

CANADA / JUDGMENT

R.L. v. M.L.

2024 BCSC 374

COURT

Supreme Court of British Columbia

DECIDED

4 March 2024

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2024 BCSC 374 R.L. v. M.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.L. v. M.L.,

2024 BCSC 374

Date: 20240304

Docket: E180831

Registry: Vancouver

Between:

R.L.

Claimant

And

M.L., 0684268 B.C. Ltd. aka 684268 B.C. Ltd., 0651756 B.C. Ltd., Ticketworld Enterprises Inc., Urban Heights Developments Ltd., 1099537 B.C. Ltd., 0573506 B.C. Ltd., Zenture Enterprises Corp., and D.L.

Respondents

Before: The Honourable Justice MacNaughton

Reasons for Judgment on Costs

Counsel for the Claimant:

P. Schmidt

Counsel for the Respondent, M.L.:

S. Bobb

No one appearing for the other Respondents

Claimant's Submissions:

February 1 and 27, 2024

Respondent M.L.'s Submissions:

February 23, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 4, 2024

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Overview

- [1] In para. 401 of my January 23, 2024 reasons for judgment, indexed at R.L. v. M.L., 2024 BCSC 106 (the "Reasons"), I set a schedule for written costs submissions. I received R.L.'s costs submissions on February 1, 2024, M.L.'s costs submissions on February 23, 2024, and R.L.'s reply submissions on February 27, 2024.
- [2] In these costs reasons, I use the same defined terms as used in the Reasons.

The Parties' Positions

- [3] R.L., the successful party at trial, seeks special costs to be determined by the Registrar. Alternatively, she seeks fixed costs in the amount of \$400,000. In the further alternative, she seeks costs determined on the "more than ordinary scale of difficulty" and double costs from May 28, 2021, the date on which she delivered a formal offer to settle (the "Offer"). With respect to this last alternative, R.L. prepared a bill of costs that, inclusive of disbursements, totals \$192,472.97.
- [4] M.L. agrees that R.L. was substantially successful at trial. He disagrees that the scale of costs should be more than ordinary difficulty or that special costs are appropriate. He asks me to exercise my discretion not to award full costs, submitting that R.L. should only receive 50 percent of her costs.

Applicable Legal Principles

- [5] There is no dispute that, pursuant to the common law rule that costs follow the event, a substantially successful family litigant is entitled to their costs unless the court orders otherwise: Rule 16-1(7) of the Supreme Court Family Rules [Rules]. A trial judge retains discretion to depart from the usual cost rule where there is a sound judicial basis for doing so: M.T. v. J.S., 2020 BCSC 1604 at para. 21 and S.A.M. v. J.A.M., 2017 BCSC 2348 at para. 7.
- [6] In *Gold v. Gold* (1993), 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.), leave to appeal ref'd, [1993] S.C.C.A. No. 441 [Gold] at para. 20, a five-member division of the Court of Appeal set out the following considerations that might lead a judge to exercise their discretion to displace the usual cost rule including: hardship; earning capacity; the purpose of a particular award; the parties' conduct in the litigation; and the importance of not upsetting the balance achieved by the award itself.
- [7] The party asking the court to depart from the usual cost rule bears the onus of persuading the court why it should do so: *Brown v. Kucher*, 2016 BCSC 194 at para. 8, citing *S.D.W. v. C.W.W.*, 2006 BCSC 162 at para. 29.
- [8] I will deal first with the appropriate scale of costs, then with the impact of the Offer, before turning to special costs.

