

CANADA / JUDGMENT

Novak v. Seemann

2024 BCSC 9

COURT

Supreme Court of British Columbia

DECIDED

3 January 2024

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2024 BCSC 9 Novak v. Seemann IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Novak v. Seemann, 2024 BCSC 9 Date: 20240103 Docket: S229861 Registry: Vancouver Between: Kevin Maximiljan Novak Plaintiff And Eric Seemann in his personal capacity, Erik Joseph Novak and Peter Christopher Novak, in their capacity as executors of the will of Rose Angela Novak, deceased Defendants Corrected Judgment: The text of the judgment was corrected at paragraph 21 on January 9, 2024. Before: Master Bilawich Reasons for Judgment - Non-Party Costs Counsel for the Applicants, Peter Christopher Novak and Erik Joseph Novak, in their capacity as administrators pending legal proceedings for the Estate of Rose Angela Novak, deceased: A. Girou M. Nakatsu Application Respondent, Trevor S. Dungate: T. Dungate Written Submissions re Costs: Mr. Dungate - October 30, 2023 Applicants - November 10, 2023 Mr. Dungate - November 17, 2023 Place and Date of Judgment: Vancouver, B.C. January 3, 2024

Introduction

- [1] These reasons address a claim for costs made by Mr. Dungate, a non-party, relating to his opposition to an application made by Erik and Peter Novak, in their capacity as administrators pending litigation of the estate of their mother Rose Angela Novak, deceased (the "Deceased"). The administrators applied for production of various files from the Deceased's former solicitor Mr. Dungate, including:
- a) Preparation and execution of the Deceased's will dated January 31, 2020 (the "Will");
 - b) Transfer of the Deceased's property at 9610 Old Cariboo Highway, Prince George, BC (the "OC Property") into a joint tenancy with the defendant Eric Seemann ("Mr. Seemann"); and
 - c) The Deceased's shares and interest in O.C.H. Investments Ltd. ("OCH Ltd.") and 563927 B.C. Ltd. ("563 BC").
- [2] The administrators also sought an order that Mr. Dungate pay their special costs of the application on a full indemnity basis.

- [3] On October 30, 2023, I issued reasons, indexed as *Novak v. Seemann*, 2023 BCSC 1784. I ordered that Mr. Dungate deliver to the administrators a certified copy of his estate planning file for the Deceased relating to the Will and Transfer of the OC Property into joint tenancy, but dismissed the portion of the application relating to OCH Ltd. and 563 BC.
- [4] Regarding costs, I dismissed the administrators' application for special costs from Mr. Dungate. I found that as the Deceased's solicitor, he had an ongoing duty to protect his former client's privileged information and a duty of confidentiality. I concluded that his responses to the file production requests and the positions he took in response to the administrators' application were generally consistent with the duties he owed to the Deceased.
- [5] Mr. Dungate seeks costs against the administrators. He relied on Master Elwood's (as he then was) approach to costs as set out in *Becker v. Hagehassan*, 2021 BCSC 1508 ["Becker"]. He summarily assessed a non-party solicitor's costs based on party and party costs at Scale B for two half-day applications plus units for giving discovery of documents. Mr. Dungate had not submitted a detailed costs claim, so I directed that the parties provide written submissions regarding the costs he is claiming as well as any new supporting affidavit material, on a schedule set out in my reasons. Mr. Dungate's Position
- [6] Mr. Dungate seeks to have his costs assessed summarily based on party and party costs at Scale B, as was done in *Becker*, and that this be payable forthwith in any event of the cause by the applicants, as opposed to this simply being an obligation of the Deceased's estate.
- [7] The administrators indicated in their original materials that the total value of the OCH Ltd. and 563 BC shares and the residue of the estate, if any, was currently unknown to them. Accordingly, it is not clear whether the estate can pay any costs award that may be made against it. Mr. Dungate notes that the administrators, who are also named as co-executors and co-trustees in the Will, have not yet applied for probate and may never do so.
- [8] Mr. Dungate submitted a Bill of Costs which includes the following claims: Item Description Units Claimed 1 Correspondence, conferences, instructions, investigations or negotiations until the commencement of the proceeding 5 2 Correspondence, conferences, instructions, investigations or negotiations after the commencement of the proceeding 15 3 Correspondence, conferences, instructions, investigations or negotiations after hearing 2 7 All process for which provision is not made elsewhere in this tariff for defending a proceeding 5 11 All process for giving discovery and inspection of documents (a) 1 to 999 documents 5 21 Preparation for an Application for each day of hearing (b) if opposed [Hearing of August 18, 2023] - full day 3 22 Application for each day (b) opposed [Hearing of August 18, 2023] - full day 5 23 Application by requisition [August 11, 2023] to appear by MS Teams 2.5 36 Written Argument - Costs 5 38 Attendance to speak to hearing list - speaking to the calling of the list on August 18, 2023 1 41 Process related to entry of certificate of costs where item 30 or 44 does not apply 1 TOTAL 49.5

