IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***ICBC v. Eurosport & Others***
2004 BCSC 1598

Date: 20041217
Docket: C986378
Registry: Vancouver

Between:

Insurance Corporation of British Columbia

Plaintiff

And:

Eurosport Auto Co. Ltd., Hwang Trading Co. Ltd., Frederick Ngok Hwang, Patti Sze Ping Hwang, and Frederick Ngok Hwang and Patti Sze Ping Hwang doing business as Hwang Porsche Parts, Hwang Trading Porsche Parts and Hwang Trading Glass

Defendants

And:

Bill Goble

Defendant by way of Counterclaim

Before: The Honourable Mr. Justice Parrett

Reasons for Judgment

Counsel for the plaintiff: F.G. Potts and C. Martin

Counsel for the defendants: G.J. Niemela

Date and Place of Hearing: August 30, 2004
Vancouver, B.C.

INTRODUCTION

[1] The plaintiff, Insurance Corporation of British Columbia, seeks a variety of relief in their present notice of motion. The relief sought includes orders that:

1. The Defendants' Counterclaim against the Plaintiff be dismissed;
2. The Plaintiff be granted special costs for the proceedings herein from commencement to July 9, 2000;
3. The Plaintiff be granted double special costs from July 10, 2000 to February 6, 2004, the date of judgment;
4. The Plaintiff be granted prejudgment and post-judgment interest on compensatory damages, special damages and punitive damages; and
5. The Plaintiff be granted costs of these applications.

BACKGROUND:

[2] The present applications follow the conclusion of the trial and the release of the written decision in that trial on February 6, 2004, and cited at 2004 BCSC 164.

THE COUNTERCLAIM

[3] On May 5, 2000, by consent, it was ordered that the claim set out in paras. 20 to 25 of the defendants' counterclaim be heard separately from the remaining matters in the action. The order went on to provide that there would be a stay of proceedings with respect to the severed claim but that:

> . . . upon resolution of the Main Action the Plaintiff shall be entitled to proceed with, and the Defendants entitled to defend, the said Defamation Action without further application.

[4] The claim referred to and outlined in paras. 20 to 25 of the counterclaim was a defamation claim founded on a press conference held by employees of the plaintiff and words spoken by them, and published, which indicated that:

(a) The Defendants attempted to defraud the Plaintiff and the Defendants' customers, and

(b) The Defendants did not properly repair vehicles.

[5] The essence of the defamation claim was that these allegations were untrue and that they were uttered in a way that injured the defendants' reputation and their business.

[6] The plaintiff seeks dismissal of this outstanding claim under R. 18A and delivered their material to the defendants on May 19, 2004. Since that time, and specifically in preparation for the hearing of that aspect of the present motion, the defendants filed no material and adduced no evidence in relation to that claim.

[7] In addition, since the reasons were delivered on February 6, 2004, the defendants were in a position to proceed with the defamation claim, yet they have done nothing to indicate an intention to proceed.

[8] In my view, the authorities[1] are clear that where adequate time is given and no effective response is given, the party failing to respond cannot be heard to complain if the claim is dispensed of.

[9] In the present case, the reason for the lack of response is patently clear. The reasons delivered on February 6, 2004, make specific findings against the defendants which, in my view, preclude any possibility of success if this claim proceeds. Despite this the defendants appeared, by counsel, who was instructed to oppose that dismissal and "to keep the counterclaim alive".

[10] On the basis of both the complete absence of responsive material from the defendants and the fact that the claim cannot possibly succeed, the plaintiff is entitled to succeed on this aspect of their motion. The outstanding claim is dismissed.

PREJUDGMENT AND POST-JUDGMENT INTEREST

[11] Under the provisions of the ***Court Order Interest Act***[2] the successful party who recovers a pecuniary judgment is entitled to recover interest on that award.

[12] In the case of compensatory damages recovered by the plaintiff, the interest will be at the rates prescribed and calculated on the amount recovered. The interest will be calculated from the date the writ was issued, as suggested by Mr. Potts.

[13] The defendant Eurosport, in this case, recovered as a set-off, some $82,016.95 which sum was admitted to be owing in the sense of a credit from the outset. The amounts found to be due and owing from the defendants to the plaintiff, inclusive of investigative costs and punitive damages, exceeded the amount withheld by a considerable margin but could only lawfully be applied after judgment. In my view, the amount of the set-off, in the circumstances of this case, is not a pecuniary judgment within the meaning of s. 1(2) of the ***Court Order Interest Act*** and no interest accrues with respect to it.