The Scale of Costs

Legal Principles

- [9] The scale of costs in family law cases is governed by Rule 16-1 and Appendix B of the Rules. Appendix B sets out three levels of difficulty with respect to family cases. Most cases are of ordinary difficulty, some are of less than ordinary difficulty, and some are of more than ordinary difficulty. Here, the issue is whether this was a case of ordinary or more than ordinary difficulty.
- [10] Considerations that assist in determining whether a matter is of more than ordinary difficulty have been set out in a number of cases. Those cases were cited by the Court of Appeal in *Kopp v. Kopp*, 2012 BCCA 140 [Kopp]. The considerations include:
- a. whether an issue is of importance to a class or body of persons, or is of general interest (Kopp at para. 86);
 - b. whether the result of the proceeding determines the rights and obligations between the parties beyond the relief that was actually granted or denied (Kopp at para. 86);
 - c. whether there is a difficult issue of law, fact, or construction (Kopp at para. 86);
 - d. whether the evidence has shown deceit (Kopp at para. 90);
 - e. whether there was disregard for court orders, procedure, or processes that lengthened the trial and made it more difficult (Kopp at para. 90);
 - f. whether a party misled the court by failing to provide full and proper disclosure (Kopp at para. 90); and/or
 - g. whether there was a failure to provide information in a cooperative manner or other conduct which increased the difficulty of the case (Kopp at para. 90).
- [11] In this case, the relevant considerations are c. - g.

Analysis

- [12] Having considered the parties submissions, I conclude that this case involved more than ordinary difficulty.
- [13] The three-week trial dealt almost exclusively with financial issues related to division of assets and debt and M.L.'s income for child and spousal support, both retroactive and prospective.
- [14] In his submissions, M.L. conceded that the financial issues addressed at trial were "more than ordinarily difficult".

- [15] As I explain at para. 91 of the Reasons, an expert was retained to prepare a joint business valuation report because of the "complex and interrelated nature of M.L.'s business interests". Despite the expert report, there remained a lack of clarity surrounding M.L.'s financial and corporate arrangements. The financial picture remained less than clear at trial.
- [16] I accept that R.L., who was not actively involved in M.L.'s businesses, expended significant time, effort, and costs to gather facts and unravel the complex asset issues presented by M.L.'s business structure. At para. 52 of the Reasons, I describe the challenge presented by the complexity of M.L.'s corporate arrangements and the fact that no forensic analysis was conducted due to the joint retainer of a business valuator.
- [17] Due to the difficulty in calculating M.L.'s income for support purposes, the parties retained the same expert to determine M.L.'s income. She expressed reservations about what M.L. told her (Reasons at para. 179), and a concern that employees, paid for by one corporate entity, were doing work for others (Reasons at para. 146). There was a lack of clarity about how the income from short term rental properties, managed at least in part by a Ticketworld employee, was treated and to whom it was paid (Reasons at paras. 183-186, 190).
- [18] The existence of the Marriage Agreement added further complexity to this case, particularly its application to the division of property and debt and how the parties' positions changed with respect to its validity.
- [19] Further, M.L.'s conduct in misleading the Court, breach of an asset restraining order, and failure to provide financial information cooperatively, resulted in significant credibility findings against him. Those findings are, in part, reflected in the awards I made with respect to property and retroactive support, but they also amount to conduct that made the trial more difficult.

Double Costs

Legal Principles

- [20] Rule 11-1(5)(b) of the Rules permits the Court to order double costs for all or some of the steps taken after a settlement offer is made that should have been accepted. Double costs are a punitive measure against a litigant for their failure to accept an offer that should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25; *Pousette v. Janssen*, 2021 BCSC 1364 at para. 15.
- [21] Rule 11-1(6) of the Rules sets out a non-exhaustive list of considerations for a court in determining whether to award double costs:
- whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - the relationship between the terms of settlement offered and the final judgment of the

court;

- c) the relative financial circumstances of the parties;
- d) any other factor the court considers appropriate.

