

CANADA / JUDGMENT

Wigen v. Wigen

2020 BCSC 14

COURT

Supreme Court of British Columbia

DECIDED

8 January 2020

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2020 BCSC 14 Wigen v. Wigen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wigen v. Wigen,

2020 BCSC 14

Date: 20200108

Docket: S27448

Registry: Cranbrook

Between:

David Allan Wigen and Karen Lee Combs

Petitioners

And

Donna Lynn Wigen

Respondent

Before: The Honourable Mr. Justice A. Saunders

On review of: An assessment of a Master of the Supreme Court of British Columbia, dated March 5, 2019 (Wigen v. Wigen, Docket No. S27448, Cranbrook Registry).

Reasons for Judgment

Counsel for the Petitioners:

A. Bird

Counsel for the Respondent:

H. Hicks

Place and Date of Hearing:

Cranbrook, B.C.

June 10, 2019

Place and Date of Judgment:

Cranbrook, B.C.

January 8, 2020

Introduction

[1] This is a review, brought by the Petitioners herein under Rule 14-1(29) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] of a costs assessment decision made by a Master on March 5, 2019, by which the Petitioners were denied recovery of two claims under Tariff Item 43 (the Tariff to Schedule 1 of Appendix B to the Rules). Tariff Item 43 allows recovery of a minimum of one unit, and a maximum of ten units, for "Conduct of sale if property sold by order of court". The Petitioners had previously been granted conduct of sale of certain lots owned by the parties, and in due course obtained court approval of sale of two of the lots, Lot 17 and Lot 19, by way of a Consent Order granted November 7, 2018. The Petitioners then sought, and were denied, assessment of their costs in respect of those two sales.

Background

[2] The background to this dispute is somewhat complex. The parties, who are siblings, were owners of several vacant lots. At the time of hearing of this Petition they remained owners of 17 vacant residential lots as tenants in common, and of an interest in a further sub-lot as joint tenants. The Petitioners sought conduct of sale under the Partition of Property Act, R.S.B.C. 1996, c. 347. On October 23, 2017, Master Keighley ordered the lands be sold and granted the Petitioners conduct of sale, with an expiry date of March 23, 2018 (the "Keighley Order"). The Keighley Order provided that sale of any parcel of the lands, and final calculation and distribution of sale proceeds, would be subject to further approval of the court unless otherwise agreed. The Keighley Order granted the Petitioners their costs, by way of the following term:

4. The Petitioners shall have their costs of this Petition from the Respondent.

- [3] On February 14, 2018, the Petitioners obtained a Registrar's Certificate of Costs in the amount of \$5,398.69, "by consent of the parties following assessment". No sales of the lots that were the subject of the Keighley Order had occurred up until that point in time, and it appears from the draft Bill of Costs on file in the Registry that no claim was made at that time under Item 43 in respect of costs of sale.
- [4] The March 23, 2018 deadline under the Keighley Order was extended twice by way of Consent Orders, and then again following a contested application heard May 14, 2018 before Madam Justice Donegan, who, by way of an order made May 30, 2018, granted a further extension to November 20, 2018, and granted the Petitioners their costs of that application (the "Donegan Order").
- [5] With the consent of the Respondent, Lot 8 was sold on May 31, 2018.
- [6] On August 7, 2018, the Petitioners filed with the Registry a Requisition seeking entry of a further Certificate of Costs. The draft submitted was endorsed by counsel for the Respondents and was supported by an attached copy of the Donegan Order. The Certificate of Costs, duly issued by the Registrar, was in the amount of \$2,453.83. Included in the Bill of Costs submitted with the Requisition, and allowed, was a claim for 5 units under Item 43. This was notwithstanding the fact that no sales had been made prior to the Donegan Order being pronounced.
- [7] Also on August 7, 2018, Madam Justice Adair, following a contested application, granted to the Petitioners approval of the sale of Lot 10 (the "Adair Order"). The Petitioners' notice of application had in addition sought a specific order distributing the proceeds of sale of Lots 8 and 10, but the Adair Order provided only for payment of taxes and selling commission, with the balance to be held in trust pending further agreement or court order as to distribution. The Adair Order also granted the Petitioners costs of that application.
- [8] By way of a Consent Order dated August 27, 2018, the parties agreed to distribution of the proceeds of sale of Lots 8 and 10, and further agreed to bear their own costs in respect of the issue of distribution of the proceeds of sale, without affecting the costs awarded the Petitioners under the Adair Order.
- [9] In the fall of 2018 the Petitioners concluded contracts for the sale of Lots 17 and 19. On November 4, 2018 counsel for the Petitioners forwarded to counsel for the Respondents draft Consent Orders respecting approval of those sales. The draft Orders included the following provision as to costs:
8. The Petitioners shall have their costs of this application, and the sale of the Lands, from the Respondent.