PUNITIVE DAMAGES

[14] I have been referred to, and agree with, the reasoning applied by Groberman J. in ***I.C.B.C. v. Sun***[3], where, at paras. 32 and 33, he says:

> 32 Elements of inflation have been included in the award of the jury, which is obviously in current dollars. That said, there were inevitable delays in bringing these matters to trial, and, for a period of time, I.C.B.C. has not had the use of money that it has ultimately been found to be entitled to.
>
> 33 In my view, the appropriate response is to award pre-judgment interest on punitive damages, but to reduce the rate of interest below the level normally provided under the ***Court Order Interest Act***. The rates normally provided under the ***Act*** over the period in question have fluctuated between about two percent and about 6.5 percent. In this case, I award interest on the punitive damages from the date of the first payment by I.C.B.C. to or on behalf of each defendant (whichever is earliest) at the rate of two percent per annum simple interest.

[15] While the present case was not a jury trial, parallel considerations apply. In this case I award interest on the punitive damages from the date the writ was issued, at the rate of two percent per annum simple interest. Post-judgment interest on the punitive damages will run at the rates prescribed from time to time under the ***Court Order Interest Act.***

SPECIAL COSTS

[16] As Mr. Potts stated at the start of his submissions on special costs:

> . . . this case is a primer for what is required for an award of special costs.

[17] In this case –

(1) there were findings of fact that the defendants lied in their testimony;

(2) there were findings of fact that they feigned misunderstanding and the lack of knowledge of the English language;

(3) they attempted to use interpreters to interfere with cross-examination;

(4) they filed false and misleading affidavits;

(5) they failed to produce documents;

(6) they tendered altered documents; and

(7) they repeatedly and deliberately failed to abide by directions of the court.

[18] The body of circumstances those factors represent cries out for an award of special costs, quite apart from the underlying circumstance of proven fraud.

[19] In addition to these factors however, there are three additional unique features.

[20] Firstly, the defendants repeatedly advanced very serious allegations of misconduct against the plaintiff, its employees and its investigators. In addition, very serious allegations were made against the plaintiff's counsel. These allegations were completely unfounded.

[21] Despite having the seriousness of those allegations brought to his attention and being given overnight to consider their position, the defendants maintained those allegations.

[22] Secondly, there are specific findings of fact in this case that the defendants acted to frustrate the plaintiff in this action endeavouring to make the process as difficult and expensive as possible.

[23] Finally, this is not Frederick Hwang's first experience with the trial process and with the impact of special costs. In a trial before Burnyeat J., special costs were awarded against him for some of the same types of conduct. If there is an element of specific deterrence in the awarding of special costs it has not been effective in Mr. Hwang's case.

[24] The award of special costs in the authorities is often centred on a discussion of a parties' conduct in the litigation. Conduct of a party, however, is but one of the factors identified in R. 57(3). The other factors are focused on the complexity and importance of the proceeding and the skill and specialized knowledge of counsel involved in the proceeding.

[25] It is important to remember in considering an award of special costs that the award of costs itself serves many functions within the litigation process[4]. These include –

a) indemnifying successful litigants;

b) deterring frivolous proceedings and defences;

c) encouraging parties to deliver (and consider) reasonable offers to settle; and

d) discouraging improper or unnecessary steps in litigation.

[26] The award of special costs is not, by its nature, punitive according to our Court of Appeal in ***Laye v. College of Psychologists of British Columbia***[5], a proposition which seems somewhat at odds with the decision in ***Fullerton v. District of Matsqui***[6]. This view, however, is consistent with the English authorities which recognize the importance of some litigation carried on as a test case and the benefits accruing to other litigants.

[27] In contrast, there is the view expressed in cases like ***Leung v. Leung***[7] where Esson C.J.S.C. wrote at p. 315:

> The concept of special costs was introduced to our rules in the 1990 amendments. It has been held that entitlement to special costs is to be determined on the same principles formerly applied to awarding solicitor-client costs. The test for awarding such costs was stated thus by Lambert J.A. in ***Stiles v. British Columbia (Workers Compensation Board)*** (1989), 38 B.C.L.R. (2d) 307 (C.A.), at p. 311:
>
> > . . . solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used.
>
> There is nothing in the conduct of Mr. Leung in relation to this matter which I would call "scandalous" or "outrageous". But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

and ***Fullerton v. District of Matsqui***[8] where Cumming J.A., speaking for the majority at p. 309, quotes the passage from ***Stiles***, set out above, before saying that:

