

CANADA / JUDGMENT

Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.

2022 BCSC 272

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 272 Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.,

2022 BCSC 272

Date: 20220218

Docket: S158001

Registry: Vancouver

Between:

Sequoia Mergers & Acquisitions Corp.

Plaintiff

And

Camacc Systems Inc.

Defendant

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff:

B.F. Morley

M.P. Larsen

Counsel for the Defendant:

M. Nied

Place and Dates of Hearing:

Vancouver, B.C.

February 3 and 8, 2022

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2022

INTRODUCTION

- [1] This is an application by the plaintiff, Sequoia Mergers & Acquisitions Corp. ("Sequoia"), for costs to be assessed by myself on a full indemnity basis fixed at just over \$360,000. In the alternative, Sequoia seeks costs on an indemnity basis to be assessed by the registrar, and in further alternatives, seeks costs and double costs on a party and party basis under the tariff on various bases. The defendant, Camacc Systems Inc. ("Camacc"), consents to the order that Sequoia is entitled to its costs on a full indemnity basis, but says that the matter must be referred to the registrar rather than assessed summarily before me.
- [2] The facts and background related to this application can be found in my reasons for judgment in this matter issued on September 2, 2021 and indexed at 2021 BCSC 1740. In those reasons, I ordered that Camacc pay Sequoia the amount of \$1,017,000 plus interest pursuant to a contract between the parties, and that Sequoia was entitled to its costs subject to submissions from the parties.
- [3] The parties do not contest that that same contract also included a clause requiring the unsuccessful party in any litigation in relation to the contract to "pay all reasonable costs and expenses including legal fees and court costs" to the successful party. It is on this basis that Camacc agrees that it is obliged to pay the costs of this proceeding on an indemnity basis.
- [4] The parties also agree that costs on an indemnity basis are not costs pursuant to the Supreme Court Civil Rules, B.C. Reg. 168/2009, such as party and party costs or special costs. Rather, costs on a full indemnity basis are contractually incurred. The parties further agree that the principles related to the assessment of full indemnity costs are most similar to an assessment of costs on a solicitor and own client basis, and that the factors considered in determining such costs are essentially the same as those considered in the taxation of legal fees pursuant to s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9 [Legal Profession Act]: see *Hobbs v. Warner*, 2020 BCSC 1180 at paras. 37, 41; *Pallot v. Douglas*, 2018 BCCA 315; *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459.

- [5] Unlike an assessment of special costs, solicitor and own client costs are less concerned with what an objectively reasonable legal fee would be for the services rendered, but rather what is reasonable as between the client and their solicitor in this particular matter: see Pallot at paras. 13-15. It is well established that recovery of full indemnity costs is subject to review to ensure their reasonableness, and that the quantum must be fair, reasonable, and proportionate: Hobbs at paras. 37, 43.
- [6] The issue before me on this application is whether I should assess Sequoia's costs entitlement on a summary basis pursuant to R. 14-1(15) of the Rules, or whether the assessment of these costs ought to be referred to the registrar. As part of this determination I have to consider both whether I have the evidence necessary to determine the costs on a summary basis, and the appropriateness of such determination in this case.

THE EVIDENCE

- [7] Sequoia has provided me with a copy of the bill received from its counsel for the proceedings to date, rendered October 1, 2021 in the amount of \$305,100 plus taxes, totalling \$341,712. Sequoia also provides a draft bill of costs which includes a summary sheet of disbursements incurred of just under \$20,000. Finally, Sequoia has filed the fee agreement under which it retained its counsel, consisting of a contingency fee agreement signed in May 2017, as well as an email exchange at the outset of this litigation in 2015 agreeing to retain counsel on a contingency fee basis. Both the 2017 contingency fee agreement and the 2015 email exchange set out a 30% contingency fee if the claim did not settle prior to 30 days of the scheduled commencement of trial.
- [8] Sequoia has also provided me with a late affidavit (which is objected to) attaching an account of the hourly rates of the lawyers and other staff at Clark Wilson LLP, and their time spent on this file, to the date of judgement. This "hypothetical bill" (prepared for litigation purposes only) sets out over 1,100 hours spent, and a total fee of over \$485,000 after taxes on a non-contingency basis.
- [9] Sequoia says that, together with my familiarity with the litigation itself, this information is sufficient for me to determine, on a summary basis, that the 30% contingency fee charged to them is reasonable, and to assess the costs they are entitled to on that basis.
- [10] Camacc says the evidence before me is insufficient in this regard. First, it says that the affidavit evidence of a legal assistant at Clark Wilson LLP is insufficient on various points relied upon by Sequoia as inadmissible hearsay. It says that the late affidavit containing the hypothetical fee should not be admitted for my consideration because of its lateness, but also because it raises more questions than it answers in terms of the hourly rates and time spent that it sets out. Camacc says that it is entitled to disclosure of not just how much time was spent, but what specifically the time was spent on and why that time was spent, so that it can challenge the reasonableness of the final fee. It has demanded disclosure of Sequoia's legal files for this purpose.

