IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Toy v. 0954516 B.C. Ltd.,
2023 BCSC 13

Date: 20230105
Docket: S238214
Registry: New Westminster

Between:

Sidney Toy

Plaintiff

And

**0954516 B.C. Ltd. carrying on business as
The Vedder Transportation Group**

Defendant

Before: The Honourable Justice Walkem
(by videoconference)

Reasons for Judgment

Counsel for the Plaintiff:	J.L. Hankinson
Counsel for the Defendant:	A. Moore
Place and Date of Hearing:	New Westminster, B.C. October 18, 2022
Place and Date of Judgment:	New Westminster, B.C. January 5, 2023

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Introduction

[1] *Toy v. 0954516 B.C. Ltd.* was heard before me on April 14, 2022 and the decision was entered July 11, 2022, indexed at 2022 BCSC 1161 (the "Decision"). This matter was brought by the defendant, 0954516 B.C. Ltd. ("Vedder"), as an application to clarify costs.

Background

[2] The plaintiff brought an application suing for damages in lieu of adequate notice and sought special, general/punitive and aggravated damages. At trial, argument focused on the issues of notice and the issue of the plaintiff's efforts to mitigate damages.

[3] At the time of his dismissal, Mr. Toy was 61-years-old working as a fuel and scale attendant and making approximately $40,000 per year. He had been with his employer, Vedder, for just over five years. His position was terminated when his employer stopped night-shift services. He was given two weeks' notice, and $2,040 in severance pay. I made an award in favour of the plaintiff, for five-and-a-half months' severance pay, as well as costs.

[4] The defendant brought this application requesting to argue costs, as there was no such opportunity previously.

[5] The first question to be addressed is what mechanism exists for a judge to re-open a matter once a judgment has been entered—in this case regarding costs. The second question to be addressed is the test for awarding costs pursuant to Rule 14-1(10) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*].

Issue One: What mechanism exists for a judge to re-open a matter once a judgment has been entered?

[6] The general principle is that once an order is entered, the court which made the order becomes *functus officio*. The doctrine of *functus officio* limits a court's authority to vary its own order: *McKenzie v. McKenzie,* 2016 BCCA 97 at para. 22. This doctrine "exists to allow finality of judgments from courts which are subject to appeal": *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at para. 79.

[7] However, Rule 13-1(17) allows the court to re-open a matter in specific circumstances. This Rule states:

> The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

Am I *functus*?

[8] Chief Justice Finch, writing for the Court of Appeal, discussed the specific circumstances in which an exception may be considered per the doctrine of *functus officio* and the *Rules*, in *Harrison v. Harrison,* 2007 BCCA 120:

> [29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein. Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the ***Supreme Court Rules*** where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court.
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> [Citations omitted.]

[9] To amend an order to provide for any matter that should have been, but was not adjudicated on (in this case costs), or where the manifest intention of the court is not reflected in the entered judgment, is at the discretion of the court. There is a body of case law where the court has re-opened a matter to specifically address costs.

[10] In *Digg'n 4U Contracting Ltd. v. Kharwar*, 2021 BCSC 2595, Justice Weatherill revisited a matter where an order had been entered, including with respect to costs, due to an oversight in awarding costs without hearing submissions from the party.

[11] In deciding whether the Court was *functus officio,* Weatherill J. referred to several previous matters where the issue of costs had been revisited; the primary focus being on whether the entered order was reflective of the manifest intentions of the Court. Justice Weatherill considered the decision of Chief Justice Hinkson in *Sherwood v. The Owners, Strata Plan VIS 1549,* 2018 BCSC 2105 at paras. 23-26, in which he discussed the authorities for re-opening an entered order, citing *Harrison* at para. 29*; Buschau v. Rogers Communications Inc.*, 2004 BCCA 142; and *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[12] Ultimately, Weatherill J. determined they were not *functus officio*, and it was not their intention to deprive the parties of making submissions on costs.

[13] This decision was appealed, on the issue of jurisdiction and the Court of Appeal found that the issue could not be properly decided in Chambers as a limited appeal: *Digg'n 4U Contracting Ltd. v. Kharwar*, 2022 BCCA 157 at paras. 22-24.

[14] I find that as the matter of costs was not previously adjudicated, nor was the decision rendered with consideration of the applicable *Rules*, I am not *functus* and there is an opportunity for the Court to re-open the matter to amend the order with respect to costs.

