
CANADA / JUDGMENT

Price v. 481530 B.C. Ltd.

2017 BCSC 1071

COURT

Supreme Court of British Columbia

DECIDED

26 June 2017

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2017 BCSC 1071 Price v. 481530 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Price v. 481530 B.C. Ltd.,

2017 BCSC 1071

Date: 20170626

Docket: S149212

Registry: Vancouver

Between:

Michael James Price

Plaintiff

And

481530 B.C. Ltd. doing business as Micron Laboratories,

8577935 Canada Corporation, Farrukh David Robson,

Sabrina Yasmeen Robson,

Katrina Robson also known as Sheena Robson

and Jonathan Robson

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

(Special Costs)

Counsel for the Plaintiff:

A.H. Narod

Counsel for the Defendants:

G.J. Allen

Place and Date of Hearing:

Vancouver, B.C.

May 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

June 26, 2017

INTRODUCTION

[1] In Reasons for Judgment issued on October 24, 2016, indexed at 2016 BCSC 1940, I allowed the plaintiff Michael Price's claims in wrongful dismissal, against the defendants 481530 B.C. Ltd., 8577935 Canada Corporation and Farrukh David Robson ("Mr. Robson"), and the tort of civil conspiracy, against the defendants Mr. Robson, Katrina, Jonathan and Sabrina Robson. Mr. Price now applies for an order that the defendants, and Anna Robson, a third party who he seeks to add as a defendant, pay special costs.

ISSUES

[2] The issues are:

1. Should Anna Robson be added as a party to these proceedings for the purpose of an award of special costs?
2. Did the defendants engage in reprehensible conduct in the litigation such that special costs should be awarded?

ANALYSIS

1. Should Anna Robson be added as a party to these proceedings for the purpose of an award of special costs?

- [3] Mr. Price says Anna Robson, who is Mr. Robson's daughter, should be added as a party for the purposes of this application for special costs because she knowingly contributed to the conspiracy at issue. He says Anna Robson, among other things, assisted the defendants: in fraudulently bankrupting 481530 B.C. Ltd.; in deflecting 481530 B.C. Ltd.'s creditors away from themselves and telling them to pursue Mr. Price and in fraudulently conveying the family home to Katrina and herself to judgment proof themselves.
- [4] The defendants object to having Anna Robson added as a party. They point out that Mr. Price applied to have her added as a party at the outset of trial, but was unsuccessful, with costs to Anna Robson. They also say Anna Robson did not give evidence in the trial and her involvement in the family business was not canvassed to any great extent by the parties at trial. They note that the Reasons for Judgment only mention Anna Robson on one occasion, at para. 266, which assigns no fault to her.

Legal Principles

- [5] Under R. 6-2(7)(b) of the Supreme Court Civil Rules, the court may, at any stage of a proceeding:
- (b) order that a person be added as a party if
 - (i) that person ought to have been joined as a party, or
 - (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on
- [6] The decision in *Perez v. Galambos*, 2008 BCCA 382, offers some guidance on whether I should exercise my discretion to add Anna Robson as a party. That case involved an application for costs against a third party. The Court of Appeal held that an award of costs against a third party is unusual and exceptional, and should only be made in "special circumstances", such as where the third party has engaged in fraudulent conduct, an abuse of process, gross misconduct, or where the third party is the "real litigant": at paras. 17-18.

Application of Principles

- [7] Although *Perez* involved an application for costs against a third party, as opposed to the present application to add a party for the purposes of an application for special costs, I find that is not a distinguishing factor. Importantly, Anna Robson was not a defendant at trial, and therefore the application in this case, at least with respect to Anna Robson, is also, in effect, for costs against a third party.

- [8] I conclude that no "special circumstances" exist in this case: Perez at para. 17. I am not convinced on the evidence that Anna Robson engaged in an abuse of process or gross misconduct, or that she was the "real litigant" behind the proceedings: Perez at para. 18. Indeed, on that last point, she had no involvement in the trial at all. Although it is contended that she engaged in fraud by assisting her family with the conspiracy, I find her participation was too limited to warrant granting the remedy sought.
- [9] I also note as set out in the recent case of *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 [Smithies]: "Special costs are an inherently unsatisfactory mechanism to punish pre-litigation conduct." (para. 132). Pre-litigating conduct should not be considered in awarding special costs.
- [10] The application to add Anna Robson as a party for the purpose of special costs is accordingly denied.
2. Did the defendants engage in reprehensible conduct in the litigation such that special costs should be awarded?
- [11] Mr. Price's position is that the defendants' conduct was reprehensible, and therefore an order of special costs is appropriate. He says the defendants engaged in many forms of misconduct, including causing unnecessary delays, failing to produce materials and comply with court orders, and perpetuating their conspiracy throughout the trial despite knowing of Mr. Price's serious health concerns.
- [12] The defendants deny their conduct during the litigation was reprehensible and oppose the order sought. They say, among other things, that they should not be faulted for having simply attempted to resist the claims against them and that the allegations of pre-litigation misconduct cannot be considered. Alternatively, they say that if special costs are awarded, the order should be directed at certain defendants only and certain reductions are in order as well.

Legal Principles

- [13] The Court of Appeal reaffirmed in *Smithies* that an order for special costs requires some form of "reprehensible conduct", which can include "scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke": at paras. 57, 132. It said:
- Special costs are intended to punish reprehensible conduct which as per *Garcia* includes scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke.
- [14] Most importantly, it definitively concluded that pre-litigation conduct should not be considered in awarding special costs: *Smithies* at para. 133. The Court of Appeal said at para. 134: "Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation." (emphasis added.)

