
CANADA / JUDGMENT

Uppal v. Rawlins

2010 BCSC 11

COURT

Supreme Court of British Columbia

DECIDED

7 January 2010

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2010 BCSC 11 Uppal v. Rawlins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Uppal v. Rawlins,

2010 BCSC 11

Date: 20100107

Docket: S081464

Registry: Vancouver

Between:

Pal Uppal and Navjeet Uppal

Plaintiffs

And

Michael Gordon Rawlins, Hans Baxter Rawlins,

Amex-Fraseridge Realty and Baljinder S. Parmar

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment on Costs

Appearing in person:

P. Uppal and N. Uppal

Counsel for the Defendants Michael Gordon Rawlins and Hans Baxter Rawlins:

S. B. Twining

Counsel for the Defendants Amex-Fraseridge Realty and Baljinder S. Parmar:

S. G. Cordell

Place and Date of Hearing:

Written Submissions:

Vancouver, B.C.

December 18, 2009

January 5, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 7, 2010

INTRODUCTION

- [1] In reasons for judgment issued November 16, 2009, I dismissed the plaintiffs' claims against all defendants. The plaintiffs had alleged a number of fraudulent and negligent representations and actions against the defendants arising out of the plaintiffs' inability to complete an agreement for the purchase of land for development purposes.
- [2] In the course of my reasons for judgment I noted that the plaintiff Navjeet Uppal had forged evidence for use in pre-trial proceedings, and had committed perjury both in an affidavit and on examination for discovery. I observed that the plaintiff Pal Uppal had deposed that he had reviewed Navjeet Uppal's affidavits and that their contents were true. I commented that I felt obliged to treat their evidence with the greatest care. I was ultimately unable to accept their evidence concerning the alleged fraudulent misrepresentations and breaches of duty.
- [3] In addition, I noted that almost none of the allegations that had initially been pleaded were pursued at trial, and that these appeared to have been intended to support the filing of certificates of pending litigation for the purpose of enforcing settlement. The allegations pursued at trial were added by amendment very shortly before the trial commenced.
- [4] The defendants now seek an order for special costs, or failing that, for double costs from the date of an Offer to Settle, with ordinary costs up to that date.

THE RULE 18A APPLICATIONS

- [5] Among the pre-trial proceedings in this matter were applications by the defendants for judgment dismissing the action by way of summary trial. Those applications were heard by the Honourable Madam Justice L. Smith on January 5, 6 and 8, 2009. In reasons for judgment released on February 6, 2009 (indexed as 2009 BCSC 127), Her Ladyship concluded that this was not a case in which it was possible to make the findings of fact necessary to resolve the issues of fact and law, and that it would be unjust to decide the issues on a summary trial application. She therefore dismissed the defendants' applications, stating that "[c]osts will follow the event" (paras. 33 and 34).
- [6] I take that to mean that the costs of the summary trial applications were awarded to the plaintiffs, otherwise one would expect the ruling to have been that costs would be in the cause. It follows that none of the defendants is entitled to costs for those applications.
- [7] With respect to those costs claimable by the defendants against the plaintiffs, the plaintiffs may set off their own party and party costs at Scale B for tariff items 18, 19 and 31 in relation to the Rule 18A applications.

SPECIAL COSTS

- [8] Whether to award special costs is within the Court's discretion. The single standard for the awarding of special costs is whether the conduct of the parties in question can properly be categorized as "reprehensible", which encompasses scandalous or outrageous conduct, as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740. Such conduct may include making serious allegations of fraud and dishonesty without any prima facie case, although an unproven fraud claim does not necessarily equate to an order for special costs: *Chaplin v. Sun Life Insurance Co. of Canada*, [2004] B.C.J. No. 146 (S.C.) and *Young v. Young* (1990), 50 B.C.L.R. (2d) 1 (C.A.).
- [9] The plaintiffs, who are now representing themselves, argue in essence that an award of special costs would be disproportionate in the circumstances. They point out that as a result of the trial judgment, they have forfeited their deposit on the purchase of the land in the amount of \$550,000 and will lose a further \$26,000 posted as security for costs in their former counsel's trust account. They also maintain that they spent around \$60,000 advancing the property, thereby enhancing its value and creating a windfall for the Rawlins defendants. They complain that they cannot afford special costs or double costs as they cannot even afford to continue retaining counsel. No evidence was put forward concerning their financial affairs.
- [10] Notwithstanding their concerns, there is no doubt in my mind that the defendants Michael Gordon Rawlins and Hans Baxter Rawlins are entitled to an award of special costs. The forged evidence and the admitted perjury were aimed specifically at them, as were the procedural steps taken to file a CPL, and to resist its removal. The allegations of fraudulent

misrepresentation made against them were completely unfounded. The conduct of the plaintiffs with respect to the claim against the Rawlins defendants was outrageous in the extreme, and eminently worthy of rebuke. The plaintiffs' losses were undoubtedly a blow to them, but were not due to any wrongdoing on the part of the defendants. They have no one but themselves to blame for the consequences of their dishonesty.