[9] Amounts claimed include:

- a) 49.5 units x \$110 per unit + GST (\$272.25) + PST (\$381.15) totals \$6,098.40.
- b) Non-taxable disbursements, including \$40 filing fee for a certificate of costs, \$12 to view pleadings on Court Services Online (August 9, 2023) and three CSO filing fees at \$7 each. The total of the foregoing is \$73.
- c) Taxable disbursements, including a Courthouse Libraries of BC charge for a memorandum of law, "Who can compel the release of a will drafting lawyer's file in the case of a challenge to a will", MemoPoLSumm 13433 at \$295.75, photocopies at 975 x \$0.25 = \$243.75, express post / courier charges of \$35, telephone / long distance charges of \$7.65, faxes at 375 x \$0.35 = \$131.25, and GST of \$36.07, for a total of \$757.42.
- d) Total of a), b) and c) - \$6,928.82. Administrators' Position

[10] The administrators say Mr. Dungate's costs claim is exaggerated, unreasonable and untenable. They argue that he ought to receive no costs award.

- a) The administrators say that any award of costs should not be made against them personally. They are named in the application in their capacity as administrators of the Deceased's estate, pursuant to an order of Justice Iyer made February 27, 2023. They are also named as defendants in their capacity as co-executors of the Deceased's Will.
- b) The administrators brought this application in the former capacity and with the consent of other parties to the action, in order to help facilitate disclosure. They are not parties to the action in their personal capacities.
- c) Mr. Dungate has not defined in his submission who the "Applicants" are from whom he seeks costs. If he suggests a costs award ought to bind the administrators in their personal capacities, that would be a costs award made against non-parties, which they suggest has not been argued. If so, they request the opportunity to make full submissions on that issue.
- d) Mr. Dungate should not be awarded costs from the estate because the application and his appearance at same was unnecessary and contrary to clear jurisprudence that was within Mr. Dungate's knowledge. He obtained the memorandum of law for which he is claiming an out of pocket disbursement. It addresses the wills exception to solicitor-client privilege.
- e) There are also free resources available which address the wills exception to solicitor-client privilege. The applicable principles were set out in the administrators' application. There was adequate legal information available to Mr. Dungate from which he ought to have concluded that disclosure was appropriate.
- f) Becker is distinguishable from the present case and actually supports the administrators' argument that this application was only necessary due to Mr. Dungate's conduct.

[11] Alternatively, if any costs are payable to Mr. Dungate, they should be summarily assessed at no more than the amounts set out below, and should be payable in the ordinary course as a debt of the estate (i.e. in appropriate priority to any other secured and unsecured debts and prior to distribution of the residue of the estate). The costs the administrators say are appropriate include: Item Description Units Claimed 1 Correspondence, conferences, instructions, investigations or negotiations until the commencement of the proceeding 1 2 Correspondence, conferences, instructions, investigations or negotiations after the commencement of the proceeding 1 3 Correspondence, conferences, instructions, investigations or negotiations after hearing 1 7 All process for which provision is not made elsewhere in this tariff for defending a proceeding 0.5 11 All process for giving discovery and inspection of documents (a) 1 to 999 documents NA 21 Preparation for an Application for each day of hearing (b) if opposed [Hearing of August 18, 2023] - full day 1.5 22 Application for each day (b) opposed [Hearing of August 18, 2023] - full day 2.5 23 Application by requisition [August 11, 2023] to appear by MS Teams 0.5 36 Written Argument - Costs 0.5 38 Attendance to speak to hearing list - speaking to the calling of the list on August 18, 2023 NA 41 Process related to entry of certificate of costs where item 30 or 44 does not apply 1 TOTAL 9.5