Issue Two: Should Mr. Toy be awarded his costs in this matter?

[15] Pursuant to Rule 14-1(10), matters which are in the purview of the Provincial Small Claims Court, which includes awards under $35,000, are not eligible for costs beyond disbursements, "unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders".

[16] Rule 14-1(10) requires a finding of "sufficient reason" to bring the matter in the B.C. Supreme Court when it may have been brought at Provincial Small Claims Court. A key difference between the two forums is that a plaintiff in Provincial Small Claims Court cannot seek their costs, while costs can be awarded to a successful plaintiff in this Court.

[17] In this case, it is unlikely Mr. Toy's application for damages in lieu of notice would have exceeded $35,000. His application claimed an appropriate notice period of seven months (based on an annual salary of $40,000) plus special, general/punitive and aggravated damages.

[18] The question is whether there was "sufficient reason" for the plaintiff to bring the application before this Court, as opposed to before the Provincial Small Claims Court.

Sufficient Reason

[19] In *Gehlen v. Rana*, 2011 BCCA 219 at para. 35, the Court of Appeal considered what was meant by the phrase "sufficient reason", citing *Gradek v. DaimlerChrysler Financial Services Canada Inc. and Fletcher,* 2011 BCCA 136 [*Gradek BCCA*], and noted that:

> [35] In *Gradek*, the Court interpreted the meaning of "sufficient reason" in Rule 57(10). The Court acknowledged that the procedures available in the Small Claims Court will, in most cases, "enable the parties to proceed in a cost-efficient manner to a just result" (para. 18).

[20] A determination that sufficient reason exists to bring a matter in Supreme Court may include whether a proceeding is legally complex; if documentary discovery may be needed; use of the summary trial procedure could lead to an

effective resolution; the plaintiff prefers a jury trial; more time would be available for a complex matter in Supreme Court; or a plaintiff needs a judgment that could be enforced more effectively outside of B.C. than a Provincial Court judgment would be: *Icecorp International v. Nicolaus*, 2007 BCCA 97 [*Icecorp*] at paras.15 and 27.

[21] Determination of whether sufficient reason exists to bring the matter in this Court, rather than the Provincial Small Claims Court, should not be limited to an assessment of the quantum of the claim alone: *Gehlen,* at para. 36. *Gradek BCCA*, was quoted as follows:

> [20] … While I am satisfied that the words, "sufficient reason" should not be interpreted in an expansive manner, but with restraint, I am also satisfied that they must be read in such a way that a trial judge is not forced to deny a party costs where [they are] satisfied, as here, that justice can only be achieved as between the parties by an award of costs to the successful party.

[22] Situations where a plaintiff has been found to have sufficient reason to seek costs under Rule 14-1(10), include where:

a) summary trial procedures are preferred due to the need for pre-trial discovery, as in *Icecorp* and *Kuehne v. Probstl*, 2004 BCSC 865;

b) complex matters such as personal injury claims, as in *Sanderson v. Van Humbeck*, 2013 BCSC 1546 and *Hall-Smith v. Yamelst*, 2016 BCSC 325;

c) matters in which the claim for damages is close to the $35,000 threshold; or

d) there is a particular need for counsel on the unique circumstances of the case, particularly in cases with an institutional defendant such as in motor vehicle cases: *Zale v. Colwell*, 2010 BCSC 1040:

> [13] …the primary reason for awarding the plaintiff costs, in circumstances not unlike these facing the plaintiff here, was the consideration that given the need to retain counsel to battle an institutional defendant, a reasonable consideration in determining the forum is the matter of indemnity for the costs of counsel.

[23] In *Gradek v. DaimlerChrysler Financial Services Canada Inc. and Fletcher,* 2010 BCSC 356 [*Gradek BCSC*], the Court considered the difference in capacity to bring a case between the plaintiff and the defendant finding that the difference in capacity was sufficient reason:

> [42] The plaintiff is who he is. As such, he would have had extraordinary difficulty presenting a case on his own. While the defendant, represented by the insurer, suggested that in Provincial Court it might, at times, be represented by an adjuster, in my view, whether the defendant was represented by an adjuster or a lawyer the plaintiff would have been out-matched.
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> [43] In my opinion the plaintiff required counsel to obtain a just result. Costs are not awarded in Provincial Court.
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> [44] The defendants argued proportionality. The costs applicable under Rule 66 are approximately one-half of the value of the claim. I agree that proportionality is an important principle in considering the selection of forum. In my view, however, for the reasons given, this is one of those circumstances where, in the interests of justice, there was sufficient reason to bring the action in Supreme Court.