Counsel for the Respondent crossed out that provision and initialed the change, signed the Orders, and returned them to the Petitioners' counsel on November 5, 2018 by email, with the following explanation:

The only costs would be conveyancing costs and those should not be our client's sole responsibility so I have signed the orders but crossed out the cost provision as we approved the contracts to avoid the costs of the application.

- [10] Counsel for the Petitioners initialled the change and submitted the Consent Orders for entry on November 7, 2018. The sales of Lots 17 and 19 then proceeded as planned.
- [11] On November 6, 2018, the Petitioners took out an appointment to settle their costs in respect of Lots 8 and 10. The assessment hearing was set for December 17, 2018. The draft Bill of Costs consisted of claims for costs of \$3,572.80, including claims under Tariff Item 43 for the sale of each of Lots 8 and 10, and disbursements of \$1,963.20. By way of a requisition filed December 14, 2018, that assessment hearing was adjourned generally by consent. By way of a further requisition filed January 16, 2019, that assessment hearing was reset to March 5, 2019.
- [12] On November 26, 2018, following a contested application, I granted the Petitioners continuing exclusive conduct of sale until all the lands are sold, and ordered the parties to each bear their own costs of that application.
- [13] The hearing that actually took place on March 5, 2019 was the hearing of the assessment that is the subject of the present review, concerning the Petitioners' claims for costs in respect of Lots 17 and 19.

Hearing before the Master, and the Master's Decision of March 5, 2019

- [14] On January 22, 2019, counsel for the Petitioners took out an appointment to assess their Bill of Costs in respect of sale of Lots 17 and 19. The record before me does not disclose the formal outcome of this costs claim in respect of Lots 8 and 10. However, in the subject hearing before the Master on March 5, 2019, counsel for the Respondent advised the Master that the Petitioners had, by that date, already received costs by way of either agreement or assessment "of over \$12,000". I infer from this statement, which was not challenged by the Petitioners' counsel, that what happened was that the parties settled the Petitioners' costs claims in respect of Lots 8 and 10, and simply elected to utilize the previously booked March 5th hearing date to deal with the Lots 17 and 19 costs claims.
- [15] The substantive costs claimed under the Petitioners' Bill of Costs were five units each in respect of conduct of sale of the two lots, under Tariff Item 43; there were ancillary costs claims made in respect of preparation for and hearing the costs assessment (Tariff Items 29 and 30, three units), entering of the costs certificate (Tariff Item 41, one unit), and process relating to filing of Orders respecting Lots 17 and 19 (Tariff Item 41 x two, two units total). The disbursements claimed totalled \$311.50 plus tax, consisting of filing fees and online filing fees for the Lot Sales Orders, Bills of Costs and Certificate of Costs, and photocopying.

[16] In oral submissions before the Master, counsel for the Petitioners took the position that the costs claim was justified by the amount of work that had been done by the Petitioners in marketing the property. Counsel submitted:

A lot of work has been put into selling these lots by my - - by my clients, and that was a finding of fact by Madam Justice Donegan in her reasons for judgment from May of last year. The work involved in selling properties when the properties are sold pursuant to court order have [sic] a costs item - it's item 43 - it specifically says "conduct of sale where properties are sold pursuant to court order". And my submission is that the purpose of that item is to compensate a party for the time and some of the expense that they go to in marketing and selling lots. There's the retention of professionals, the work into improving the properties. In this case, my clients did a tremendous amount of work into maintaining and improving these vacant lots, clearing off the hay, moving dirt piles, building retaining walls, and so on. And the item 43 conduct of sale, that should be granted to a party whenever that party sells land pursuant to a court order when that party has conduct of sale.

The submissions as to the work done by the Petitioners were substantiated by affidavits of the Petitioner Ms. Combs.

