

CANADA / JUDGMENT

Vesuna v. British Columbia (Transportation)

2011 BCSC 1618

COURT

Supreme Court of British Columbia

DECIDED

29 November 2011

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2011 BCSC 1618 Vesuna v. British Columbia (Transportation)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vesuna v. British Columbia (Transportation),

2011 BCSC 1618

Date: 20111129

Docket: S1992

Registry: Powell River

Between:

Rumi Vesuna

Plaintiff

And

Kevin Falcon (Minister of Transportation of British Columbia),

Alec Drysdale, Her Majesty the Queen in Right of the Province of British Columbia, Sea-Mait
Investments Ltd., and M.L. & H. Holdings Ltd.

Defendants

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment - Costs

The Plaintiff, Rumi Vesuna:

On his own behalf

Counsel for the Defendants, the Province of British Columbia and Alec Drysdale:

Angela F. Davies

Karrie Wolfe

Counsel for the Defendants, Sea-Mait Investments and M.L. & H. Holdings Ltd.:

Ian Fleming

L. Berezan (A/S)

Date of Written Submissions of the Plaintiff:

October 2, 2011

Date of Written Submissions of the Defendants, the Province of British Columbia and Alec Drysdale:

October 13, 2011

Date of Written Submissions of the Defendants, Sea-Mait Investments and M.L. & H. Holdings Ltd.:

October 14, 2011

Place and Date of Judgment:

Powell River, B.C.

November 29, 2011

Introduction

- [1] On July 13, 2011 I delivered Reasons for Judgment dismissing the plaintiff's claims against the defendants. The Reasons for Judgment are indexed at 2011 BCSC 941.
- [2] The purpose of Mr. Vesuna's lawsuit was to obtain road access through the corporate defendants' property to his own property, which he purchased in February 2005 without investigating road access. Mr. Vesuna advanced a broad variety of allegations but was unsuccessful in all of them.
- [3] In my final conclusions in the trial Reasons for Judgment, I stated at para. 186 that I would order ordinary costs payable by the plaintiff to the successful defendants, however, if any party wished to argue a different costs result, they were invited to do so. The parties have taken up this invitation. The parties have now filed written submissions with respect to costs.

The Parties' Positions

- [4] The plaintiff Mr. Vesuna argues that he should not be liable for costs. There seem to be two threads of argument in his ten page, single spaced submission:
- (a) he attacks the defendants for their conduct of the litigation, and suggests that the court should have sympathy for him as an unrepresented litigant; and,
 - (b) he submits that the court should take into account an Offer to Settle made by the Crown defendant.
- [5] The corporate defendants seek:
- (a) special costs against the plaintiff;
 - (b) or in the alternative, ordinary costs for each of the corporate defendants, treated separately; and
 - (c) in any event, an order that the plaintiff be prevented from bringing any further claims or proceedings against the defendants.
- [6] The Crown submits that ordinary costs should be payable by the plaintiff to the Crown defendants. However, the Crown asks for an order fixing costs on a lump sum basis. In addition, the Crown seeks rulings that certain disbursements incurred by it are reasonable and should be allowed.

The Plaintiff's Position

- [7] The plaintiff's argument that he should not have to pay the defendants' costs is largely based on assertions of fact relating to his underlying claim, which was ultimately unsuccessful. For example, he complains that the corporate defendants changed the lock on the gate across the road on the corporate defendants' property, and that this was "outrageous". However, given that this same allegation did not form the basis of relief for the plaintiff in the lawsuit, I do not see it as providing any basis for depriving the successful corporate defendants of their costs.
- [8] As noted by the Crown in its submissions, the rule that a successful party is entitled to his costs is not departed from except for good reason. The court must act judicially and upon proper material connected with the case or related to the subject matter of the proceeding: *Currie v. Thomas Estate* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.). Unless special circumstances can be established that would warrant depriving the successful party of an award of costs following trial, the successful party should receive their costs: *Sutherland v. Attorney General of Canada*, 2008 BCCA 27, para. 26-27. It is trite law that sympathy and financial hardship, in and of themselves, are not special circumstances upon which this court may depart from the rule that successful parties are entitled to their costs: see *Morris v John Doe*, 2011 BCSC 1053 at para. 36; *Robinson v Lakner* (1998), 159 D.L.R. (4th) 191 (B.C.C.A.).

