

CANADA / JUDGMENT

Tsai v. Li

2020 BCCA 264

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 264 Tsai v. Li

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Tsai v. Li,

2020 BCCA 264

Date: 20200923

Docket: CA46691

Between:

Wen Hsien Tsai

Appellant

(Plaintiff)

And

Zhixiang Li

Respondent

(Defendant)

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 17, 2020 (Tsai v. Li, 2020 BCSC 60, Vancouver Docket S158797).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

T.M. Arbogast

Counsel for the Respondent

(via teleconference):

S.A. Mellows

Place and Date of Hearing:

Vancouver, British Columbia

September 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 23, 2020

Summary:

The appellant seeks leave to appeal a special costs award made following an 18-day trial. Held: an extension of time to file the motion book on the application for leave to appeal is granted; however, leave to appeal is denied. The appellant has not established it is in the interests of justice for leave to be granted. There is nothing on the face of the costs ruling that reveals misdirection on a matter of legal principle, a palpable error in assessing the underlying facts, or an unjust award. Nor does the application for leave to appeal raise questions of principle that extend beyond the parameters of this case, or are of significance to practice.

- [1] DEWITT-VAN OOSTEN J.A.: This is an application for leave to appeal a special costs award arising out of an 18-day trial.
- [2] The appellant, Mr. Tsai, refused to complete a contract for the \$5.1 million purchase and sale of his home in West Vancouver. He did so on the belief that he had been "stiffed" by the purchaser who, after executing the purchase and sale agreement, assigned the contract to another party. (The assignment did not take effect because of Mr. Tsai's refusal to close. The assignee subsequently obtained an order for specific performance. However, that order was overturned on appeal. See *Zhang v. Tsai*, 2017 BCSC 583; *Zhang v. Tsai*, 2017 BCCA 371).
- [3] Mr. Tsai sued the purchaser, Zhixiang Li, and others for rescission and damages. Among other things, Mr. Tsai alleged that Mr. Li and their dual agent, Leo Zhang, conspired to obtain the property at a reduced price. He also claimed a breach of fiduciary duty, negligence and misrepresentation by the dual agent.

- [4] After an unsuccessful attempt by the defendants to have the claims resolved at a summary trial, Mr. Tsai's action proceeded to a full trial. Reasons for judgment are indexed as *Tsai v. Li*, 2019 BCSC 1317 ("RFJ"). The trial judge did not find Mr. Tsai to be a reliable or credible witness. Ultimately, the judge concluded that the evidence did not support the alleged conspiracy. To the contrary, it supported Mr. Li's position that at the time he entered into the purchase and sale agreement, he intended to buy the property for use as his residence.
- [5] The judge also rejected the claim of breach of fiduciary duty, specific to Mr. Zhang. On the evidence, the agent:

did not misrepresent anything. He did not make a profit or other benefit from the transaction other than his commissions. There was no nefarious plan. He did not think the property was undervalued and in fact it was not undervalued. Assuming there was a fiduciary relationship [between Mr. Tsai and the agent] it was not breached.

(RFJ at para. 128).

- [6] Lastly, the judge rejected the negligence claim. Mr. Tsai alleged two breaches of a duty of care by Mr. Zhang. First, that the documents signed by Mr. Tsai were not adequately explained to him. Second, that the agent did not provide an accurate valuation of the property and mischaracterized the agreed-upon purchase price as "high and unlikely to be bettered" (RFJ at para. 129). The trial judge found there was no support for either allegation. He dismissed all of Mr. Tsai's claims.
- [7] After trial, and by way of a separate ruling following the receipt of written submissions, the judge awarded special costs in favour of Mr. Li: *Tsai v. Li*, 2020 BCSC 60 ("Ruling"). The bases for the costs award are set out in paras. 7-11 of the Ruling:
- [7] It is clear from my trial reasons that the only evidence Mr. Tsai had with respect to his claims were the facts that Mr. Li did not move into the house after closing and that he had assigned the contract. This led Mr. Tsai to believe that he had been "stiffed". From beginning to end, there was no evidence of the wrongs alleged by Mr. Tsai. If that was not apparent to Mr. Tsai at the commencement of the litigation, it ought to have become so as the case progressed through the discovery stage when nothing of moment was unearthed.
- [8] In 2016, in support of their summary trial application, the defendants provided Mr. Tsai with an appraisal report indicating that the sale price was at fair market value. The report was not challenged at the summary trial or the trial in front of me. This essentially cut the legs out from the claim, which was already devoid of evidence. It is no doubt this which led to an amendment (made shortly before the full trial) changing the conspiracy claim from one to convince Mr. Tsai to sell at an under-market price to selling at a "reduced price". At the trial, Mr. Tsai said he had been told that the sale price was a "heavenly price"; something he had not alluded to in his discovery evidence. I rejected his evidence on that and in any event concluded that it could not advance his claim given the home was sold at fair market value: see trial decision paras. 101 and following.

