
CANADA / JUDGMENT

Olive Hospitality Inc. v. Woo

2008 BCSC 615

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 615 Olive Hospitality Inc. v. Woo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olive Hospitality Inc. v. Woo,

2008 BCSC 615

Date: 20080515

Docket: S040146

Registry: Vancouver

Between:

Olive Hospitality Inc., Olive's Main Restaurant Ltd.,

Olive's Valleyfair Restaurant Inc., and

Olive's Sumas Restaurant Inc.

Plaintiffs

And

Tae Soo Woo

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiffs

Michael D. Tatchell

Counsel for the Defendant

Patrick F. Lewis

Date and Place of Hearing:

March 26 and April 9, 2008

Vancouver, B.C.

- [1] This is an application to deal with the issue of costs. The plaintiffs seek an order for special costs or, in the alternative, costs at Scale C. The defendant submits that he was, in substance, the successful party in the litigation and accordingly, seeks an order for costs in his favour or, in the alternative, an order that each side bear their own costs.
- [2] The plaintiff, Olive Hospitality Inc. ("Olive"), was incorporated by a group of businessmen in Korea who had obtained the franchise rights to open Popeyes Chicken & Biscuit restaurants in British Columbia. The founders' business plan was to open a chain of restaurant; recruiting Korean investors who were seeking investment opportunities in Canada to facilitate their immigration pursuant to the entrepreneur category. Three restaurants were opened pursuant to the business plan and the remaining plaintiffs were the subsidiaries that were incorporated in relation to the venture.
- [3] The defendant, Tae Soo Woo, was one of the founders of Olive and a director throughout the relevant period. Mr. Woo was, at the outset, a Vice President. Until September of 2003, he was responsible for Olive's financial management including banking and accounting. The plaintiffs alleged that at a critical time in the development of the venture, Mr. Woo committed significant breaches of fiduciary duty and defamed Olive. They alleged that Mr. Woo's wrongful acts initiated a chain of events that culminated in the ruin of the business. In the litigation, the plaintiffs sought redress for these acts on the basis of allegations of defamation, breach of fiduciary duty, and unlawful interference with a business.
- [4] In Reasons for Judgment that are indexed at 2006 BCSC 1554, I concluded that Mr. Woo had defamed the plaintiffs and breached his fiduciary duty and that his breaches constituted an unlawful interference with the plaintiffs' business. I awarded damages as follows:

(a)

general damages

\$ 50,000.00

(b)

damages for breach of fiduciary duty

\$1,088,995.00

(c)

recovery of funds improperly obtained by Mr. Woo

\$ 6,323.39

(d)

punitive damages

\$ 10,000.00

- [5] The general damages were awarded in relation to the tort of defamation. With respect to the tort of unlawful interference with the plaintiffs' business, I concluded that Mr. Woo intended to injure the plaintiffs and that he employed unlawful means to do so; namely, defamation and breach of fiduciary duty. I concluded that the conduct constituted an interference with the plaintiffs' business and that actual injury was suffered. However, I found that the damages flowing from this conduct were encompassed in the damages awarded for breach of fiduciary duty.
- [6] With respect to the punitive damages award, my findings were that Mr. Woo's conduct as the fiduciary was reprehensible and highly blameworthy. The conduct was planned and deliberate. Misconduct took place over a prolonged period, culminating in a series of very serious incidents that set in motion the forces that resulted in the destruction of the plaintiffs. I found that Mr. Woo's motive was anger and vindictiveness. He intended the harm that he caused. I concluded that Mr. Woo was aware that his acts were wrong, and that he attempted to conceal some of his misconduct. I noted that Mr. Woo derived some profit and benefit from his wrongful acts, with the most significant benefit being the use of the company books to create the impression that he had invested \$100,000 in the venture for purposes of facilitating the removal of his immigration condition. I found that given Mr. Woo's position in Olive, the plaintiffs were very vulnerable. His fellow directors trusted Mr. Woo and deferred to his experience and knowledge in financial matters. Mr. Woo fostered this trust by assuring his fellow directors that he kept the books as if conducting an audit. He alone prepared the books; he alone had the password to the computer with all the company records. I noted that the damages awarded in this case were substantial, particularly in light of the evidence with respect to Mr. Woo's assets.
- [7] Considering all these factors, I concluded that a punitive damage award was called for to express the condemnation of the conduct in this case. However, in all of the circumstances, and in particular given the compensatory award, I concluded that a modest award in the amount of \$10,000 was appropriate.
- [8] The order provided that the plaintiffs were awarded their costs, with double costs after March 3, 2006, and with liberty to apply for an increased scale of costs or for special costs.
- [9] Mr. Woo appealed. In Reasons for Judgment indexed at 2007 BCCA 355, the Court of Appeal allowed Mr. Woo's appeal. Mr. Justice Lowry, for the Court, described the grounds of appeal as follows at para. 2:

The former director appeals the award of \$1,088,995 raising two grounds. He contends no evidence was adduced that would prove the company (as distinct from its shareholders, the investors) suffered any loss, and, in any event, the judge failed to properly determine that any loss the company suffered was in fact caused by the statements Mr. Woo made to the bank. He takes the position that, if successful, the first ground advanced would be determinative, while the second would require a new trial.

[10] The Reasons of the Court concluded at para. 3:

I consider the first of the two grounds raised to be sound: no evidence of any loss suffered by the company was adduced such that there was no evidence upon which the damages awarded could be based. It becomes unnecessary to consider the second ground and I confine my analysis accordingly.

The Court concluded that the award was not sustainable because it ignored the distinction between the company's loss and the loss to the shareholders.

[11] There was neither an appeal nor a cross-appeal with respect to the awards of punitive damages or general damages with respect to the defamation.

[12] In the result, the order of the Court of Appeal set aside the awards of \$1,088,995 for damages for breach of fiduciary duty and double costs to the plaintiffs, and remitted the matter of the costs of trial proceedings back to the trial judge.

[13] Rule 57(9) of the Rules of Court, B.C. Reg 221/90 provides:

Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

[14] Rule 57(15) provides:

(15) The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

[15] In *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.), Chief Justice McEachern, writing for a five justice panel concluded at para. 19-22 that:

It is my further view that the rule which should govern the award of costs in matrimonial proceedings should be the same as in other civil litigation, namely, that costs should follow the event unless the Court otherwise orders as specified in R. 57: *Meneghetti v. Meneghetti* (1979), 17 B.C.L.R. 200 (S.C.), at p. 202.

The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award,

the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

In this case, therefore, I conclude that the learned trial judge erred in depriving Mrs. Gold of her costs of the trial. None of the purposes of s. 51 will be compromised by awarding her the cost-fruits of her success. Both parties probably contributed to the prolongation of the trial, but in the end she was substantially successful and no grounds have been shown for exercising a discretion against her.

In my view, the costs of the appeal should also follow the event. Mrs. Gold has been substantially successful on the main issue, and the items on which Mr. Gold has been successful, although not insignificant, are not sufficient to warrant departing from the usual rule.

[16] The threshold issue is therefore which party enjoyed substantial success in the event. The leading authority is *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal refused 2002 BCCA 454, 172 B.C.A.C. 179. In that decision Mr. Justice Bouck outlined a four step inquiry as follows at para. 46:

Based on the above interpretation of Rules 57(9), 57(15) and Gold, a decision to award or not award costs after a trial might follow a four step inquiry.

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those "matters" to the parties.
3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

[17] The considerations with respect to the issue of apportionment pursuant to Rule 57(15) were summarized by Madam Justice Ballance in *Dinyer-Fraser v. Laurentian Bank*, 2005 BCSC 1432, 28 C.P.C. (6th) 293. She noted that apportionment of costs is limited to exceptional cases. Rule 57(15) is only to be invoked in respect of discrete issues which can be clearly delineated. Ballance J. noted that it is not a legitimate approach to compare the amount of the final award to the claims or positions taken during the trial as a measure of success on particular issues for the purpose of apportioning costs, stating at para. 9:

Rule 57(15) empowers the trial judge with a discretion, to be exercised judicially, to effect a just result between parties in cases which have been prolonged by issues raised unsuccessfully by a party. Whether it would be manifestly fair and just to apportion costs is fact dependent. In the leading case of *British Columbia v. Worthington (Can.) Inc.* (1988), 29 B.C.L.R. (2d) 145, [1989] 1