- [11] It also raises issues with the sparsity of material to support the disbursement claims (simply a printout and summary without any invoices), along with aspects of those disbursements, including such things as legal research fees.
- [12] More fundamentally, Camacc says that the contingency agreement itself is unclear, particularly between 2015 and 2017 prior to the formal contingency fee agreement being signed. As a matter of natural justice, Camacc says it is entitled to disclosure of all communications in relation to the formation of that agreement between Sequoia and its counsel, in relation to both periods, so that it can make arguments with respect to the meaning and scope of the agreements. It argues that a "wide focus" is required with respect to disclosure in this regard.

Determination

- [13] As I expressed to counsel at the outset of this hearing, while I agree with Camacc that it is generally entitled to challenge the costs claim that it must pay, and to do so on evidence before the registrar, the challenge ought to be proportionate to the real issues between the parties and not a delay tactic, fishing expedition, or other abuse of process. In relating its lengthy complaints about the deficiencies of the evidence provided in support of the contingency fee, its concerns about the breadth of disclosure required to interpret the contingency contract, and its demands for access to privileged information to address them, Camacc's submissions tended to heighten, rather than assuage, my concerns regarding the proportionality of its intended proceedings before the registrar.
- [14] I agree with Camacc that our Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414, has stated that the assessment of special costs (and by extension full indemnity costs) must be done on evidence and the opportunity given to the paying party to challenge the reasonableness of the costs. It also contemplates a certain amount of disclosure in order to facilitate this challenge, including the waiver of privileged information. At paras. 109-110, the Court of Appeal considers the concern that the party who has to pay costs might prolong the assessment and require a "microscopic review of the services undertaken by counsel for the successful party" but balances that against "the right of a party to challenge the reasonableness of the opposing party's proposed cost" based on the rules of natural justice.
- [15] At para. 110, the Court of Appeal notes that while R. 1-3(1) of the Rules sets out that the object of the Rules is to secure the just, speedy, and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is "proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding."

- [16] At para. 114, the Court of Appeal states "it is difficult to conceive how a proper examination of the party's reasonably incurred legal fees can be made without disclosure of the party's file." At para. 118, the Court of Appeal notes that the Rules allow that a bill of special costs may be rendered on a lump sum basis, and that R. 14-1(31) "sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges."
- [17] Ultimately, the Court of Appeal's conclusion as to what must be disclosed for an assessment of special costs can be found at paras. 119-120 as follows:
- [119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the Legal Profession Act. Those cases, such as *Bradshaw*, that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.
- [120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.
- [Emphasis added.]
- [18] I note that the suggestion that waiting until all appeals are exhausted only addresses the waiver of litigation privilege, and not solicitor-client privilege. Because legal accounts, fees, and bills may contain information that is subject to litigation privilege as opposed to solicitor-client privilege (though this is not always the case), and there is a recognized necessity to providing a bill that is to be assessed, the reasoning at paras. 113 and 120 of *Gichuru* that a party may wait until appeals are exhausted could address this concern. However, waiting until all appeals are concluded is not a solution to the requirement to produce solicitor-client privileged information, as opposed to information subject only to litigation privilege.
- [19] Since *Gichuru*, the Supreme Court of Canada has further elucidated the quasi-constitutional protection afforded to solicitor-client communications, and the importance of that privilege to the integrity of our legal system. Protection of solicitor-client privilege is now recognized as a principle of fundamental justice, not merely an evidentiary rule: *Canada (National Revenue) v. Thompson*, 2016 SCC 21; *Canada (Attorney) v. Chambre des notaires du Québec*, 2016 SCC 20; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. At para. 43 of *Alberta (Information and Privacy Commissioner)*, the Supreme Court of Canada wrote that "[t]his Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."