> The test was affirmed in ***Nygard International Ltd. v. Robinson*** (1990), 46 B.C.L.R. (2d) 103 (C.A.), by Macdonald J.A. as follows [p. 106]: "Our general rule is that costs on a solicitor-and-client scale are given only with respect to or in situations of misbehaviour in the conduct of the litigation."
>
> This test has been met in the circumstances of this case. This Court found that

> evidence was presented by the respondents that was "calculated to mislead the trial judge and jury" and held that the lack of candour demonstrated by Corporal Gustafson in giving his evidence "cannot be condoned." Furthermore, this lack of candour continued in this Court with the filing of an affidavit by Corporal Gustafson that was inconsistent with his sworn testimony before the Commission of Inquiry.
>
> This lack of candour constitutes sufficient "misbehaviour in the conduct of this litigation" so as to make an award of special costs "desirable as a form of chastisement."

[28] Finally, it seems clear on the authorities that conduct giving rise to a cause of action and continuing through the litigation that follows may lead to both awards of punitive damages and an order for special costs as in ***Golden Capital Securities Ltd. v. Holmes***[9], where the court said:

> . . . where the misconduct continues during the course of litigation, the conduct giving rise to the cause of action can be punished by both punitive damages and by special costs. Thus, special costs can be ordered in addition to punitive damages where reprehensible pre-litigation conduct is combined with reprehensible conduct during the litigation process. See ***International Forest Products Ltd. v. Higgs***, [1997] B.C.J. No. 745 (B.C.S.C.) para. 12.

[29] There can be no doubt, in my view, that the circumstances of this case generally meet the criteria required for an award of special costs and do so on the basis of misconduct (R. 57(3)(e)) and of general importance (R. 57(3)(f)). The important issue in this case emerges from the fact that what was established at trial was a widespread systematic fraud being perpetrated against a public insurer. The impact of such conduct touches every member of the motoring public in the province.

[30] The consideration must be the extent to which the award of punitive damages overlapped, if at all, on the conduct at trial.

[31] The reasons for judgment in this case deal at length with what I will now characterize as the defendants' misconduct during the course of this trial. Those portions of the judgment deal with discrete issues such as credibility and the defendants' allegations of difficulty with the language.

[32] In the portion of the judgment (paras. 242 to 251) dealing with punitive damages, the focus and reasoning was on the:

> . . . systematic nature of the frauds in the present case, the difficulty of detecting them and the high cost of investigating and prosecuting claims in relation to them.

[33] At para. 248 of those reasons, I wrote the following:

> Quite apart from the underlying conduct giving rise to the claims themselves, Mr. Hwang, on behalf of himself and the other defendants, persisted in allegations of criminal or quasi criminal conduct against the plaintiff and allegations of unprofessional conduct against their counsel.

[34] Although this passage refers to the persistent allegations made by the defendants against the plaintiff and their counsel, it is clear that the underlying conduct referred to was the systematic fraud leading to the litigation itself.

[35] In my view, it is open to the court, as outlined in ***Golden Capital Securities*** to award both punitive damages arising from the defendants' pre-litigation conduct and special costs where that conduct is coupled with reprehensible conduct during the litigation process which both prolonged it considerably and significantly increased the cost to the plaintiff.

[36] The defendants' response to the overwhelming body of evidence indicating that for policy reasons this is a case that must, and must be seen to, attract an award of special costs is a plea of hardship in which Mr. and Mrs. Hwang assert that:

> As a result of this action commenced by ICBC . . . My husband and I have lost our family business. The property owned by Hwang Trading Co. Ltd. . . . has been sold off in foreclosure proceedings.

[37] Mr. Hwang has filed an affidavit containing similar assertions.

[38] I do not wish to sound inconsiderate but these assertions must be placed in proper context. They amount to the defendants maintaining their original assertion that ICBC is somehow guilty of misconduct in this matter.

[39] It must be recognized that it is not as a result of " . . . this action commenced by ICBC . . ." that these misfortunes have befallen the defendants, but as a direct result of the systematic fraud that it has been found they practised against ICBC.

[40] The defendants' affidavits make it abundantly clear why special costs must be awarded in this case. Perhaps the best summary emerges from paras. 207 and 208 of the reasons for judgment:

> 207 The plaintiff's efforts to investigate and bring this case to trial have been massive. They have been hampered in those efforts by an equally massive volume of documentation and the dogged determination of the defendants, and Mr. Hwang in particular, to frustrate their efforts at every stage.

