

CANADA / JUDGMENT

Zhao v. Chandi

2021 BCSC 322

COURT

Supreme Court of British Columbia

DECIDED

24 February 2021

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2021 BCSC 322 Zhao v. Chandi IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Zhao v. Chandi, 2021 BCSC 322 Date: 20210224 Docket: S171382 Registry: Vancouver Between: Yu Lin Zhao Plaintiff And Jadwinder Singh Chandi and Ghulam Murtaza Defendants And Yu Lin Zhao and Gary Wang Defendants by Counterclaim Before: The Honourable Madam Justice Jackson Oral Reasons for Judgment (In Chambers) Counsel for the defendant Jadwinder Chandi (via teleconference): M. Shergill The defendant by counterclaim, appearing on his own behalf (via teleconference): G. Wang The defendant by counterclaim, appearing on her own behalf (via teleconference): Y. Zhao No other appearances Place and Date of Hearing: Vancouver, B.C. February 22, 2021 Place and Date of Judgment: Vancouver, B.C. February 24, 2021 I.

BACKGROUND

- [1] On August 20, 2020, following a summary trial on application of the defendant by counterclaim, Mr. Gary Wang, filed April 13, 2017, I dismissed the counterclaim filed against him on October 11, 2016, by the defendant, Jadwinder Singh Chandi.
- [2] In dismissing Mr. Chandi's counterclaim against Mr. Wang, I found that Mr. Wang had been the successful party and that he was entitled to his costs. I indicated in my reasons that costs would be at Scale B, to be assessed by the registrar.
- [3] Subsequent to delivery of my reasons, Mr. Wang made an application for an order that costs against Mr. Chandi be assessed on a scale other than Scale B, specifically that the costs awarded in his favour be assessed as special costs against Mr. Chandi.
- [4] In this application, Mr. Wang seeks: § an order of special costs against the defendant Jadwinder Singh Chandi; and § an order that the costs he was ordered by Master Harper to pay to the defendant Ghulam Murtaza, be paid by Mr. Chandi.
- [5] Mr. Chandi opposes Mr. Wang's application.
- [6] The defendant Mr. Murtaza opposes the second order sought by Mr. Wang, and filed a response to that effect, but did not participate in the hearing.
- [7] The plaintiff Ms. Zhao takes no position with respect to the orders Mr. Wang seeks. II.

PRELIMINARY ISSUE

- [8] Counsel for Mr. Chandi argues Mr. Wang's application for special costs constitutes an application to vary a final order, and is in effect an application to reopen the summary trial. Counsel for Mr. Chandi argues that although trial judges have a broad discretion to reopen a trial after judgment has been given, it is a discretion that should be exercised rarely and only where the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice, and that the circumstances of this application do not warrant reopening the summary trial: *Bajwa v. Habib*, 2020 BCCA 230 at para. 48. However, the facts in *Bajwa* were markedly different than the circumstances of Mr. Wang's application for special costs. In *Bajwa*, part of the court's order after trial was the setting of a new completion date for an agreement. However, shortly before the new date for completion and before the formal order was entered, an application was made to extend the time to complete which the trial judge treated as an application to reopen the trial.
- [9] In my view Mr. Wang's application for special costs is not an application to reopen the summary trial. If a court has made an order for costs, it may fix the scale, but may nonetheless order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps: Supreme Court Civil Rules [SCCR], Appendix B, s. 2(1). Mr. Wang's application seeks to obtain an order of the court that costs be assessed under a scale other than Scale B, as contemplated by SCCR, Appendix B, s. 2(4). As no order has yet been entered, I am not functus and I retain jurisdiction to consider Mr. Wang's application that costs against Mr. Chandi be assessed as special costs: *Samuda v. Recipco and Fierro*, 2008 BCSC 192 at para. 6; *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 140, leave to appeal ref'd [2020] S.C.C.A. No. 140. III. LEGAL PRINCIPLES GOVERNING AN AWARD OF SPECIAL COSTS
- [10] The court has inherent jurisdiction to make an award of costs, and may award special costs under Rule 14-1(1)(b)(i) of the SCCR, but such an award is "exceptional": *Hoisington v. Johnson & Johnson Inc.*, 2020 BCSC 431 at para. 98. A person is not precluded from receiving an award of special costs simply because they are self-represented: *McKnight v. Hutchison*, 2014 BCCA 472 at para. 39
- [11] In *Chapman v. Chapman*, 2020 BCSC 1896, I summarized the legal principles governing an award of special costs:
- [5] Special costs are punitive and imposed to sanction a party's reprehensible conduct during the litigation, conduct from which the court seeks to disassociate itself: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 745, 9 B.C.L.R. (3d) 242 (C.A.) [*Garcia*]; *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. The word "reprehensible" is broad and encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746-747. Improper pre-litigation conduct is excluded from consideration: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133-134.