- [9] The plaintiff alleges that the corporate defendants conducted themselves in the litigation in an unreasonable manner. I have reviewed his many complaints and find no substance to them.
- [10] On the contrary, my observations are that both sets of counsel, counsel for the corporate defendants and counsel for the Crown, conducted themselves patiently, reasonably, and with the utmost effort to cooperate in allowing Mr. Vesuna to bring his claim to trial, despite the many challenges posed by the plaintiff's disorganization and lack of understanding of the rules of procedure or evidence.
- [11] Another thread to Mr. Vesuna's argument is that the corporate defendants have considerable assets and the principals are very wealthy businessmen, but that in contrast he has limited financial resources. There was no evidence to support these allegations, but even if they were true, these are not sufficient reasons to depart from the ordinary rules as to costs.
- [12] Mr. Vesuna seems to suggest that the public nature of the action should result in deviation from the normal costs rule. In reality, however, he was making a claim which if successful, would have financial value to him and be to the financial detriment of the defendants. There was no wider altruistic or public reason for the claim.
- [13] Access to justice considerations are taken into account in the policy reasons that lie behind having ordinary costs determined by a tariff. Ordinary costs according to the court tariff are often far less than what a party actually incurred by way of legal fees. On the one hand, the risk of ordinary costs does not pose such a barrier that it prevents meritorious claims from being brought forward; on the other hand, that same risk can be said to act as a deterrent to unmeritorious claims.
- [14] The plaintiff has to be taken to have been aware of the risk that he would be subject to ordinary costs when he commenced and prosecuted this lawsuit. There is no reason here to depart from the rule that costs ordinarily follow the event.
- [15] I turn now to the plaintiff's submissions that the court ought to take into account an offer to settle.
- [16] In the course of this proceeding, on March 9, 2009, the Crown made a formal offer to settle jointly to the plaintiff and the corporate defendants. While the plaintiff wished to accept it, the corporate defendants did not, and therefore the offer was not effective. Ultimately, both the Crown defendants and the corporate defendants did better in the litigation than the terms of the offer made by the Crown, in that all of the plaintiff's claims were dismissed.
- [17] There is nothing about the fact of the Crown offer to settle which, in my view, ought to lessen or disentitle the defendants to their ordinary costs. While the offer was entirely reasonable for the Crown to make, it cannot be criticized for the fact that the corporate defendants were not willing to accede to the offer.

- [18] Likewise, the corporate defendants did better in the litigation than the terms of the offer and they too cannot be criticized for not accepting the offer.
- [19] I do not consider the fact that the plaintiff was willing to settle on terms proposed by the Crown, but the corporate defendants were not, sufficient to justify reducing the costs to which the defendants would ordinarily be entitled. Considering all of the factors in Rule 9-1(6), I am not persuaded by the plaintiff that the offer to settle by the Crown should be taken into account to affect the award of costs here.
- [20] In reaching this conclusion, I have found it unnecessary to consider the Crown argument that the right to bring an offer to settle to the attention of the court only accrues to the offering party who attempts to resolve litigation through settlement. Also, because of my conclusion I found it unnecessary to review the form of the offer to settle itself or the defendants' submissions that it was not in the form which would allow the court to consider it under Rule 9-1(4).
- [21] In conclusion, I am not persuaded by any of the plaintiff's arguments that the defendants should be deprived of their ordinary costs.

Corporate Defendants' Position

- [22] The corporate defendants argue that they should be awarded special costs.
- [23] The key ground appears to be the submission that the plaintiff's claim was unnecessary, based on no evidence, and that the corporate defendants' legal expenses were increased by the plaintiff's conduct both in advancing a claim that was so unorganized that it was difficult to discern and in the plaintiff's conduct that unnecessarily protracted the legal proceedings.
- [24] The corporate defendants have not cited any case law to assist the court in their claim for special costs.
- [25] There is no doubt that the plaintiff's lack of legal representation made the case more difficult for the other parties. Mr. Vesuna is not a clear communicator and had difficulty appreciating and following the rules of procedure and laws of evidence. He also exercised bad judgment in his use of rhetoric at times, insulting the other parties and their counsel. However, I do not conclude that his conduct was in the nature of an abuse of process or so crossed the line that it justifies an award of special costs. I therefore decline to award special costs to the corporate defendants.
- [26] The corporate defendants also seek an order that each of them obtain their costs, as separate legal entities.

- [27] Both corporate defendants were represented by the same counsel. They are not entitled to claim two sets of costs. Certainly if separate steps in the proceeding were taken on behalf of one or the other of them, each of those steps can be included as a tariff item in a single Bill of Costs. However, it would be inappropriate to suggest that they can, in effect, double their costs even though they were represented by one counsel jointly.
- [28] The corporate defendants also seek an order that the plaintiff be restricted from bringing any further court proceedings and applications against them.
- [29] Again, the corporate defendants provided no authority in this regard.
- [30] The corporate defendants assert that the plaintiff is very litigious and is "known to the courts in Alberta and British Columbia and Ottawa", citing five cases involving Mr. Vesuna. This is not sufficient evidence to support an order of the nature sought by the corporate defendants.
- [31] I am not persuaded that any order other than an order that the plaintiff pay the corporate defendants' ordinary costs would be appropriate.