[12] Amounts include:

- a) 9.5 units multiplied by \$110 per unit + GST (\$52.25) + PST (\$73.15) total \$1,170.40.
- b) Non-taxable disbursements as claimed, at \$73.
- c) All taxable disbursements are opposed.
- d) Total of a) and b) - \$1,243.40.

Analysis

- [13] In my previous reasons, I noted that Mr. Dungate's father had been the Deceased's long-time solicitor, acting for her in relation to corporate matters for OCH Ltd. and 563 BC. Mr. Dungate had acted for the Deceased in relation to the Will and Transfer. The background relating to the requests made for production of those files is set out in my previous reasons.
- [14] The administrators applied for production of presumptively privileged or confidential documents from a non-party. In *A.L. Sott Financial (Newton) Ltd. v. Bauman*, [1998] B.C.J. No. 950, 1998 CanLII 3853 (S.C.), Master Bolton found that an order may be made for the reasonable costs of non-parties under the general power of what was then Rule 1(12) of the Rules of Court [now Rule 13-1(19) of the Supreme Court Civil Rules, B.C. Reg 168/2009]. It is as follows: Orders on terms and conditions
- (19) When making an order under these Supreme Court Civil Rules, the court may impose terms and conditions and give directions it considers will further the object of these Supreme Court Civil Rules.

- [15] Master Bolton's rationale was summarized at para. 6: 6 It would be patently unjust to third parties dragged into the middle of other people's litigation to require them to identify, produce and copy a small forest worth of papers without being able to recover some of their costs. The courts have recognized this, as is evidenced by the numerous cases cited by counsel for the plaintiff where orders have been made for payment of "proper photocopying fees", "all costs of copying and delivery of the documents", and so on. The wisdom and propriety of such orders can hardly be questioned. In the absence of express authority for such orders in Rule 26 itself, the authority must come from Rule 1(12) cited above. That being so, proper directions are not limited to photocopying costs, but must encompass what is just in all the circumstances of a particular case.
- [16] He went on to suggest that in the majority of cases it would rarely be appropriate for the non-party to get legal advice where there were no issues of privilege or confidentiality likely to arise. Where a request for documentation is particularly extensive or sensitive, the non-party may properly claim for the cost to obtain appropriate legal advice. At para. 20: 20 But where a request for documentation is particularly extensive or sensitive, the third party may properly claim for appropriate legal advice. In my view, as soon as solicitors are consulted, and before doing any substantive work at all, they should advise the party requesting production that they have received instructions because of specified concerns of the client, and asking or making proposals as to how those concerns will be dealt with. At this stage, the parties requesting the documents can consider whether they wish to proceed, or to restrict the extent of the documents requested, or to abandon the chase altogether. Whatever they decide, they should advise the third parties' solicitors in some detail of their position - "We agree to pay a reasonable amount, to be taxed if necessary, for advice on confidentiality"; "None of these documents can possibly be confidential, and we will pay for [retrieval and] copying but apply under Rule 26(11) if you do not agree"; "We will restrict our request to such and such type of documents for the time being"; "Why will retrieval be so time-consuming?". Given that definition of the issues, the parties can then proceed as they are advised and, if necessary, the court will resolve the issue for them, at the usual cost.
- [17] Having determined that Mr. Dungate acted in a manner consistent with the duties he owed to the Deceased, it is appropriate to follow the normal approach of allowing Mr. Dungate his reasonable costs to appropriately respond to the application.
- [18] In this case, the documents requested qualify as "sensitive". As the Deceased's former solicitor, Mr. Dungate was obligated to assert privilege and protect the Deceased's confidentiality interests. The administrators' suggestion that Mr. Dungate ought to have acknowledged that the documents sought fell within the "wills exception" to privilege is not a full answer, as the documents they sought included classes which went well beyond estate planning relating to the Will and partial Transfer of the OC Property. They also sought production of numerous historical files relating OCH Ltd. and 563 BC, which I determined did not fall within the "wills exception" and disallowed.