- [6] The Court of Appeal recently reviewed the purpose underlying special costs in 567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc., 2020 BCCA 69, leave to appeal ref'd 39145 (1 October 2020) [Le Soleil]. The Court affirmed the purpose of special costs is to punish and deter litigation misconduct, not to compensate the other party: at paras. 40-42.
- [7] However, special costs also enable a court to substantially indemnify a successful party: Everywoman's Health Centre Soc. (1988) v. Bridges (1991), 54 B.C.L.R. (2d) 294 at 297, [1991] B.C.W.L.D. 816 (C.A.); Tanious v. The Empire Life Insurance Company, 2019 BCCA 329, leave to appeal ref'd 38924 (20 February 2020), at para. 49. The indemnification function is particularly relevant where one party has had to incur excessive costs due to misconduct on the part of the other party: D'Atri v. Gonzalez, 2017 BCSC 1244 at para. 55 [D'Atri].
- [8] It is not necessary for the party's conduct throughout the litigation to have been reprehensible to warrant an award of special costs for the entire action: Bradshaw v. Stenner, 2012 BCSC 237 at para. 9, leave to appeal ref'd 2012 BCCA 481. Nonetheless, while special costs are usually awarded for the whole proceeding, where such an award would be disproportionate, the court has the discretion to award special costs with respect to particular steps in the litigation: SCFR R. 16-1(1)(b)(ii) [SCCR R. 14-1(1)(b)(ii)]; Gichuru v. Smith, 2014 BCCA 414 at para. 91, leave to appeal ref'd 36221 (16 April 2015).
- [9] Where previous orders are silent as to the scale of costs, the trial judge's cost order for special costs will govern: Le Soleil at para. 109. However, if a previous order for a particular step in the litigation has expressly addressed the scale of costs, or has summarily assessed costs, it cannot be varied by the trial judge: Le Soleil at paras. 101 and 108.
- [10] While not exhaustive, the types of conduct that may attract an award of special costs include delayed disclosure of or a failure to disclose documents, pursuing meritless claims and being reckless with regard to the truth, improper allegations of fraud or conspiracy, or making the resolution of an issue far more difficult than it should have been: Hu v. Dickson, 2015 BCSC 218 at para. 49; McIntyre v. McIntyre, 2018 BCSC 472 at paras. 7-8; Mayer v. Osborne Contracting Ltd., 2011 BCSC 914 at para. 11; see also Westsea Construction Ltd. v. 0759553 B.C. Ltd., 2013 BCSC 1352 [Westsea] and D.G.S. v. J.D.S., 2014 BCSC 2183. IV. SHOULD SPECIAL COSTS BE ORDERED AGAINST MR. CHANDI?
- [12] Mr. Wang argues special costs are appropriate in this case for five reasons. I will address each of them in turn. A. The amended counterclaim was completely without merit
- [13] Mr. Chandi submitted no evidence opposing Mr. Wang's motion to dismiss the amended counterclaim on summary trial. However, unsuccessful allegations alone cannot support an order for special costs: Lantzius Estate, 2015 BCSC 1687 at para. 24; Cimolai v. Hall et al, 2007 BCCA 225 at para. 68. B. The counterclaim against him was an attempt to intimidate him so that he would not be in a position to be an independent witness in Ms. Zhao's action against Mr. Chandi