- [15] That is the focus of the inquiry that must be undertaken.
- [16] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 [Westsea], Gropper J. summarized the principles for awarding special costs at para. 73:
- a) the court must exercise restraint in awarding special costs;
 - b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
 - c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
 - d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
 - e) special costs can be ordered against parties and non-parties alike; and
 - f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

Application of the Principles

- [17] I conclude special costs should be awarded against the defendants in this matter. I do so on the basis of what I conclude was reprehensible conduct by the defendants during the course of this litigation. The conclusion is reached largely on the basis the defendants misled the court and abused the court processes in doing so, with persistent breaches of the Rules of Court to prejudice Mr. Price in his claim.
- [18] My reasons will be brief. The background of this matter has largely been set out in my Reasons for Judgement at 2016 BCSC 1960. I note however this decision is based on conduct which occurred during the course of the litigation as per the recent direction by the Court of Appeal in *Smithies*.
- [19] At the outset, I note the defendants participated in persistent breaches of the Rules of Court that prejudiced the applicant. The defendants did not comply with various orders for production of documents and particulars in a timely way. While some leeway can be said to be necessary in the early days of the trial as it was advanced to trial relatively quickly, the trial continued some months later and document production problems persisted. These in particular related to financial documentation and consequent issues, an important part of the matter due to the allegations of just cause against Mr. Price.
- [20] Furthermore, Mr. Robson interrupted family witnesses during their cross-examination, despite repeated directions from the court to stop interfering with their testimony. This was with the apparent intention of correcting or interfering with their evidence on critical points

in the case. I find to be a direct interference with the evidence to perpetuate the misrepresentation of the actual facts. Indeed I conclude as in *Jogia v. Aetna Life Insurance Company of Canada*, [1999] B.C.J. No. 1502 (S.C.), there has been a deliberate attempt to mislead the court through fabricated evidence. Such conduct can found an order for special costs.

- [21] The defendants made unfounded allegations of dishonesty against Mr. Price with total disregard for the consequences of their actions. To perpetuate these claims, the defendants abused the court processes and mislead the court throughout the litigation process. Most notably, the defendants fabricated a self-serving story about why Mr. Price was fired for cause and constructed evidence to suit their purposes. They adduced fabricated negative employee letters about Mr. Price which were obtained from staff under pressure and promises of reward. They continued this action at trial by presenting these letters and as a witness, the author of one of the fabricated negative employees' letters in support of their case. In her testimony a second employee recanted her allegations in a negative letter about of Mr. Price, noting Mr. Robson's pressure to provide such a letter. This misconduct which continued in the course of the trial, in and of itself, weighs strongly in favour of awarding special costs: *Westsea* at para. 73(d).
- [22] The defendants counter that Mr. Price is seeking to characterize every step taken by them as wrongful as though their very decision to resist Mr. Price's claims was, in and of itself, a justification for special costs. The defendants cannot be faulted for every step they took, such as, for instance, changing lawyers multiple times, assuming it was done in good faith. I agree. I conclude, however, the behaviour of the defendants went above and beyond simply resisting the claim by the actions noted above.
- [23] While the defendants say the alleged conspiracy was commenced pre-litigation and therefore actions taken under it may not be considered in assessing special costs: *Smithies* at para. 133, the defendants perpetuated these actions throughout the litigation by presenting false evidence and with Mr. Robson in particular, attempting to interfere with witnesses. This conduct committed during the litigation in furtherance of the conspiracy is therefore relevant. I had excluded conduct committed pre-litigation as per the recent direction of the Court of Appeal in *Smithies*.
- [24] The defendants submit if special costs are awarded, a reduction is needed to account for the divided success at trial. They say Mr. Price's claim had two primary focuses: a claim in wrongful dismissal and conspiracy to injure, which was successful, and a claim in derivative action and various other torts, which was unsuccessful. In my view, however, Mr. Price advanced both sets of claims as alternative ways of seeking damages for the same loss. The fact the first claim was allowed meant that it was not necessary to consider the other avenue to recover the damages.

- [25] The defendants also seek a reduction to account for what they maintain was Mr. Price causing the trial to extend as long as it did. They say the manner in which he presented his case was the direct cause of the lengthy trial, saying he raised over a dozen different causes of action and argued each one fully at trial. While I agree the materials were lengthy and even duplicative at times, the defendants are primarily responsible for the trial's length. Mr. Price, in view of his failing health, took steps to move the trial along in a speedy fashion, requesting short turnarounds and early hearing dates. The defendants were the source of delay in the delay in providing documents. They also denied the conspiracy all along, necessitating a full and lengthy presentation of evidence to establish the claim.
- [26] Lastly, the defendants say that not all of them should bear the responsibility to pay special costs if ordered. They say that their conduct was not equally blameworthy and that the court should only make the order against those whose conduct was reprehensible. Although some defendants did engage in milder forms of misconduct, especially compared to the others, their conduct may still qualify as reprehensible, so long as it is deserving of rebuke: Smithies at para. 132. They should not avoid liability simply because some were worse than others.
- [27] In considering this point, I conclude the evidence does not support a finding of reprehensible conduct against Jonathon Robson. His testimony was relatively straightforward; indeed it was his testimony in particular that Mr. Robson sought to correct. Unlike the other defendants, I do not conclude he was engaged in a deliberate attempt to deceive in the course of the litigation proceedings.
- [28] I conclude therefore the defendants' conduct in the course of the litigation, with the exception of Jonathan Robson, was reprehensible. Special costs are accordingly appropriate in these circumstances.

DECISION

- [29] The application for special costs, including for this application, is allowed as against Mr. David Robson, Ms. Sabrina Robson and Ms. Katrina Robson.

The Honourable Madam Justice E. Burke

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