- [9] Mr. Tsai successfully resisted the application to have his claim dismissed at the summary trial, largely on the basis that conflicts in the evidence had to be tested at a full trial. However, in Justice Kent's reasons, he put him on notice that he might be liable for significant costs, given the convincing arguments of the defendants: see 2018 BCSC 582 at para. 14.
- [10] At the end of the trial, during argument, Mr. Tsai expanded the fraudulent conspiracy allegations originally alleged against Mr. Li and Mr. Zhang only, by claiming others, including independent realtors and builders, were also involved.
- [11] Mr. Tsai was not truthful in his testimony at trial. Amongst other things, he falsely presented himself as being a naïf at real estate. He concealed phone records until he thought they might serve his advantage during the trial. As I noted in the trial reasons, this was a shocking lack of disclosure. When those were produced they showed that he had a telephone call with his daughter who lived in London, Ontario on the day the documents were signed; yet, he had previously testified that he had been prevented from calling his daughter or others to seek advice. When the call was put to him, he made the completely unbelievable assertion that he and his daughter did not discuss the transactions.
- [8] Mr. Li had filed a counterclaim, which was also heard at the trial. The counterclaim was dismissed. In light of the fact that Mr. Tsai succeeded on the counterclaim, the trial judge allowed Mr. Li to recover only 90% of his special costs. The Ruling explains it this way:
- [20] Finally, Mr. Tsai asks for apportionment of costs or that each party bear their own costs because I dismissed Mr. Li's counterclaim. The counterclaim took virtually no additional trial time. Apportionment of costs which would have [to] be dealt with at a Registrar's hearing would be de minimis. Each party bearing their own costs for - at most - a collective few hours of trial and discovery time would be absurd. Mr. Li suggests that this be dealt with by way of ordering that he recover 90% of his special costs. That is reasonable and I so order.

Application for Leave to Appeal

- [9] Mr. Tsai seeks to challenge the order for special costs (entered January 17, 2020). Initially, by way of a separate notice of appeal, he also sought to challenge the dismissal of his claim in rescission and damages. However, he abandoned that appeal in January 2020, before filing his application for leave to appeal the costs award.
- [10] A preliminary question has arisen as to whether the special costs award is a limited appeal order within the meaning of Rule 2.1(f) of the Court of Appeal Rules ("Rules"), thereby requiring leave. Although Mr. Tsai abandoned his appeal of the dismissal for rescission and damages, when he filed his notice of application for leave to appeal the costs award, there was an outstanding appeal from the dismissal of the counterclaim that had been filed by Mr. Li. That appeal has also been abandoned. Counsel for Mr. Tsai suggests that in light of the fact that the appeal of the counterclaim existed at the time he filed, his client does not

require leave. Under Rule 2.1(f), leave is required if the order granting costs is the "only matter being appealed". When Mr. Tsai filed his application for leave to appeal, there was another matter under appeal arising from the trial, namely, the counterclaim.

- [11] In my view, Mr. Tsai does require leave to proceed with his appeal. There are no longer any substantive appeals as of right arising out of the claim in rescission and damages or the counterclaim. If this remaining matter proceeds to a hearing before a division, the only order under review will be the special costs award. That award stands as a distinct order. It was made separately from the substantive orders on both the main action and the counterclaim and after the judge received comprehensive written submissions from the parties specific to the issue of costs.
- [12] In these circumstances, requiring leave is consistent with the language and objective of Rule 2.1(f). It is also consistent with the decisions of this Court in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2016 BCCA 311 (Chambers) at para. 6 and *Price v. Robson*, 2017 BCCA 419 (Chambers) at para. 45.
- [13] Mr. Tsai also requires an extension of time to file his motion book on the application for leave. His notice of application for leave was filed on February 12, 2020. Under Rule 7(1), he had 30 days from then to file his motion book: March 13, 2020. His book was filed on August 11, 2020. However, as a result of the COVID-19 pandemic, the Court suspended its filing deadlines for subsisting appeals from March 18 until September 14, 2020. Accordingly, the appellant requires only a four-day extension (the difference between the prescribed deadline and the suspension).