- [14] There is no evidence to support that allegation and I am not prepared to infer such a nefarious motive. C. Mr. Chandi's conduct made litigation of this action more difficult
- [15] Mr. Wang argues that Mr. Chandi's actions, including changing lawyers multiple times, often at the last minute, and his refusal to instruct his lawyers to communicate by email, unnecessarily prolonged the litigation and made the conduct of the litigation more difficult.
- [16] In the circumstances of this case, and remembering that special costs are punitive, I am not prepared to punish Mr. Chandi for changing counsel. Although this can be frustrating for an opposing party, there are sometimes reasons why a change in counsel cannot be avoided. If I were satisfied that his multiple changes of counsel had been done for strategic purposes, I may have felt differently.
- [17] I do agree that it was unreasonable for Mr. Chandi's legal counsel not to communicate with Mr. Wang by email, a position which I infer was based on Mr. Chandi's instructions. This refusal to communicate through a medium which is acknowledged to be accessible, efficient, and cost-effective, undoubtedly increased the time, effort, and cost Mr. Wang needed to expend in order to communicate throughout the litigation. However, this action alone does not rise to the level warranting special costs, in my view. D. Mr. Chandi failed to diligently pursue his amended counterclaim
- [18] I find Mr. Chandi failed to diligently pursue his amended counterclaim. In the years that followed the filing of the amended counterclaim, Mr. Wang made numerous requests to be provided with Mr. Chandi's documentary disclosure. That disclosure was not provided until the spring of 2019. Further, Mr. Wang repeatedly asked whether Mr. Chandi was going to pursue examination for discovery of Mr. Wang. Despite Mr. Wang's inquiries, Mr. Chandi did not ask to conduct an examination for discovery of Mr. Wang until July 2020. While Mr. Chandi's lack of diligence in pursuing his amended counterclaim comes close to being conduct I would describe as reprehensible, and litigation conduct this Court will not condone, I am not prepared to exercise my discretion to award special costs on the basis of that lack of diligence in this case. E. Mr. Chandi intentionally delayed the proceedings
- [19] Mr. Wang argues that he has been dragged into a litigation process for the last four years, despite his timely application to be released through his application to dismiss Mr. Chandi's amended counterclaim. I am not satisfied Mr. Chandi's gross lack of diligence in pursuing his amended counterclaim against Mr. Wang was intended to delay the proceedings. There are alternative explanations, which I cannot rule out based on the evidence before me. V. SHOULD THE COSTS PAYABLE TO MR. MURTAZA BE PAID BY MR. CHANDI?
- [20] Following a hearing on May 7, 2018, Master Harper awarded costs to Mr. Murtaza against Mr. Wang and Ms. Zhao in any event of the cause, and ordered that each of Mr. Wang and Ms. Zhao pay one half. Mr. Wang and Ms. Zhao appealed Master Harper's decision; the appeal was dismissed by Justice Brundrett. Mr. Wang seeks an order that Mr. Chandi be required to pay his share of those costs.

- [21] Mr. Wang provided no authority for the order he seeks. Further, a trial judge may not change or vary an earlier costs order made in a proceeding; a trial judge's costs order is limited to the costs of the action apart from those costs that have already been awarded during the course of the litigation. Those interim costs orders can only be varied on appeal. No appeal was taken from Justice Brundrett's order. I do not have jurisdiction to vary Justice Brundrett's order: 567 Hornby Apartment Ltd. at para. 101. VI. CONCLUSION
- [22] While I am not satisfied the conduct of Mr. Chandi in this litigation, taken as a whole, is sufficiently reprehensible to warrant an award of special costs, this case came very close to the line. I have significant sympathy for Mr. Wang, who I agree was dragged into litigation by Mr. Chandi for years, only to have the claim against him ultimately dismissed without Mr. Chandi submitting any evidence against him. For this reason, even though Mr. Chandi was successful on this application, I am exercising my discretion under Rule 14-1 to award costs of this application to Mr. Wang.
- [23] Mr. Wang's application that costs be awarded to him as special costs is dismissed. Mr. Wang is entitled to his costs of the action, including this application, at Scale B, which are to be assessed by the registrar.
- [24] Mr. Wang's application that the cost order made against him be payable by Mr. Chandi is also dismissed.
- [25] Mr. Murtaza was successful with respect to the aspect of the application that involved him. However, Mr. Murtaza took no position on costs of the application. Given that, and the fact that Mr. Murtaza's involvement in the application was quite limited, I am exercising my discretion not to award costs of the application in his favour against Mr. Wang. In my view that is a fair and just outcome for all given the overall circumstances of this litigation. "Jackson J."

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