W.W.R. 1 (C.A.) [Worthington], Esson J.A. explained the purpose of the predecessor to Rule 57(15), and pointed out that it is concerned not with the success of a party in terms of the relief claimed but with whether success has been achieved on a particular issue. The authorities decided after Worthington consistently recognize that it is not a legitimate approach to compare the amount of the final award to the claims or positions taken during trial as a measure of relative success on particular issues for the purposes of apportioning costs: *Pangil v. Mutual Fire Insurance* (1995), 30 C.C.L.I. (2d) 268, [1995] B.C.J. No. 531 (QL) (S.C.); *Jacobsen v. Bergman*, [1999] B.C.J. No. 2910 (QL) (S.C.) and *Kimp v. Wittenberg*, (8 June 1999), Vancouver Registry, C915296 (B.C.S.C.).

- [18] Counsel for Mr. Woo acknowledges that the mere fact of a lower quantum award than sought on a head of a plaintiff's claim will not equate to a defendant's substantial success. However, counsel submits that in the present case the following important factors are at play:
- (a) first, the difference in quantum as between the claim and the award is extremely large. Indeed, the award is dwarfed by the claim that had been advanced; and
 - (b) critically, the essential claim for loss of a commercial opportunity, so dominant a feature of the case, was dismissed entirely, and not merely the subject of a lower judgment than had been sought.
- [19] With respect to the matters at issue at trial, that is the causes of action identified in the pleadings, the plaintiffs succeeded in establishing liability with respect to each cause of action at issue. The result of the appeal was that the damage award was substantially reduced, but not set aside entirely. The awards of general damages for defamation and punitive damages in relation to breach of fiduciary duty were not disturbed.
- [20] With respect to the importance of these matters, Mr. Justice Edwards in *Jawanda v. Jawanda*, 2005 BCSC 1721, rev'd on other grounds 2007 BCCA 93, 39 C.P.C. (6th) 77, notes that the nature of the matters, in particular where they amount to assertions of dishonesty, is a consideration. Here these matters were of considerable significance. The plaintiffs succeeded in establishing the allegations of dishonesty, malice and breach of fiduciary duty.
- [21] Considering the matter from a global perspective, it is my conclusion that notwithstanding the loss of the damage award for loss of a commercial opportunity, the plaintiffs enjoyed substantial success, and therefore won the event. It follows that the plaintiffs are entitled to their costs at trial. This is not, in my view, one of those rare cases in which it is appropriate to apportion costs pursuant to Rule 57(15).
- [22] I turn next to the issue of the plaintiff's claim for special costs. The plaintiffs seek an order for special costs in relation to the conduct of Mr. Woo's both pre-litigation and during the litigation.

[23] The general rule is that special costs are given only with respect to the conduct of the litigation and not in relation to pre-litigation conduct: see *Nygard Int. Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.). The rationale for the distinction was discussed by Brenner J., as he then was, in *Foundation Co. of Canada v. Untied Grain Growers Ltd.* (1996), 8 C.P.C. (4th) 354, [1996] B.C.J. No. 2090 (QL) at para. 32:

However, in my respectful view, CMI's submission confuses misconduct prior to litigation and misconduct by a party once litigation commences. Party misconduct prior to litigation will presumably give rise to a cause of action which will be pleaded by the aggrieved party along with a claim for appropriate relief such as, for example, punitive damages. Costs, on the other hand, are assessed based on conduct after litigation has commenced.

[24] In the present case, the pre-litigation conduct was reflected in the awards that remain in place, in particular, in relation to the finding that Mr. Woo acted with malice in relation to the defamation, and the findings of fact giving rise to the award of punitive damages.

[25] The plaintiffs' counsel notes that this Court's award of punitive damages of \$10,000.00 was predicated on a very substantial compensatory award for damages for breach of fiduciary duty and to this extent the Court exercised significant restraint. The plaintiffs submit that the result is that the Court has heretofore been prevented from expressing its condemnation and rebuke of the defendant's pre-litigation conduct.

[26] The pre-litigation conduct has been addressed in the damage awards that have been left undisturbed and that were the subject of neither an appeal nor a cross-appeal. In my view, it is not open to the Court at this juncture to in effect re-visit that issue through the mechanism of an order for special costs.