- [19] The non-party in this case is a lawyer, so he was in a position to formulate his own legal advice, but reasonable compensation for him having to do so may be appropriate. This issue was addressed in the context of appropriate amounts of conduct money for a non-party lawyer to prepare to be examined, in *Northland Properties Ltd. v. Equitable Trust Co.* (1992) 71 B.C.L.R. (2d) 124. In the present case, the parties agree that if costs are awarded to Mr. Dungate, the appropriate approach to quantifying them is to follow Master Elwood's approach in *Becker* by summarily assessing party and party costs at Scale B, in Appendix B of the SCCR. I agree this approach is reasonable in the circumstances.
- [20] Mr. Dungate seeks an order that the costs awarded to him be payable by the administrators as opposed to the estate. The administrators have indicated (by implication) that they are not aware of the estate having liquid funds with which to pay a costs award at this time.
- [21] The administrators state in their submission that it is not clear from Mr. Dungate's submission whether he was seeking costs against them personally. With respect, I disagree. Mr. Dungate's intent is clear. The administrators were able to identify this issue in their responding submissions. They were in a position to address it and did address it to a significant degree. If they wished to make additional submissions on this aspect of the costs order sought, they could and should have done so. A litigant is obliged to bring all available arguments they wish to advance to the original hearing of an issue: *Sood v. Hans*, 2023 BCCA 138 at paras. 39-41.
- [22] The next issue is whether any costs order I am inclined to make should only be enforceable against the Deceased's estate only or also be enforceable against Peter and Erik Novak personally.
- [23] The administrators argue that in their personal capacities, they are non-parties to this action and say it would not be appropriate to order costs against non-parties. The administrators indicated in their application that they were seeking the documents because they are directly relevant to the Deceased's testamentary capacity, the presence or absence of undue influence, her vulnerability in relation to the Transfer and preparation and execution of the Will. The documents were being sought for the express purpose of advancing document discovery in this action, not to help the administrators with some aspect of their duty to administer the Deceased's estate while this litigation is pending. The application could easily have been made by the plaintiff or Mr. Seemann instead. By opting to apply, the administrators have voluntarily inserted themselves into the "fray" in this litigation.
- [24] In my previous reasons, I noted that Mr. Dungate had indirectly raised a concern about whether Peter and Erik Novak were neutral decision makers where their brother Kevin's action is concerned. As siblings, fellow residual beneficiaries named in the Will and intestate successors, they are in a similar position to Kevin, in terms of potentially benefitting if the Transfer or Will are successfully challenged. I also expressed my view that because the relief that the plaintiff seeks will have a direct impact on their personal interests as residual beneficiaries named in the Will, Peter and Erik Novak should have been named

as defendants in their personal capacities as well.