Position of the Parties

Vedder

[24] The defendant relies on the decision of Justice Norell in *True v. Vedder Transport,* (27 August 2018), Vancouver Docket No: S179109 (B.C.S.C.). The defendant in this action was also the defendant in *True.*

[25] In *True*, Norell J. determined the plaintiff was not entitled to costs pursuant to Rule 14-1(10), following a successful wrongful dismissal action in which the award was below the $35,000 threshold.

[26] The plaintiff in *True* argued they should be entitled to costs, because the summary trial procedure was the most efficient and cost-effective route to resolve the dispute, and that the damages sought in the initial application would have exceeded the amount within the jurisdiction of Provincial Court.

[27] Justice Norell found that the grounds argued did not meet the “sufficient reason” test required for an exception to Rule 14-1(10). In particular, the initial damages sought were optimistic: *True* at para.15.

[28] In reaching this decision, the Court considered the factors set out in *Khan v. All-Can Express Ltd.*, 2014 BCSC 2066, leave to appeal refused at 2015 BCCA 234, including the quantity of damages sought, the fact that the burden lies on the plaintiff to establish "persuasive and compelling" proof of eligible circumstances: *Gehlen,* at para 37. Determination of whether "sufficient reason" has been made out is an objective test: *True,* at para. 12.

[29] The costs decision was appealed and dismissed, with the Court of Appeal upholding the decision of Norell J. (2018 BCCA 463).

[30] On appeal, in *True*, the Court found:

> [18] This Court has already considered Rule 14-1(10) in the context of expedited trials. In *Khan*, the appellant sought to challenge the trial judge's decision to refuse him costs following a three-day fast track trail. The trial judge summarized the appellant's argument as follows:
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> > In the plaintiff's submission, the case was complex and it would have been unreasonable and unfair to expect him to prosecute this matter in the Provincial Court. That would have required him to proceed without legal counsel, there being no right to recover his costs, and without the discovery rights that proceeding in the Supreme Court affords.
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> > [At para. 17]
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> …
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> [21] Similarly, in the case at bar, the judge expressly stated the relevant test set out in *Khan* at para. 12 of her reasons. She directly addressed the question of whether it was objectively reasonable for Mr. True to conclude that the damages claimed were outside the monetary jurisdiction of the Small Claims Court. She set out her findings and concluded that 14 months was an "optimistic assessment" of the reasonable notice period. The judge further found that Mr. True could reasonably expect to find work in the notice period.
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> [22] In addition, the judge rejected Mr. True's submission that the procedures available in the Supreme Court were necessary to establish his claim. As was noted in *Khan* and referred to by the judge, there are various measures available in the Provincial Court, including pre-trial disclosure of documents, mediation services and settlement conferences, to facilitate the resolution of the action.
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> …
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> [27] I am not persuaded that the point on appeal is significant to the practice. The jurisprudence on the application of Rule 14-1(10) is settled. I acknowledge that there are a myriad of possible outcomes in cases where a summary trial is sought but the amount claimed or awarded falls within the

> monetary jurisdiction of the Provincial Court. That is because the determination of sufficient reason is an intensely fact-specific exercise. There can be no question that the availability of a summary trial is a factor to be considered in the "sufficient reason" analysis. But I do not think it is necessary or desirable to accede to the applicant's proposition that a summary trial must necessarily establish sufficient reason.

Mr. Toy

[31] The plaintiff argues that the parties agreed the matter was appropriate to be heard by way of summary trial as per Rule 9-7 of the *Rules*. The plaintiff says this is evidenced by the fact that the defendant did not apply to have the matter transferred to the Provincial Small Claims Court.

[32] In *Gradek BCCA*, the Court recognized at para. 19: "It is open to a defendant who believes that the claim should not have been brought in the Supreme Court to apply under s. 15 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443, to have the matter transferred to the Provincial Court." The plaintiff argues that the defendant had an opportunity to do so, but did not. The plaintiff further argues that the defendant availed themselves of the discovery procedure which resulted in a lowered award, given details it revealed about the plaintiff's mitigation efforts.