[17] Counsel went on to submit that entitlement to claim Tariff Item 43 costs arises directly out of the Keighley Order, and was not affected by the parties having consensually removed any specific reference to costs from the November 7, 2018 orders approving sale of Lots 17 and 19. Reliance was placed, inter alia, on the decision of Registrar Sainty in Vancouver City Savings Credit Union v. Randhawa, 2011 BCSC 1517, in which a claim for costs under Tariff Item 43 was allowed subsequent to sale following an order nisi and conduct of sale order made in a foreclosure proceeding. Counsel further drew an analogy between sale consequent to conduct of sale being granted, and a step taken in enforcement of an order, and relied on sub-rule 13-2(22):

Unless the court otherwise orders, a party who is entitled to enforce an order is entitled to the costs, fees and expenses of enforcement

[18] Counsel for the Respondent made submissions before the Master as to the Petitioners' costs already allowed or agreed to, as described above, including recognition of Tariff Item 43 of the Bill of Costs submitted in respect of the Donegan Order. Further, counsel submitted that the Petitioners had already been paid conveyance costs of \$750 for Lots 17 and 19; I note this submission is substantiated by a letter from the Petitioners' counsel dated January 30, 2019 which confirmed an agreed-to distribution of the Lots 17 and 19 sales proceeds, including "\$1,500.00 to Rockies Law Corporation for its accounts in respect of the conveyance". (Those particular accounts are not in evidence.) There is also a line item in each Order to Pay in respect of those sales, referencing an account "to effect Sale and administer Non-Resident Income Tax holdback". As submitted by the Respondent's counsel before the Master, an indemnity against those conveyance costs would have been recoverable under Tariff Item 43, but for those costs having already been paid.

- [19] Reliance was also placed on the email exchange that accompanied Respondent counsel's consent to approval of the Lot 17 and 19 sales.
- [20] The Master, in brief oral reasons, held that the Petitioners' claimed costs were unrecoverable as there was no order granting costs clearly in place. Referring to the submission that the claimed costs related back to the Keighley Order, and are analogous to costs of execution proceedings, he held that:
- [7] this argument ignores a plain reading of the orders that were entered, wherein both counsel initialled the negation of the only potential claims for costs.
- [9] In this instance, counsel for the petitioners initialled the cancellation of the only authorization for costs in both consent orders, thereby eliminating the basis for a claim for party/party costs with respect to each.

Appeal

- [21] On this review, the Petitioners seek the following relief:
- a) that the decision of the Master be set aside;
 - b) a declaration that the Petitioners are entitled to costs for Tariff Item 43 - Conduct of Sale for each of the lots that they sell, and that costs shall be assessed thereon without the need for a court order;
 - c) a declaration that the authority for costs under Tariff Item 43 - Conduct of Sale for each of the lots is Rule 13-2(22);
 - d) a declaration that the Petitioners did not waive their costs to the sale of Lots 17 and 19;
 - e) an award to the Petitioners of the costs for the sale of Lots 17 and 19 in the amount of \$2,283.97;
 - f) costs; and
 - g) such further and other relief as seems just.

Analysis

- [22] I am in agreement with the Master's disposition of the Petitioners' costs claim, although for different reasons than he expressed.
- [23] First, I note that my jurisdiction on a review is limited to either upholding the assessment, or varying on the grounds that the taxing officer has made what amounts to an error on a matter of principle: *Frost v. Frost*, [1941] 3 W.W.R. 273 (B.C.C.A.). A court hearing a review has no power to issue declarations or otherwise make prospective rulings as to the rights and obligations of the parties. I will in these reasons make certain limited observations as to the effect of the subject rules and as to the parties' circumstances, but these statements are by no means binding.