- [25] The administrators have opted to take an active role in the document production aspect of this litigation. They have done so in circumstances where they do not know whether or when the estate will have funds with which to cover costs obligations to a non-party they are creating which naturally arise from their application. It is also questionable whether this application appropriately falls within the scope of their duties as administrators pending litigation. In the circumstances, it is appropriate that Peter and Erik Novak be personally liable, jointly and severally with the Deceased's estate, for the resulting costs obligation to Mr. Dungate. As administrators, they are entitled to be reimbursed by the estate for any expenses they properly incur in the course of carrying out their duties. Presumably, they can seek reimbursement when funds become available to the estate.
- [26] I turn now to determination of the appropriate amount of costs due to Mr. Dungate.
- [27] Item 1, Mr. Dungate seeks 5 units for correspondence, conferences, instructions, investigations or negotiations by a party until the start of the proceeding. He lists a total of 14 communications, including phone messages, phone calls and letters. The administrators say 1 unit is sufficient. I do not agree that this item ought to apply to costs for a specific interlocutory application, as opposed to costs for an action or proceeding. I am not inclined to allow any units under this item.
- [28] Item 2, Mr. Dungate claims 15 units for correspondence, conferences, instructions, investigations or negotiations by a party after the commencement of the proceeding to the completion of trial or hearing. He lists 27 communications which include phone messages, telephone calls and letters. The administrators say 1 unit is sufficient. It is relatively rare for allowances to be made under item 2 where costs of an interlocutory application only are being assessed. An exception is where it is a stand-alone application. See *Jing v. Pan*, 2009 BCSC 140 and *Laxton v. Coglon*, 2009 BCSC 1544. In this case the application appears to qualify as a stand-alone application given it was brought by the administrators who argue they are non-parties, against Mr. Dungate who is also a non-party. There was a substantial volume of communications but many of these are repetitive. I allow 2 units for this item.
- [29] Item 3 - Mr. Dungate seeks 2 units for correspondence, conferences, instructions, investigations or negotiations by a party after the trial or hearing. The administrators say 1 unit is sufficient. I do not agree that this item ought to apply to costs for a specific interlocutory application, as opposed to post trial or post hearing costs for an action or proceeding. I am not inclined to allow any units under this item.
- [30] Item 7 - Mr. Dungate seeks 5 units for all process for which provision is not made elsewhere in the tariff for defending a proceeding. He includes in this drawing, filing and serving his application response and his written submissions regarding costs. The administrators say 0.5 units are appropriate, noting Mr. Dungate makes a separate claim for written submissions elsewhere. I do not agree that this item can be applied to steps relating exclusively to a specific interlocutory application, as opposed to preparing a response to

civil claim or petition response to defend an action or proceeding generally. Item 21 includes preparation for an application, and item 36 deals with written argument. I am not inclined to allow any units under this item.

- [31] Item 11 - Mr. Dungate claims 5 units for giving discovery of documents, under (a) 1-999 documents. The range of units available under this item is 1-10 units. He relies on the award of units allowed in Becker at para. 52. The administrators say that because the entire file has been ordered produced, no file review on Mr. Dungate's part should be necessary, or alternatively it should require minimal effort. A general difficulty I have with Mr. Dungate's claim under this item is that he did not tender evidence regarding the actual or anticipated volume of documents contained in the file(s) he was ordered to produce or how much time he spent collecting and producing them. Given the subject matter, I allow 3 units under this item.
- [32] Item 21 - Mr. Dungate claims 3 units for preparation for an application based on a full day hearing on August 18, 2023. This is based on the hearing being returnable at 9:45 am but not getting called until the afternoon. The administrators say the actual hearing only occupied about 1 hour and Mr. Dungate participated via MS Teams. He was in his office while awaiting the start of the hearing. They say 1.5 units for a half day hearing is appropriate. The actual hearing occupied just under 1 hour and 20 minutes. I agree the units awarded should be based on the length of the hearing, not on time spent waiting for a matter to be called. I allow 1.5 units.
- [33] Item 22 - Mr. Dungate claims 5 units for a full day hearing on August 18, 2023, for the same reasons set out in item 21 above. The administrators say 2.5 units for a half day hearing is appropriate, for the same reasons they gave under item 21. In this case the hearing occupied just under 1 hour and 20 minutes. I agree that the units awarded should be based on the length of the hearing, not on time spent waiting for a matter to be called. I allow 2.5 units.
- [34] Item 23 - Mr. Dungate claims 2.5 units for an application by requisition he filed on August 14, 2023 seeking a direction that he be allowed to attend the hearing of the application by MS Teams. His office is in Prince George. The administrators consented to this. Leave was granted. The range available under this item is 1-5 units. The administrators say a reduction to 0.5 unit is appropriate given their consent. This required minimal time and effort on Mr. Dungate's part. I allow 1 unit.
- [35] Item 36 - Mr. Dungate claims 5 units for written argument. The administrators say that 0.5 units is appropriate because (a) he is attempting to recover twice for his written argument and (b) his written argument is brief and largely repeats his oral submissions. Mr. Dungate tendered a 1 page initial argument with accompanying draft bill of costs and a reply argument of just over 3 pages. The only case authority he references is Becker. This appears to have involved relatively modest effort to produce. I allow 2 units.