- [20] Prior to Gichuru, Master Boulton in *Chaplin v. Sun Life Assurance Co. of Canada*, 2006 BCSC 449, took a more issue-specific approach to the requirement for the disclosure of solicitor-client privileged information in special costs assessments, writing:
- [25] In my view, the duty of the court is to balance, as best it can, the right of one party to uphold the principle of solicitor/client privilege against the other party's right to natural justice and the disclosure of relevant evidence. I conclude that the balance can best be achieved by allowing the defendant to maintain its claims of privilege for all the documents it has enumerated. It may do so without prejudicing its general right to have the costs assessed on an increased costs basis, as specified by the learned trial judge. However, it takes the risk that a particular aspect of the costs will be disallowed by the taxing officer because the evidence is simply not there to support the claim.
- [21] This approach was endorsed by this Court in *Grewal v. Sandhu*, 2011 BCSC 726 at para. 7, partly rev'd on other grounds 2012 BCCA 26, leave to appeal ref'd [2012] S.C.C.A. No. 120 (S.C.C.) and *Haydu v. Nagy*, 2012 BCSC 1870 at paras. 30-31. This approach also appears to have been endorsed by our Court of Appeal, shortly after its decision in *Gichuru*, in *Bronson v. Hewitt*, 2014 BCCA 514 at paras. 24-28.
- [22] In my view, the suggestion that a party must routinely waive solicitor-client privilege in order to quantify the amounts that a court has already determined the party is contractually entitled to, or abandon its contractual claim for indemnity entirely, overstates the waiver that is required to address natural justice as expressed in *Gichuru*, and other decisions of this Court and our Court of Appeal.
- [23] This Court frequently must balance the demands of protecting solicitor-client communications and the relevance of that information to an issue at trial (and hence the interests of natural justice). In these circumstances, as a general rule, this Court protects the privileged information. Even in cases where the privileged information is at the heart of the dispute, for example judicial reviews of administrative decisions made in relation to the disclosure of privileged information, this Court regularly seals that information and will sometimes even preclude counsel from reviewing it despite the obvious obstacles that raises: see for example *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 1132, aff'd 2020 BCCA 238; *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 48; *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2062.
- [24] It is incumbent upon the assessor of costs, whether that be the registrar in most cases, or a trial judge in rare cases, to weigh both the importance of maintaining solicitor-client communication to the integrity of our justice system against the importance of natural justice in considering applications for disclosure. As stated by the Court of Appeal at para. 110 in *Gichuru*, the proceeding must be conducted in a way that is proportionate to the amounts involved and the importance of the issue in dispute.

- [25] In my view, requiring a party to waive privilege over its solicitor-client communications in order to quantify its contractual entitlement, as is contemplated by Camacc in this case, should not be routinely expected. Nor do I consider such a waiver to be a proportionate response to the concerns and issues raised by Camacc as its basis for seeking a review of the contingency fee before the registrar.
- [26] In this case, Camacc says I do not have the information necessary to assess costs on a summary basis, in part because of the "wide focus" of disclosure it says it requires of communications around the formation of the contingency agreement, and the detailed accounting of the subject and purpose of each hour spent by Sequoia's counsel in pursuing Sequoia's claim. In my view, the level of disclosure initially suggested by Camacc, if not more closely tailored, would likely require a gross waiver of solicitor-client privilege, and would not be proportionate to the requirements of natural justice, particularly in a case like this where time spent is only one factor of the reasonableness of a contingency fee claim, and the time spent by Sequoia's counsel to pursue this claim to the end of trial was manifestly significant.

APPROPRIATENESS OF SUMMARY ASSESSMENT

- [27] As Gichuru confirms, this Court has the jurisdiction, both inherent and pursuant to the Rules, to assess costs summarily. However, it is a discretion which should be exercised sparingly, primarily because the registrar in BC has extensive knowledge and experience in assessing legal bills that are seldom matched by that of a trial judge. The same is true of assessing contingency fee agreements and their reasonableness.
- [28] This appears to be the opposite of the practice in Ontario, as described by Justice Donegan in *Hobbs* at paras. 57-73. In our Court, it is well settled that it is only in rare cases that this Court will agree to assess costs summarily rather than refer them to the registrar. Furthermore, those cases will often be ones where there are real concerns about the costs, delay, expense of further proceedings, the use of such proceedings to pursue vexatious ends, and the overall proportionality of such proceedings. Generally, where costs are assessed summarily, they are done by consent, or with a significant discount to ensure that they do not overshoot the mark of what might be awarded by the registrar in a more detailed hearing.
- [29] In this case, Sequoia seeks an assessment, on a summary basis, of its full indemnity costs without any suggested discount, on the premise that the contingency fee of 30% is imminently reasonable. Sequoia notes that:
- a) the 30% contingency is less than the maximum fee percentage allowable for personal injury or wrongful death claims in BC, which is the only type of claim in which there is a statutory maximum percentage limit;