The Offer to Settle

[22] In this case, R.L. made a formal settlement offer on May 28, 2021. In relevant part, the Offer provided that:

1. 353 Delta shall remain [R.L.'s] asset
2. Payment to [R.L.] of \$192,644.63 forthwith (\$130,244.63 + \$62,400). This will cover all retroactive child and spousal support claims, disposition of assets, and prospective spousal support. This calculation includes the increase of 573, 342 Delta to June 2014, and the 210 Street Property to 2016, and support/debt payments. But it does not include any increases to 342 Delta after June 2014, any value on TicketWorld, any value on the Kitchener Property transaction, any value on the increase in value of "the various properties in Croatia", or any increase in value of Citadel; those would definitely form part of [R.L.'s] arguments at trial and could increase her award significantly.
3. [M.L.] shall continue paying all costs on the mortgage on 353 Delta as his sole debt
5. Both parties to retain all over assets in their legal or beneficial names, incl. CPP credits.
6. [M.L.] to pay ongoing child support of \$1,000 per month
10. Both parties to retain all other debts in their legal or beneficial names. This would have [R.L.] maintaining responsibility for her credit card debt of approximately \$24,500 that was used by [M.L.] to purchase season's tickets during their relationship
11. Parties to be responsible for own costs

Analysis

Should the Offer have been accepted when delivered or at a later date?

[23] This factor is considered without reference to the Court's ultimate decision.

[24] When the Offer was delivered, the parties just concluded two full days of mediation and were continuing their discussions. In the Offer, the mediation was described as "fruitful". As a result of wishing to continue those discussions, the then-scheduled July 7, 2021 trial was adjourned.

[25] M.L. says that in 2021, he was not in a position to determine the full extent of the parties' financial circumstances. I do not agree. M.L. controlled all of the parties' corporate and other assets. He knew what assets he had and how his businesses operated. R.L. did not. By May 2021, the parties had conducted their first round of discoveries, exchanged financial statements, and provided documentary disclosure. The Offer referred to information

provided by the joint expert, who prepared a joint business valuation report and a guideline income report. An earlier version of the expert's report was clearly available to the parties in May 2021.

- [26] The Offer made clear that it was based on the Marriage Agreement being applied. That was what M.L. sought in his pleadings. I accept that there was some uncertainty about whether and how the Marriage Agreement would apply, but R.L. built that uncertainty into her settlement proposal. The Offer set out the applicable provisions of the Marriage Agreement and explained, in some detail, how R.L. believed it would be applied at trial. She also set out the issues on which she was prepared to compromise.
- [27] The Offer was not time-limited. Both parties had access to experienced legal counsel to guide their analysis of the benefits of a settlement and the risks they faced at trial.
- [28] After the trial was adjourned, there was ample time for M.L. to consider the Offer, its terms, and the basis on which it was made.
- [29] I conclude that the offer should have been accepted when it was delivered or shortly thereafter.

What is the relationship between the Offer and the Court's judgment?

- [30] M.L. does not dispute that R.L. did better at trial than she would have under the Offer, if accepted by M.L. If the Offer had been accepted, R.L. would have received:
- a. title to 353 Delta;
 - b. \$1,000/month in child support; and
 - c. an equal division of the secured Home Trust line of credit; and a separate payment of \$192,644.
- [31] M.L. would have retained responsibility for the mortgage registered against 353 Delta and both parties would have been responsible for any other debts in their own names as well as their own costs.
- [32] Under my judgment, R.L. received title to 353 Delta and more child support than she offered to accept. Responsibility for the mortgage was divided equally which resulted in a financial obligation for R.L. of approximately \$220,000; however, I ordered M.L. to make additional payments of \$597,813 (plus an RRSP rollover of \$6,236 and the RBC debt payment of approximately \$28,000).
- [33] My award of \$597,813 less the \$220,000 mortgage obligation, is \$377,813, an amount well exceeding the \$192,644 R.L. was willing to accept under the Offer.

[34] M.L. submits that the ultimate effect of the Marriage Agreement, as applied and interpreted in my Reasons, could not have reasonably been contemplated when the Offer was made. I do not agree. M.L. insisted on the Marriage Agreement; he would not marry without it. With the assistance of his counsel, he was in as good a position, or perhaps better, to assess the likely outcomes at trial. Based on the trial evidence, he was also in a better position to determine the parties' financial circumstances and he knew his corporate holdings.