[27] With respect to conduct during the litigation, counsel relies upon conduct of Mr. Woo and that of his counsel at trial, who was not the counsel who appeared on the appeal or on this application. With respect to Mr. Woo, counsel points to instances of dishonesty and fabrication of evidence by Mr. Woo, and his absence of remorse.

[28] In general, an adverse finding with respect to the credibility of a party will not, of itself, form the basis for an order for special costs: see *O'Cadlaigh v. Madiuk* (1994), 33 C.P.C. (3d) 116, [1994] B.C.J. No. 2521 (QL) (SC).

[29] The plaintiff's counsel cited the decision of Mr. Justice Vickers in *Lee v. Kuo*, [1996] B.C.J. No. 1858 (QL) (S.C.) in which special costs were awarded in circumstances of a failed plea of justification combined with adverse findings of credibility. Vickers J. summarized his findings as follows at para. 11:

I do not propose to repeat what I said in my reasons for judgment. At this time it will be sufficient to say that I concluded the defendant Hui-Yu Kuo fabricated a self-serving story. Chih-Huei Lee was argumentative, evasive and equivocal, constructing his evidence to suit his purposes. Both men, whose evidence was entirely unreliable, maliciously set out to destroy the reputation of the plaintiff in the small but significant community of Taiwanese in Vancouver. The plea of fraud was

maintained throughout and no apology has ever been made. I concluded the remaining defendants were the willing pawns of these two men and merely followed their lead.

- [30] However, a distinguishing feature of the decision is that in *Lee* the Court had declined to make an award of punitive damages.
- [31] By contrast, a finding of falsification of documents has been held to be a relevant consideration with respect to the issue of special costs: see for example, *Muncaster v. Nunnenmacher* (1996), 76 B.C.A.C. 211, [1996] B.C.J. No. 885 (QL) (C.A.). However, while the conduct is without doubt reprehensible, the issue must be considered in the context of the litigation as a whole. Here the document at issue was not fundamental to the question at issue, it did not create nor did it perpetuate the dispute. The document was peripheral and occupied only a small portion of the time at trial.
- [32] The other conduct during the litigation upon which the plaintiffs rely is that of Mr. Woo's then counsel with respect to his treatment of Mr. Hwang, Olive's solicitor who was a witness in the proceedings. Mr. Woo's counsel at trial made submissions concerning Mr. Hwang's credibility that were intemperate and which the Court rejected.
- [33] However, Mr. Hwang was a witness in the proceedings and his credibility was at issue since there was a clear conflict between his testimony and that of Mr. Woo's on material points in issue. I agree with the submission of Mr. Woo's present counsel that a court should be slow to penalize a party in costs for a robust challenge by counsel to the credibility of a witness. Cumming J.A. stated in *Young v. Young* (1990), 50 B.C.L.R. (2d) 1 (C.A.), rev'd on other grounds [1993] 4 S.C.R. 3, at 63-64:

Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rights of those clients are also necessarily limited. The potential for a chilling effect, especially if solicitors may be exposed to orders that they pay costs as between solicitor and client, the repercussions on solicitors' positions and consequently upon that of their clients, if adverse costs awards are made, underscore the need for judges to exercise caution in the making of such orders.

- [34] In the result, reprehensible conduct is a matter of degree in all of the circumstances: see *Chaplin v. Sun Life Assurance Company of Canada*, 2004 BCSC 116, 7 C.C.L.I. (4th) 277, leave to appeal refused 2004 BCCA 361, 200 B.C.A.C. 361. In all the circumstances, I decline to make an order for special costs.
- [35] The next matter to be addressed is the plaintiffs' application for an order for costs at Scale C. While the trial was lengthy, the matters involved were not, in my view, of more than ordinary difficulty. The plaintiffs will be entitled to their costs at Scale B.

[36] Finally, counsel for Mr. Woo submits that the plaintiffs should not recover any disbursements for the costs of Mr. Park's report, citing *Bailey v. Victory* (1995), 4 B.C.L.R. (3d) 388, [1995] B.C.J. No. 526 (QL) (C.A.). It was reasonable for Olive to obtain an opinion from Mr. Parks. I am not prepared to accede to this submission.

[37] In the result, the plaintiffs will receive their costs at trial on Scale B.

"Ross J."

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