- [36] Item 38 - Mr. Dungate claims 1 unit for attending to speak to a hearing list on August 18, 2023. The administrators say he is not entitled to any units under this item because it applies to situations where counsel is required to speak to a trial or hearing list at a registry operating on the assize system, citing *Silvicon Services Inc. v. Millar*, 2005 BCSC 1753 at para. 9. I agree this is not an appropriate tariff item in the present circumstances. No units are allowed.
- [37] Item 41 - Mr. Dungate claims 1 unit for process related to entry of a Certificate of Costs. The administrators agree this is appropriate. I allow 1 unit under this item.
- [38] Total units allowed are 13. Multiplied by \$110 per unit, this is \$1,430. Applicable GST (5%) is \$71.50. PST (7%) is \$100.10. Subtotal is \$1,601.60.
- [39] Mr. Dungate's claim for non-taxable disbursements totalling \$73 is not disputed. Those are allowed.
- [40] Mr. Dungate seeks the following taxable disbursements:
- a) Postage - \$7.95. Mr. Dungate did not provide a detailed explanation of this charge. Conflicting with this is his evidence that virtually all of his communications in this matter were almost exclusively by fax. I disallow this item.
 - b) Courthouse Libraries NC Memorandum of Law - \$295.75. Mr. Dungate says he used this to prepare his application response and to prepare for the hearing of the application. The administrators say this is unreasonable because the law relating to the wills exception is well known and available without charge from sources such as CanLII. He also had the benefit of the law as summarized in their application. In my view, this item should be treated similarly to a claim for the cost of computer-assisted research. A party seeking such costs must generally demonstrate why the use of a paid service was necessary. In this case, the research has been compiled and analyzed into a memorandum form prepared by another lawyer. Another way to view this would be as a form of contracting out of legal research needs as a time-saving measure. Mr. Dungate has not provided any explanation for why a paid memorandum was necessary in this case. I accept it was convenient, but that is not the test. I disallow this item.
 - c) Photocopies - 975 pages x \$0.25 = \$243.75. It is not clear what exactly the copies claimed relate to; the application versus copies of file materials that were ordered produced. He did not tender an affidavit in response to the application. He did tender a 406 page affidavit in support of his costs submissions, but it was e-filed and consists of 7 pages + voluminous exhibits which include a significant volume of materials that were previously filed. In the circumstances, I allow 400 pages x \$0.25 = \$100 for photocopies.

- d) Express Post / Courier - \$35.00. Mr. Dungate says this relates to his intended express-post delivery of file materials to the administrators. The administrators say this is unnecessary because electronic disclosure is appropriate. I note that electronic disclosure would presumably involve some amount of scanning of hard copy file contents, which would also generate a recoverable cost, so the savings are speculative. This is allowed as claimed.
- e) Telephone / Long Distance - \$7.65. Mr. Dungate does not specify what this charge relates to. His office is in Prince George, while counsel for all parties have offices in Vancouver. I will allow this item as claimed.
- f) Fax - 375 pages x \$0.35 = \$131.25. Mr. Dungate says his communications in his matter were almost exclusively by fax. The administrators say he insisted on fax communications and refused to correspond by electronic mail or telephone. Given the ease and convenience of electronic mail, I agree that insisting in fax communications was not a choice for which the administrators should be required to pay. While I appreciate a desire to insist on written communications in cases where counsel wishes to preserve a written record, that can also be accomplished by email. I disallow this item.
- g) Subtotal of allowed items: \$142.65
- h) GST (5%) on \$142.65: \$7.13
- i) Total - \$149.78

[41] The grand total of the foregoing amounts allowed is \$1,824.38.

Conclusion

[42] Peter Novak and Erik Novak, in their capacity as administrators of the estate of the Deceased and in their personal capacities, jointly and severally, are ordered to pay Mr. Dungate costs assessed at \$1,824.38, payable forthwith. A certificate of costs will issue in that amount.
"Master Bilawich"

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