- [24] I am in agreement with counsel for the Petitioners that the Master erred in finding that the claims for costs could only have been authorized through the Consent Order approving the sale. The Keighley Order granted the Petitioners conduct of sale, and ordered that the properties be sold. It also, in the form the manner was drawn and entered, awarded the Petitioners costs of the Petition generally. This order was sufficiently broad to include all proper claims for costs incurred consequent to conduct of sale.
- [25] The Master did not explicitly find that the Petitioners' counsel's initialling of the changes to the Consent Order, removing the explicit reference to costs, constituted a waiver of costs claims by the Petitioners. Had the Master made such a finding, I would have found that to be a clear error in principle. An effective waiver can only arise through unambiguous acts or communications. Here, the deleted clause referenced both costs of the court approval application, and of the sales; the deletion of that specific wording could leave open the possibility of the right to a costs claim continuing if properly founded independent of the Consent Order. The right to costs respecting conduct of sale of each lot arose from the Keighley Order. Such right was contingent only upon each property being sold pursuant to the ordered conduct of sale. It was not contingent on a costs award being further specifically provided for in the order approving the sale.
- [26] I also find, however, that the Petitioners have not established a valid costs claim. I agree with counsel for the Respondent, that the costs provisions under the Rules are not intended to provide compensation to a party for their own personal efforts in enforcing a court order. In *Paz v. Hardouin*, [1995] B.C.W.L.D. 543, 36 C.P.C. (3d) 383 (aff'd on other grounds, 138 D.L.R. (4th) 292 (B.C.C.A.)), Madam Justice Boyd, in refusing to award special costs to a self-represented litigant who had already been indemnified against his actual costs by one of the parties, observed the distinction between such personal costs, and actual legal costs:
- [26] The principal purpose of costs is indemnification for legal expenses incurred; the secondary purpose of costs is to punish an unsuccessful litigant's misconduct by imposing on that party a greater obligation to indemnify in excess of that normally required under party-and-party costs. Nonetheless, there can be no award of costs in the absence of legal expenses to indemnify
- [27] On the appeal from that decision, Huddart J.A. noted that the former rule that the purpose of costs awards was to indemnify against actual legal expenses, had been supplanted by a broader, purposive approach to costs entitlement, under which costs may be awarded not only to indemnify but also to encourage or discourage certain types of conduct in litigation. This newer approach follows the decision of a five-judge division of the Court of Appeal in *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (B.C.C.A.) [Skidmore].
- [28] However, in the present case there is no indication that the term of the Keighley Order awarding the Petitioners their costs reflected anything other than the conventional purpose of providing indemnity. In *Skidmore*, the Court of Appeal recognized that the rationale for indemnifying even self-represented litigants is that it serves the purpose of compensating

them for "the cost of doing what a solicitor would do to prepare and present the case" (para. 36, emphasis added). There is simply no authority for the proposition that the indemnity principle underlying a costs award extends to rewarding a litigant for their own efforts in litigation, in particular for the sorts of tasks that counsel describes the Petitioners as having undertaken to effect and promote sale of the lands, e.g. their time spent marketing. Any costs recoverable by the Petitioners under Tariff Item 43 are limited, therefore, to indemnifying them against their solicitors' fees in respect of the sales. Those fees appear to have already been paid out of the proceeds of sale previously by agreement, through the payment of the solicitors' conveyance accounts in the amount of \$1,500.00 as confirmed in the aforementioned letter of January 30, 2019. No further entitlement is demonstrated.

- [29] What of the claims in respect of the filing fees? Assuming, for a moment, that the solicitors' fees and disbursements in respect of the filing fees for the Lot 17 and 19 sale approval orders were not covered in those \$1,500.00 conveyancing accounts, it may be the case that a costs claim in respect of those matters could be said to derive from the Keighley Order, as it was entered. That assumption is not borne out in the record and I make no order in respect of same.
- [30] Having said that, I must observe that though it is the case that the Keighley Order's costs provision was drawn very broadly, there appears to be no reason in principle why, apart from the breadth of the Order, such costs would properly be borne by the Respondent, and not shared between the parties. Indeed, the parties appear to have recognized the logic and fairness of sharing such costs between them, through their agreement to satisfy the conveyancing accounts out of the proceeds of sale. I do note that in this respect, the Keighley Order may have been drawn too broadly. The clerk's notes for the hearing record Master Keighley as having stated only that he was awarding the Petitioners "today's costs in the cause". A transcript of the proceedings might shed further light on Master Keighley's intent; if so, and if the parties are unable to agree to share future conveyancing and/or court approval and filing costs, it may be that an application to revise the Keighley Order under the slip rule would be in order.
- [31] For these reasons, the review is dismissed, and the decision of the Master denying the Petitioners their claims for costs as submitted is affirmed.

"A. Saunders J."

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Prepared on 25 October 2026 · Esheria