Discussion

Extension of Time

- [14] I am satisfied it is in the interests of justice to grant the appellant his extension of time. He demonstrated a bona fide intention to appeal. The respondent received timely notice of that intention, and, although the delay in filing the motion book caused uncertainty for Mr. Li about whether the appellant intended to follow through with an appeal, I do not find that Mr. Li has been unduly prejudiced: *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.) at 259-260. Mr. Tsai missed the prescribed deadline; however, his lawyer's office closed the week of the deadline because of COVID-19, and it affected his ability to move things forward. Due to the pandemic, this Court was only scheduling urgent matters in April and May. Access to hearing time was limited, and I accept that the public health concerns surrounding the compilation and filing of documents rendered processes more complex than usual. Generally, the Court takes a less stringent approach to extension requests that relate to steps taken in an appeal, as opposed to the filing of initiating documents: *Hydro Fuels Inc. v. Moran* (1993), 43 A.C.W.S. (3d) 179 at para. 9 (Chambers). See also *Davies* at 259. In the circumstances, I consider it appropriate to give effect to that principle here.

Leave to Appeal

[15] In *Gichuru v. Pallai*, 2019 BCCA 282 (Chambers) at para. 10, Hunter J.A. noted that before granting leave to appeal a costs award in the absence of a challenge to the underlying litigation (which is the case here), the application judge must ask:

- (1) whether the proposed appeal raises questions of principle that extend beyond the parameters of the particular case;
- (2) whether the questions of principle are of significance to the practice; and
- (3) whether the proposed grounds for appeal are arguable.

See also *Yung v. Jade Flower Investments Ltd.*, 2012 BCCA 168 at paras. 18-20.

[16] The applicant says he meets these criteria. First, he contends that the reasons provided in support of the special costs award do not support or adequately explain a finding of "reprehensible conduct", a precondition to awarding special costs. As explained in *Gichuru v. Pallai*, 2018 BCCA 78:

[86] The authority to award special costs is found in Rule 14-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009: *Gichuru v. Smith*, 2014 BCCA 414 at para. 98 [Smith]. Special costs are typically awarded against a party that has engaged in some form of reprehensible conduct during the course of litigation: see *Young v. Young*, [1993] 4 S.C.R. 3 at 134-138; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56, 134. Other situations, not relevant here, may justify special costs: *Smith* at para. 90.

[87] Special costs have as their purpose the punishment and deterrence of reprehensible conduct: *Smithies Holdings* at para. 128; *Grewal v. Sandhu*, 2012 BCCA 26.

[Emphasis added.]

[17] Second, the appellant says apportioning costs is something that is supposed to occur in "relatively rare cases": *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at para. 7, citing *British Columbia v. Worthington (Canada) Inc. et al.* (1988), 32 C.P.C. (2d) 166, 29 B.C.L.R. (2d) 145 (C.A.). More importantly, when this is done, the trial judge is obliged to engage in a three-pronged enquiry:

- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
- (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
- (3) it must be shown that apportionment would effect a just result.

(*Sutherland* at para. 31).

- [18] The appellant says the judge did not adhere to this framework when ordering that Mr. Li receive only 90% of his special costs. Alternatively, he did not give the three steps mandated by Sutherland meaningful consideration. The apportionment analysis was cursory and speculative. Before assessing the costs on the counterclaim, the judge was obliged to engage in a more in-depth enquiry, one that broke down and considered the specific steps taken in response to the counterclaim, as supported by an evidentiary foundation specific to that analysis.
- [19] The respondent opposes the granting of leave. In so doing, he emphasizes the highly deferential standard of review brought to a costs award (not disputed by the appellant). For example, in *Price*, Justice Fitch noted that:
- [51] leave to appeal a costs order is only warranted if the trial judge misdirected himself or herself on a matter of legal principle, committed a palpable error in assessing the facts, or if the award was "so clearly wrong as to amount to an injustice" .

[Internal references omitted.]

See also *Seminoff v. Seminoff*, 2007 BCCA 403 (Chambers) at paras. 2-4.

- [20] The respondent also says the trial judge made no error in principle in granting special costs and the award was amply justified on the evidence. This is especially so in light of the conclusion that the appellant pursued a "meritless claim with unfounded allegations of fraud" (respondent's memorandum at para. 11).
- [21] The respondent says a conjunctive reading of the RFJ and Ruling is necessary to appreciate the entirety of the foundation underlying the special costs award. The judge made this clear in the Ruling (at para. 3). Together, the two sets of reasons demonstrate that the judge found more than one form of "reprehensible conduct" on the part of Mr. Tsai and they adequately explain the award.
- [22] The respondent also says the costs award is fact-specific and does not raise issues of general importance that transcend the matrix of the case, requiring review by this Court to clarify uncertainty in the law or to provide guidance in practice. This includes the issue of apportionment.
- [23] It is the respondent's position that the trial judge was not engaged in an apportionment enquiry involving discrete issues arising in the context of Mr. Tsai's action, necessitating a Sutherland enquiry. Instead, in the appellant's written submissions on costs post-trial, he asserted that he was entitled to costs on the counterclaim because of the dismissal (he did not seek special costs on the counterclaim). The appellant then posed a specific question for the trial judge, namely: "what portion of the trial should be attributed to the main action, and what portion to the counterclaim" (respondent's memorandum at para. 17). The judge answered that question by determining the extent to which the counterclaim, as a separate action, added to the costs of the main action (he found it to be minimal). He then awarded Mr. Tsai his costs on the counterclaim by setting them off against the special costs award, on

a percentage basis.