- [11] With respect to the realtor defendants, however, the appropriateness of an award of special costs is not so obvious. The particulars of the claim initially alleged against Amex-Fraseridge Realty and Baljinder S. Parmar were the same as those alleged against the Rawlins defendants. The context, however, was different. As against the Rawlins defendants, the particulars illustrated ways in which the Rawlins defendants were alleged to have fraudulently duped the plaintiffs. As against the realtor defendants, they were put forward as particulars of their negligence and failure "to act in the Uppals' best interest", the claim being founded upon alleged breaches of a professional duty of care owed by Mr. Parmar as the plaintiffs' realtor.
- [12] Only with the amendments added shortly before the trial did the word "fraudulently" appear in relation to Mr. Parmar, when it was alleged that he had "fraudulently or negligently [advised] the Uppals that the Rawlins would provide vendor financing". The other aspects of the plaintiffs' outrageous conduct did not relate to the claim against Mr. Parmar at all.
- [13] Notwithstanding that I found the claims against Mr. Parmar to be unsupported by the evidence, I do not consider the plaintiffs' conduct in relation to him, taken as a whole, to be sufficiently deserving of reproof or rebuke so as to justify an award of special costs.

SCALE OF COSTS

- [14] It follows that the realtor defendants are entitled to party and party costs as a result of their successful defence of the action. In my view, the matter was one of ordinary difficulty, and I fix the scale of the realtor defendants' costs at Scale B.

DOUBLE COSTS

- [15] By letter delivered by counsel for the realtor defendants at approximately 1:00 PM on Wednesday, March 25, 2009, and open for acceptance until 4:00 PM on Friday, March 27, 2009, the defendants offered the all-inclusive sum of \$40,000 in full settlement of the plaintiffs' claim. The proposal would also have entitled the plaintiffs to the return of \$26,000 that they had been obliged to post as security for costs in their solicitor's trust account. The trial was set to commence the following Monday, March 30, 2009. The letter complied with Rule 37B(1)(c).

- [16] Rule 37B is discretionary. Where an offer to settle has been made, the Court may do a number of things, one of which includes awarding double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle (Rule 37B(5)(b)). Rule 37(6) provides as follows:
- (6) In making an order under subrule (5), the court may consider the following:
- (a) 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 on any later date;
 - (b) the relationship between the terms of settlement offered at the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.
- [17] It has been suggested, on the basis of, *inter alia*, my brother Hinkson's judgment in *Bailey v. Jang*, 2008 BCSC 1372 at para. 39, and my own judgment in *Brown v. Boyar*, 2009 BCSC 1603 at paras. 20-22, that an offeree should have at least seven days in which to consider an offer to settle, whereas here only two days were given.
- [18] I do not agree that either judgment stands for so rigid a proposition. In my view, the proper question is whether the offeree was given time for consideration that was reasonable in all of the circumstances. I note that my brother Masuhara recently came to the same conclusion in *Dodge v. Shaw Cablesystems Ltd.*, 2009 BCSC 1765.
- [19] In *Bailey*, Hinkson J. found that the defendants were entitled to an award of double costs "beginning a reasonable period of time after which the plaintiff could consider their offer". His specific concern was not what length of time was appropriate for reasonable consideration, but when the doubling of the costs should commence in relation to the date of the offer. In *Brown*, I concluded that the plaintiff ought to have accepted the offer in question "within the seven days permitted [by the terms of the offer]", taking into account the history of the litigation. I did not find that seven days was required for reasonable consideration, but rather that the period of seven days stipulated by the offeror was sufficient in the circumstances.
- [20] In this case, although the offer was open for only a relatively short period of time, it was presented just before trial, when all discovery of documents and examinations for discovery had been completed, and when the issues had been fully aired in a Rule 18A application for judgment brought by the defendants. That application was dismissed because the chambers judge found that the case was not suitable for determination by summary trial given the credibility issues. Nevertheless, the position of the defendants was made abundantly clear to the plaintiffs. There would be no surprises at trial. Moreover, the perjury and forgery of the plaintiff Navjeet Uppal had been exposed, and the defendants had obtained admissions on discovery that had seriously imperiled the plaintiffs' case.

- [21] In all of these circumstances, I have no hesitation in concluding that the offer was one that ought reasonably to have been accepted within the 51 hours or so during which it was open for acceptance. Had the plaintiffs accepted it, they would have saved \$26,000 that they will now lose, they would have received \$40,000 that they will not now get, they would have saved the time and expense of many days of trial, and they would have avoided all their additional liability for costs.
- [22] Taking all of the considerations outlined in Rule 37B(6) into account, and considering also the fundamental purpose of the rule, which is to encourage parties to avoid the costs and risks of trial where a reasonable settlement proposal is available, I conclude that it is appropriate to award the realtor defendants double costs for the trial and subsequent proceedings. I do not consider the plaintiffs' plea of poverty to be of importance in this regard. There is in fact no evidence of the relative financial circumstances of the parties. In any event, the risk of impecuniosity, which should have been obvious to the plaintiffs, ought to have motivated them all the more to accept the offer, which was generous in all of the circumstances.

CONCLUSION

- [23] The plaintiffs shall pay the defendants Michael Gordon Rawlins and Hans Baxter Rawlins their special costs of this proceeding with the exception of the costs of their Rule 18A application.
- [24] The plaintiffs shall pay the defendants Amex-Fraseridge Realty and Baljinder S. Parmar their party and party costs at Scale B for all items up to and including March 27, 2009, with the exception of their Rule 18A application, and double their party and party costs at Scale B for all items thereafter.
- [25] The plaintiffs may set off against their liability to the defendants their party and party costs at Scale B for items 18, 19 and 31 in relation to the Rule 18A applications.
- [26] The defendants are entitled to payment forthwith of the sum of \$26,000, together with all accumulated interest, from the trust account of Palkowski & Company Law Corp. in partial payment of their costs. If the defendants are able to agree on how the funds are to be divided between them, they may include their agreement as a term of the order. Otherwise, they may apply for directions.

"GRAUER, J."

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