What were the parties' financial circumstances?

[35] The parties' financial circumstances remained relatively static from May 2021 until the trial before me. R.L. retrained in the summer of 2022 and began working as an education assistant in January 2023. Her income was not high enough that it significantly affected her financial circumstances.

[36] While I accept that the pandemic and other external factors created some uncertainty with respect to M.L.'s financial situation at the time of the Offer, I am satisfied that M.L.'s corporate structure and sources of income were well settled by the date of the Offer. His "corporate divorce" with Mr. Corea was finalized, his dispute with the CRA was resolved, and he had a clear understanding of his financial circumstances. As I set out in para. 227 of my Reasons, the parties post-separation vacations indicated a disparity in their standards of living.

[37] The parties used equity in the former family home to fund litigation. In 2018, they secured a Home Trust line of credit against 353 Delta to fund litigation advances for both of them. M.L. also used the advance to pay outstanding taxes on one of the Graveley Properties.

Conclusion on Double Costs

[38] Based on the foregoing, I conclude that M.L. should have accepted the offer. M.L. should have assessed the risk that he might not succeed at trial, the risk that credibility findings would be made against him, the cost of a three-week trial, and accepted the Offer in May 2021. As a result, I conclude that R.L. is entitled to double costs from May 28, 2021 onward.

[39] On a review of the Draft Bill of Costs attached to R.L.'s submissions, she is claiming double costs for the two days of mediation that led to the Offer and also led to the June 7, 2021 trial adjournment. These costs should not be double costs.

Special Costs

Legal Principles

[40] Rule 16-1(1)(b)(i) of the Rules provides that this Court may order costs of a family law case to be assessed as special costs. Such awards are governed by the same principles as apply to special costs in civil proceedings.

- [41] Special costs are "intended to express the court's disapproval of a party's conduct": *Hu v. Dickson*, 2015 BCSC 218 at para. 47 [Hu]. The Court must, however, "exercise restraint in awarding special costs and as such the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order": *Hu* at para. 48, citing *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73.
- [42] Special costs are punitive and imposed to sanction a party's reprehensible conduct during the litigation, conduct from which the court seeks to disassociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745, 1994 CanLII 2570 (B.C.C.A.) [Garcia]; *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. Reprehensible conduct encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746-747.
- [43] The purpose underlying special costs is punitive not compensatory: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 42, leave to appeal ref'd, 39145 (1 October 2020). Nevertheless, special costs also allow a court to substantially indemnify a successful party which is particularly important where one party has to incur excessive costs as a result of the other parties misconduct: *D'Atri v. Gonzalez*, 2017 BCSC 1244 at para. 55.
- [44] Improper pre-litigation conduct is excluded from consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133-134.
- [45] Conduct that may attract special costs includes delayed disclosure or a failure to disclose documents, dissipating or not disclosing assets, depriving the other party of financial assets, disregarding the other party's interest in family assets, pursuing meritless claims and being reckless with regard to the truth, improper allegations of fraud or conspiracy, disobeying a court order, or making the resolution of an issue far more difficult than necessary: *Hu* at para. 49; *McIntyre v. McIntyre*, 2018 BCSC 472 at paras. 7-8; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11; and *D.G.S. v. J.D.S.*, 2014 BCSC 2183 at para. 11.

Analysis

- [46] R.L. seeks special costs against M.L. as a result of his reprehensible behaviour in this family litigation, including:
- a) swearing a false affidavit in 2019 to oppose R.L.'s claim for a litigation advance, in which he misled R.L. and the Court about his ownership of 573;
 - b) breaching the 2015 Asset Restraining Order;
 - c) pressuring R.L. to release CPLs from title to certain properties and then disposing of his interests in those properties; and