[24] The respondent says Rule 14-1(15) of the Supreme Court Civil Rules allows for this approach:

The court may award costs

- (a) of a proceeding,
- (b) that relate to some particular application, step or matter in or related to the proceeding, or
- (c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

See also *Gichuru v. Smith*, 2014 BCCA 414 at paras. 106-107, 154-156.

[25] He also submits that the approach taken by the trial judge finds ample support in the case law and in practice. For the purpose of costs, claims and counterclaims are generally treated as separate actions: *Venables v. Venables*, 2019 BCCA 378 at para. 11.

[26] If this Court disagrees that what occurred was a set-off between the main action and the counterclaim (as opposed to apportionment), the respondent contends that the Sutherland test was nonetheless satisfied: "The counterclaim [was] discrete, the trial judge identified the time spent on the counterclaim ('a few hours of trial') and a just result [was] achieved" (respondent's memorandum at para. 24).

[27] On a consideration of the leave materials, as a whole, I am of the view that leave to appeal is not warranted.

[28] The Ruling *prima facie* reveals that the trial judge properly instructed himself on the factors for consideration in making a special costs award, as summarized in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 (Ruling at para. 4). Contrary to the appellant's contention, the Ruling, read in combination with the RFJ, provides a comprehensive and discernible basis for the award. This includes specific findings of:

- a "shocking lack of disclosure" in relation to phone records that were relevant to material issues at trial (RFJ at para. 93);
- impugning the honesty of a witness by alleging that she was part of the supposed conspiracy, notwithstanding the fact that that witness' evidence was consistent with the documentary evidence tendered at trial and there was no basis for that claim (RFJ at paras. 97, 107);
- "a construction" of his denial of knowledge of the assignment or Mr. Li's desire to assign (RFJ at para. 97);
- alleging a fraudulent conspiracy that had no basis in fact or law (RFJ at para. 135); and,

· providing false testimony with the intention of misleading the trial court (Ruling at para. 11).

[29] In light of these factual findings, I see no prospect of success for Mr. Tsai's contention that appellate intervention is warranted on grounds the award was clearly unreasonable, that its factual underpinning was insufficient, or that there has been an inadequate articulation of the rationale for the award. The trial judge's findings speak for themselves. Mr. Tsai is not challenging the dismissal of his action in rescission and damages, the findings of fact made in respect of those claims, or the judge's assessment of Mr. Tsai's credibility. Those findings fed into and informed the special costs determination.

[30] I also agree with the respondent that there is no merit to the suggestion that the judge erred in principle by not completing a Sutherland analysis, or that this aspect of the Ruling raises questions of general importance that transcend the case because of the summary nature of the costs determination. Like the respondent, I do not see this as an apportionment case. Rather, on the basis of the distinction suggested by the appellant, the trial judge awarded Mr. Tsai his costs on the counterclaim (a discrete action), using a percentage basis, and then simply deducted those costs from the amount owing on the special costs award (the main action). A full accounting of costs is yet to come through the taxation process. I see nothing unusual or demonstrably unreasonable about the judge's approach, such that this Court's review is required. The methodology by which a judge should approach the issue of costs, including the process of summary assessment, has already been comprehensively considered by this Court and is set out in *Gichuru v. Smith*.

[31] The trial judge was intimately familiar with the litigation, including its history, the evolution of Mr. Tsai's approach to his action, and the extent to which the counterclaim impacted the course of the 18-day trial. Counsel for Mr. Li, who participated at trial, has advised that only one witness was called in support of the counterclaim. Of the 30-page reasons for judgment, one and one-half pages is devoted to the counterclaim, confirming that it played only a small part in the overall hearing. The judge was entitled to bring his familiarity with the proceedings to bear in his exercise of discretion when addressing the issue of costs, and I see nothing on the face of the Ruling that reveals misdirection on a matter of legal principle, a palpable error in assessing the underlying facts, or an unjust award: Price at para. 51.

Disposition

[32] For the reasons provided, I grant the appellant an extension of time to file his motion book for leave to appeal to August 11, 2020. However, I dismiss the application for leave to appeal. Costs on the application are awarded to the respondent.

"The Honourable Madam Justice DeWitt-Van Oosten"

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