> 208 Those efforts of the defendants included applications and actions calculated, in my view, to delay these proceedings and to make the costs of these proceedings as expensive as possible for the plaintiff. Applications in this category include, but are not restricted to, the defendants' attempt to force the plaintiff to provide them, at the plaintiff's expense, with certified daily transcripts, the application to adjourn a scheduled trial date on the basis, according to Mr. Hwang, of false representations and submissions, the attempt for force plaintiff's counsel to withdraw and the attempts to re-open this trial after it was concluded.

[41] The defendants conduct of the litigation and the trial was, in my view, reprehensible, scandalous and outrageous. In addition, much of that conduct was calculated to increase the costs of the plaintiff in pursuing its remedy. I have difficulty conceiving of a set of circumstances more compelling. The plaintiff will recover its costs against the defendants as special costs, including the costs of the present application.

DOUBLE COSTS

[42] On July 10, 2000, and again on January 31, 2001, the plaintiff, through counsel, forwarded Calderbank letters containing offers to settle the present litigation. The first was forwarded to the defendants directly and the second to counsel acting for the defendants. Neither offer was accepted and in virtually every particular the offers were exceeded in the ultimate orders obtained at trial.

[43] The issue of the applicability of R. 37(23) to an award of special costs was, in my view, determined by Bouck J. in ***Bradshaw Construction Ltd. v. Bank of Nova Scotia***[10] and Burnyeat J. in ***S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd.***[11]. In para. 2 of those reasons, Burnyeat J. finds that:

> Dealing with the Offer to Settle, I may depart from the provision of Double Costs if there is "very good reason" to do so: ***Baart v. Kumar*** (1985), 66 B.C.L.R. 61 (B.C.C.A.) but this overriding discretion should not be exercised lightly: ***Sitwell v. Sitwell*** (1997), 29 B.C.L.R. (3d) 61 (B.C.S.C.); ***Olynyk v. Yeo*** (1987), 17 B.C.L.R. (2d) 95 (B.C.S.C.); and ***Y(S.) v. C.(F.G.)*** (1997), 32 B.C.L.R. (3d) 235. In the case at bar, I cannot find that there is any reason, let alone a very good reason, why Double Costs should not be invoked. In fact, for the reasons set out in the part of this judgment dealing with whether Special Costs should be awarded, I am satisfied that the interests of justice require that an award of Double Costs be made. Accordingly, the plaintiff will have Double Costs from February 9, 1999 through January 24, 2000.

[44] I have read and considered both decisions. I can add little to the language of Burnyeat J. quoted above.

[45] In the case at bar, I cannot find any reason, let alone a very good reason, to depart from the intention of R. 37(23).

[46] The plaintiff will recover Special Costs throughout, from the commencement of the action to July 9, 2000. Thereafter, they will recover Double Special Costs after assessment before the Registrar.

"W.G. Parrett, J."
The Honourable Mr. Justice W.G. Parrett

December 20, 2004 – ***Revised Judgment***

It has come to my attention that defence counsel's name has been misspelled on page 1 of that judgment. Counsel is G.J. Niemela.

That change is noted and applied. I apologize to counsel for the misspelling.

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[1] ***Anglo Canadian Shipping Co. v. P.P.W., Local 8*** (1988), 27 B.C.L.R. (2d) 378; ***Wendeb Properties Inc. v. Elite Management Ltd.*** (1991), 53 B.C.L.R. (2d) 246; ***Wilk v. Kelowna and District Boys & Girls Club***, [1997] B.C.J. No. 220.

[2] R.S.B.C. 1996, c. 79

[3] 2003 BCSC 1175

[4] ***Skidmore v. Blackmore*** (1991), 122 D.L.R. (4th) 330, [1995] 4 W.W.R. 524, 2 B.C.L.R. (3d) 201.

[5] (1998) 59 B.C.L.R. (3d) 349 at para. 12

[6] (1992) 12 C.P.C/ (3d) 310 at p. 328.

[7] (1993) 77 B.C.L.R. (2d) 314

[8] (1992) 74 B.C.L.R. (2d) 305

[9] (2003) 22 B.C.L.R. (4th) 171 at para. 171

[10] [1993] B.C.J. No. 831

[11] 2000 BCSC 812