The Crown's Position

- [32] The Crown submits that it should be entitled to its ordinary costs. The plaintiff argued that the Crown should not be entitled to costs, as counsel for the Crown were employees of the Ministry of Attorney General. This argument is misguided and has no merit. The Plaintiff ignored Rule 14-1(11), which states "[a] party is not disentitled to costs merely because the party's lawyer is an employee of the party," and case law which reiterates this point. The Crown defendants are entitled to recover their costs.
- [33] The Crown relies on Rule 14-1(15)(a) to argue that the court ought to award costs of the entire proceeding in a fixed amount, including the amount of disbursements. The Crown submits that this would lend some finality to what it quite fairly describes as lengthy and protracted proceedings.
- [34] A difficulty posed by this position is that while the Crown has helpfully put forward a Bill of Costs, the corporate defendants have not.
- [35] Furthermore, the Crown Bill of Costs totals \$52,802.96 under Tariff Scale B. I am not suggesting that it is at all unreasonable, however, it clearly has significant implications for the plaintiff, particularly if the corporate defendants advance a similar claim. I am hesitant to fix lump sum costs for an entire proceeding as I am concerned that it will deprive the plaintiff of the opportunity of a fuller canvassing of the reasonableness of the items in the Bill of Costs on a hearing before the Registrar. The plaintiff has not had an opportunity to reply to the Bill of Costs that has been submitted, and I do not wish to invite reply before me. It is a more efficient use of judicial resources if this process is conducted by a Registrar. I therefore decline to order a lump sum amount of costs.

- [36] However, I do consider it appropriate to give some directions regarding the appropriateness of disbursements claimed by the Crown defendants.
- [37] The Crown defendants claim the travel costs for one lawyer on their legal team to attend the various interlocutory and trial court proceedings. I find that the costs claimed in this regard are reasonable. The proceeding by the plaintiff advanced complicated legal arguments and delved into the distant historical past. The Crown defendants were entitled to use the lawyers they considered most suitable to defend the proceeding, even if that meant that counsel for the Crown defendants had to travel from Victoria to Powell River to attend court.
- [38] I also note that the Crown has claimed for only one lawyer's travel expenses, even though the complexity of the matter required the assistance of additional counsel, as well as a legal assistant.
- [39] Pursuant to Rule 14-1(7), I direct that these travel costs as claimed in the draft Bill of Costs submitted to me by the Crown be allowed.
- [40] The Crown also claims for the cost of reports prepared by Mike Hansen, surveyor, and Otto Langer, fisheries biologist. These reports were served upon the plaintiff before trial. Mr. Hansen's report was introduced into evidence. Mr. Langer's report was not. However, the Crown advises as to the nature of his expert opinion, namely that it concerned whether or not, at the time the plaintiff's property was subdivided in 1960, existing fisheries statutes and regulations would have provided a practical impediment to construction of a driveway on the plaintiff's property.
- [41] I find, based on the claims advanced by the plaintiff, that it was entirely reasonable for the Crown defendants to seek an opinion on this issue. Given that the plaintiff's own evidence fell short, it is not surprising that in the end the Crown defendants elected not to call this expert evidence. I find that the disbursements incurred by the Crown defendants in retaining these experts and obtaining their reports, as set out in the draft bill of costs, are reasonable, and I direct that these costs be allowed.
- [42] In addition, the Crown defendants claim the tariff item cost of retaining and consulting three experts, Mr. Langer and Mr. Hansen as aforesaid, and Sharon Goddard. Since Ms. Goddard is an employee of the Provincial Government, there was no extra disbursement incurred in retaining her. However, she is an engineer employed by the Ministry of Transportation and Highways, and she provided an expert opinion on the issue of whether there were any engineering design impediments to constructing a driveway from Highway 101 to the plaintiff's property. I find that this was relevant evidence for the Crown defendants to obtain in light of the plaintiff's allegations in the case. I find that it was reasonable for the Crown to retain and consult with these experts, and therefore I direct that the tariff item 17 costs of doing so be allowed.

- [43] The Crown defendants also seek to recover the disbursements related to their examination of a witness, Mr. Don McLeod, pursuant to what was then Rule 28. This examination took place after the defendants were successful in obtaining a court order for the same, as set out in the Reasons for Judgment of Halfyard J., indexed at 2009 BCSC 664.
- [44] Mr. McLeod was the real estate agent involved in Mr. Vesuna's purchase of the property at issue in this case. Mr. Justice Halfyard found that Mr. McLeod might be able to give material evidence relating to the matter in question in the action. I agree that conducting this examination was a prudent and reasonable choice by the Crown defendants and that the examination was likely to assist them in the preparation of their defence. I find that the disbursements claimed in relation to this are reasonable and direct the Registrar to allow them.

Conclusion

- [45] I have concluded that the defendants are entitled to their ordinary costs, payable by the plaintiff.
- [46] This was a matter of ordinary difficulty and I fix the scale of costs at Scale B. As well, I have made certain directions allowing certain costs and disbursements claimed by the Crown.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

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