- d) failing to provide proper financial disclosure, intentionally obscuring his income, and diverting revenue from various companies to fund his start-up property management business.
- [47] In my view, M.L. has engaged in instances of reprehensible conduct (for example, breaching the asset restraining order and filing a false affidavit). I considered that conduct in my assessment of M.L.'s credibility and concluded that I would treat all of his evidence with caution and only accept it where corroborated by independent evidence: Reasons at para. 151.
- [48] Later in my Reasons, when assessing the validity of a loan agreement between M.L. and his mother, and the assignment of a loan indebtedness agreement, M.L.'s lack of credibility resulted in a negative conclusion about their validity: at para. 333. As a result, R.L. was awarded a share in the increase in value of 342 Delta: at para. 335. Finally, I considered M.L.'s blameworthy conduct in awarding retroactive support to the date of separation.
- [49] I note that while M.L.'s conduct does not approach the conduct the husband engaged in as described by Justice Jackson in *Chapman v. Chapman*, 2020 BCSC 1896, it is, nevertheless, worthy of rebuke and should result in partial special costs. It is within the court's discretion to award costs that relate to only certain aspects of a proceeding where it would be disproportionate to award special costs of the entire proceeding: *Hu* at para. 47.
- [50] It is not possible to precisely calculate the preparation and trial time that was used to address M.L.'s misleading February Affidavit and other credibility issues including his lack of transparency about his income and assets, the transfer of his 2/3 interest in 342 Delta to his mother, the discrepancies in his F8 financial statements, and his breaches of the asset restraining order. These issues were also addressed at length in R.L.'s closing submissions.
- [51] In my view, a fair approach is to award R.L. special costs for two days of trial preparation and for two days of trial time to reflect the fact that M.L.'s reprehensible conduct lengthened the time needed to prepare to cross-examine M.L. and R.L., the duration of M.L. and R.L.'s evidence, and the preparation and delivery of closing submissions.

Conclusion

- [52] In all the circumstances of this case, M.L. has not persuaded me that there is a reason to depart from the usual order that R.L. is entitled to her costs of this proceeding, including double costs from the date of the Offer onward and partial special costs.
- [53] M.L. did not cite any cases that would justify his submission that R.L.'s costs should be reduced by 50 percent.

- [54] Further, there was no evidence on which I could find that M.L. would be crippled or significantly hampered by an award of costs. Through his corporate entities and the Trust, M.L. owns property that, according to the Walters Report, is worth between \$2.8 and \$3.356 million. The reported rental income from the Graveley Properties was \$127,000 annually in 2020-2021.
- [55] Further, there may well be other assets and income to which M.L. has access. In the Reasons, I found that:
- a. M.L.'s February Affidavit was deliberately misleading to R.L., her counsel and to the Court and that he directly benefited from that deception (Reasons at paras. 143-144);
 - b. M.L. did not provide proper disclosure, thereby affecting R.L.'s ability to make her case and for the Court to make factual findings (Reasons at para. 161);
 - c. On the issue of the short-term rental income, Ms. Konsmo's evidence was to be preferred over that of C., M.L.'s eldest daughter, and that the rental income from the Canmore properties was diverted to C. and did not appear to have been appropriately accounted for in the financial records. As a result, revenue might have been higher and expenses reduced thereby affecting the value of all or some of M.L.'s businesses (Reasons at paras. 185, 369); and
 - d. M.L. did not provide any explanations for relevant cash transactions up to \$75,000 and that he engaged in extensive questionable transactions including granting a mortgage to his mother on his interest in 342 Delta and then transferring that interest to her: Reasons at paras. 120, 147.
- [56] In any event, financial hardship, without more, is not sufficient to depart from the usual cost rule or to limit R.L. to half of the costs to which she is entitled as the successful party.
- [57] There is no basis on which to conclude that the usual order would upset the balance of the orders I made.
- [58] If the parties are unable to agree on the quantum of costs, based on the Bill of Costs prepared by R.L.'s counsel, adjusted to deduct double costs for two days of mediation on May 26 and 27, 2021 and my partial special costs order, they are to appear before the Registrar for the purpose of assessing costs.

"MacNaughton J."

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