[33] Counsel for the plaintiff argues that the summary trial procedure was the most efficient way to resolve this dispute and an essential tool for access to justice, citing Justice Karakatsanis in *Hryniak v. Mauldin*, 2014 1 S.C.C. 7.

[34] The plaintiff argued it would be contrary to the principles of access to justice and fairness to deprive him of costs. Two cases cited by the plaintiff in support of this argument, *Rowe v. Thomson,* 2011 BCSC 617 and *Mehta v. Douglas*, 2011 BCSC 714, are distinguishable as the plaintiffs in those actions were also seeking injunctions—a measure not available in the Provincial Court.

Analysis

[35] It is within the discretion of the Court to determine whether a plaintiff had sufficient reason to bring a matter in this Court when it would have otherwise fit the criteria of Provincial Small Claims Court, for purposes of determining costs.

[36] That being said, with *True*, the Court has held this bar quite high. The desire to have a lawyer is not, in and of itself, sufficient reason.

[37] Here, I do not find it was objectively reasonable for Mr. Toy to conclude potential damages were outside the monetary jurisdiction of a Provincial Small Claims Court. As in *True*, to conclude that possible damages would have exceeded $35,000 would be an “optimistic assessment”. The plaintiff did not avail himself of the discovery process, nor was there a need to enforce the decision outside of this jurisdiction or for an injunction. One area which remains to be considered is whether, on the specific facts of this case, the plaintiff lacked capacity to bring his case in other forums and required legal representation.

[38] The development of mechanisms such as the Provincial Small Claims Court, and other alternative dispute resolution forums reflect attempts to make justice accessible to those who cannot afford counsel, or who require a solution which can be achieved through a simplified and streamlined process. The Provincial Small Claims Court process includes a dispute resolution step to assist parties in seeking a resolution to matters, prior to a hearing.

[39] Despite simplified processes available in Provincial Small Claims Court, access to justice considerations must also reflect the ability of a plaintiff to bring the action and to navigate the ins and outs of the law required to advance their claim. A simple and straightforward matter to lawyers, judges or most lay-litigants may nonetheless be insurmountable and unduly complex to others. This is the situation the Court contemplated in *Gradek BCSC*.

[40] Lay-litigants will themselves have different capacities to understand the law in a particular area, or to understand the types of evidence that they may need to support a claim, or to respond to claims made against them. For some lay-litigants, a

relatively small and straightforward wrongful dismissal claim might be difficult, yet with research and preparation, entirely possible to bring. Yet, for others, the prospect of bringing such a case on their own may be impossible.

[41] As the Supreme Court of Canada stated in *Hryniak*:

> [25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[42] For some litigants, without the capacity to bring a case on their own, the choice may well be between bringing their case in this Court where legal costs are potentially recoverable, and accepting the litigation risk in the event they are unsuccessful, or simply giving up on seeking justice for themselves because they do not have the ability to forward the case on their own in any forum

[43] The "sufficient reason" exception permitted within the *Rules* is context specific, and will depend on the circumstances of each case. Here, arguments advanced by the plaintiff centred on suitability of the summary trial procedure as an accessible and proportionate way to resolve this matter. The plaintiff argued that access to the streamlined summary trial process available in this Court was an access to justice issue. The plaintiff did not focus argument on another facet of access to justice—the question of the specific capacity (or lack of capacity) of the plaintiff to bring their case forward without counsel, including through the simplified process available through Provincial Small Claims Court. Mr. Toy is not unlike the claimant in *True*, in that he is of a similar age and skillset. The cases are dissimilar in that the claimant in *True* brought forward a medical report in support of their claim for costs, and received a significantly higher award due to years of employment. As in this case, the plaintiff in *True* argued access to justice as the core reason for bringing their claim before this Court. Ultimately, Norell J., followed by the Court of Appeal, determined this was not sufficient reason.

[44] Here, on the evidence presented, I do not find the plaintiff has made out a sufficient reason to bring this matter to this Court, rather than the Provincial Small Claims Court. Accordingly, the plaintiff is entitled to his reasonable disbursements, but not costs.

"Walkem J."