allow an additional percentage, calculated on the value assessed, equal to the percentage rate of tax payable. This logically follows the principle that an assessment of costs, at least in part, "depends upon their being an obligation on a part of the client to pay the solicitor": *Clark v. Nash*, [1990] B.C.J. No. 727 (C.A.); *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). I see no reason the principle should differ on an assessment of special costs.
- [38] The more important point, however, is that a party that receives a costs award may, in turn, receive any number of tax benefits, depending on how they structure their affairs. If a registrar were to entertain evidence and argument about tax benefits and liabilities on every assessment, it would complicate the assessment process, for example, by potentially requiring additional expert evidence and awards contingent on future tax filings. No such evidence was before me on this assessment. There was only a short statement in the respondents' submission that some tax benefit would accrue, depending on whether corporate or individual respondents remitted fees on certain, as yet, unpaid bills.
- [39] On this assessment, I would not reduce the amount claimed. Even if some benefit does accrue to the respondents, the fees and disbursements, inclusive of tax, are objectively proper in my view, subject to the deductions I have made.
- [40] In reaching my conclusion, I am aware that there are other cases that have made certain costs awards net of input tax credits: see e.g. *Perry v. Heywood* (1997), 159 Nfld. & P.E.I.R. 183 (T.D.); *H. (V.A.) v. Lynch*, 1998 ABQB 1020 at para. 73 - 76, rev'd on other grounds 2000 ABCA 97; *Sun Life Assurance Co. of Canada v. The Queen*, 2015 TCC 171 at para. 35. Others seem to have engaged the debate as to whether such credits are truly claimable, requiring expert opinion: see e.g. *Haggart v. Canada*, 2003 TCC 185, aff'd 2003 FCA 446.

E. Disbursements

- [41] The appellant raises a concern about the amount claimed for photocopying, couriers, and agency fees in this appeal. Subject to the deductions made above, these items are necessarily or properly incurred. I decline to adjust them further.

IV. Conclusion

- [42] Taking into account the analysis above and subject to the nominal deductions made, I am of the view that the fees incurred in this appeal were proper or reasonably necessary and that disbursements were necessary or properly incurred. I provide no further discount.
- [43] I allow the full amount of legal fees minus a deduction of \$1,000 for a total of \$33,763.12. I allow the full amount of disbursements minus a deduction of \$150 for a total of \$5,682.83. Total: \$39,445.95, inclusive of tax.
- [44] Following the assessment, the respondents submitted an additional bill covering the time incurred for the purposes of the assessment itself. The costs of the assessment are also recoverable as special costs: see *Ezer v. Yorkton Securities*, 2006 BCCA 548 (Registrar) at para. 60. Applying the factors under Rule 61(2), I am not convinced that the respondents ought to recover close to the full extent of their fees and disbursements, as in the assessment of the main appeal.
- [45] To Mr. Moon's credit, this is primarily because the assessment was conducted in a more efficient manner than the appeal itself, saving time and decreasing complexity. The respondents had, for the most part, clear notice of the issues to be argued. That said, the length of the underlying appeal proceeding and range of objections raised by the appellant did complicate it to a degree.
- [46] I fix the special costs for the purposes of the preparation and conduct of the assessment at \$5,000 and disbursements at \$1,000, both inclusive of tax. This brings the total amount of special costs in this appeal to \$45,445.95 and I will sign a certificate of costs in this amount.

"Registrar T.R. Outerbridge"

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