- b) the award in this case followed almost six years of litigation, culminating in a ten-day trial, which included examinations for discovery, two different mediation dates, multiple pretrial applications, and a trial that did not proceed due to the lack of a judge;
 - c) because this is an indemnity assessment and not a special costs assessment, the objective reasonableness of the fee itself is less at issue than the reasonableness as between the Sequoia and its lawyers; and
 - d) I am in a unique position as the trial judge to determine the reasonableness of the contingency fee.
- [30] Sequoia points to two cases involving contingency fees in the context of special costs awards, where this Court summarily assessed those costs on the basis of the contingency fee: *Noriss v. Burgess*, 2016 BCSC 1451, and *Northmont Resort Properties Ltd. v. Golberg*, 2018 BCSC 151.
- [31] Camacc argues that none of the above factors bring this case outside of the ordinary expectation that it be given the opportunity to challenge the costs claimed by Sequoia before the registrar in accordance with the requirements of natural justice. It says that contingency fee awards are regularly reviewed by the registrar, and it cannot be presumed that the full amount of the contingency fee would be upheld if it was reviewed in accordance with the factors under the Legal Profession Act. Camacc also distinguishes *Noriss* and *Northmont* from this case.

Determination

- [32] I agree with Sequoia that, because I had to weigh the arguments made by both parties in this trial, I am in a privileged position to consider some aspects of the assessment required to determine costs in this case, including the risks involved in the contingency fee arrangement. In my view, Sequoia's counsel faced a real risk of non-recovery in this case, with a hard upper limit on that recovery (which they achieved). This was a hard-fought case, where virtually every arguable defence was pursued and had to be addressed.
- [33] However, I do not consider that this puts me in a better position than the registrar to determine and assess costs of this contingency fee arrangement in general. Furthermore, I agree with Camacc that the factors that made summary assessment appropriate in *Norris* and *Northmont* are not present here, including that:
- a) the *Norris* trial was more procedurally complex than this trial, and there does not appear to have been any objection to a summary assessment of costs in *Norris*; and
 - b) the procedural background of the *Northmont* trial, and the fee assessment and application of the contingency fee agreement (to this trial and a class of related cases), were highly complex and the trial judge was uniquely positioned to consider those issues.

- [34] Overall, I am convinced by Camacc's arguments that, despite the attractiveness and simplicity of settling costs based on the 30% contingency fee arrangement in this case, Camacc should have an opportunity to challenge the reasonableness of these fees and disbursements before the registrar.
- [35] I therefore grant para. 2 of Sequoia's application, as consented to by Camacc, and order that Camacc pay Sequoia costs of this proceeding, on a full indemnity basis, in an amount to be assessed by the registrar.
- [36] However, in light of my concerns about the proportionality of Camacc's demands for disclosure in this contingency fee case, particularly as they relate to disclosure of solicitor-client privilege, I direct the registrar to closely consider and weigh any demands for the waiver of solicitor-client privilege as a principle of fundamental justice, against the relevance and usefulness of that information as it pertains to Camacc's entitlement to natural justice. Camacc indicated over the course of its submissions that it is prepared to start with a more limited scope of disclosure, though it reserves the right to expand these demands. To the extent that Camacc's demands for disclosure must be determined by the registrar, I direct the registrar that Camacc's demands for waiver of solicitor-client privileged information ought to be reviewed closely against a substantiated need for such disclosure to address the natural justice requirements in each case, and tailored to require disclosure only where it is both necessary and proportionate to do so.
- [37] I also direct the registrar to ensure that the costs and procedures of the assessment are proportionate to the amounts at issue. In this case, the fee claimed is sizable; however, I am unclear, based on Camacc's arguments before me, how much of that fee is actually at issue.
- [38] Finally, I note that, in special costs and indemnity fee assessments, proportionality is often facilitated by the fact that the party challenging the amount of those fees is also required to pay the costs of the assessment and any related disclosure on the same basis. In this case, Camacc says that it will not be required to pay any additional costs to Sequoia in relation to the costs assessment process, at least not on an indemnity basis, because the contingency fee award already covers this assessment. Sequoia disagrees, and seeks recovery of its full indemnity costs on the assessment in addition to the contingency fee. That issue, if not settled, will have to be resolved by an interpretation of the contingency fee agreement by the registrar. I urge Camacc not to rely on its position in this regard to pursue what would otherwise be disproportionate procedures and processes in relation to the contingency fee assessment before the registrar.
- [39] Costs of this application are adjourned until the registrar's hearing is complete. While I have accepted Camacc's position that it is entitled to have these costs assessed by the registrar, it will be for the registrar to determine whether this referral, including its additional costs and delays, results in a more successful costs position for Camacc than if I had assessed these costs summarily. I therefore direct that the costs of this application be referred back to me after the registrar's costs assessment. Of course, none of this should preclude the parties

from settling costs of the action, or of this proceeding, and I encourage them to do so.

"Marzari J."

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