IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Parker Cove Properties Limited Partnership v. Gerow,* 2023 BCSC 2275

Date: 20231227
Docket: S2110233
Registry: Vancouver

2023 BCSC 2275 (CanLII)

Between:

Parker Cove Properties Limited Partnership

Plaintiff

And

Robin Gerow, Carmen Gerow and Royal Bank of Canada

Defendants

Before: The Honourable Justice E. McDonald

Reasons for Judgment Regarding Costs

Counsel for the Plaintiff:	K. Ramji
Counsel for the defendants:	R.J. Kaardal, K.C. S. Penney
Place and Date of Trial/Hearing:	Vancouver, B.C. October 27, 2023
Place and Date of Judgment:	Vancouver, B.C. December 27, 2023

Table of Contents

INTRODUCTION 3
COSTS 4
Time to Address the Issue of costs 4
Request for Special Costs 5
Alternative Request for Increased Costs 8
Claim for Contractual Costs 11
DISPOSITION 13

2023 BCSC 2275 (CanLII)

2023 BCSC 2275 (CanLII)

Introduction

[1] On August 11, 2023, I delivered reasons for judgment dismissing the plaintiff's claim against the defendants. In those reasons for judgment indexed at 2023 BCSC 1397, I granted the parties an opportunity to make further submissions regarding costs.

[2] On October 27, 2023, the parties appeared before me to make submissions regarding costs. The defendants, Mr. Gerow and Ms. Gerow (the "Gerow Defendants"), seek an award of special costs or alternatively, increased costs at Scale C.

[3] The plaintiff has appealed from the order made August 11, 2023 dismissing the claim and it submits that the determination of costs should await the conclusion of the appeal proceedings. The plaintiff submits that it is entitled to indemnity for its costs on a contractual basis.

[4] According to the submissions made by the parties, I am required to determine the following issues regarding costs:

a) Whether the Court should adjourn the question of costs until the appeal proceedings have completed?

b) If the issue of costs is to be determined now, are the Gerow Defendants entitled to special costs, or alternatively, increased costs at Scale C?

c) What should happen regarding the plaintiff's claim for costs indemnity pursuant to the sublease?

[5] For the following reasons, I conclude that the issue of costs should be determined at this juncture. As the Gerow Defendants were the successful parties, they shall recover against the plaintiff costs at Scale C to be assessed. The request for special costs and increased costs at Scale C is denied. I decline to address the issue of indemnity for costs on a contractual basis.

2023 BCSC 2275 (CanLII)

Costs

Time to Address the Issue of costs

[6] Rule 14-1(9) of the *Supreme Court Civil Rules* [*Rules*] provides that while costs are discretionary, they normally follow the event:

> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[7] On the application, the Gerow Defendants were the successful parties. An order was made dismissing the plaintiff's claim.

[8] The plaintiff's counsel submits that since the Court determined that the Gerow Defendants breached, but not fundamentally, the sublease, and because there is an appeal pending, it remains unknown which party has achieved substantial success. I do not agree with that submission.

[9] Regardless of which party succeeds on the appeal, it does not, in my respectful view, alter the fact that on the summary trial application, the Gerow Defendants were the successful parties. The outcome of the application was that the claim was dismissed. Normally, costs should follow the cause.

[10] In light of the summary trial outcome, I do not find it appropriate to adjourn the question of costs merely because an appeal from the order has been brought. In concluding that costs should be determined at this point, I note that my order for costs could be raised as an additional issue on appeal and, in my view, deciding all matters at this juncture is consistent with the objectives of efficiency and proportionality in the *Rules*.

[11] I am supported in my view that now is the time to address the issue of costs by s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which states:

> **10** In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the

> parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[12] Having concluded that costs ought to be determined now, I will next consider the parties' submissions on what the award of costs should be.

Request for Special Costs

[13] The Gerow Defendants seek an award of special costs.

[14] The standard applicable for an award of special costs, is that the conduct of the party in question be categorized as "reprehensible", which is capable of including not only scandalous and outrageous conduct, but also "milder forms of misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para 17,1994 CanLII 2570 (C.A.).

[15] An award of special costs requires exceptional circumstances, which has been described as "something more" to justify such an award: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 39; *Yeomans v. Buttar*, 2021 BCSC 1394 at para. 14.

[16] In *Mayer v. Osborn Contracting Ltd.*, 2011 BCSC 914, Justice Walker summarizes the circumstances that may justify an award of special costs:

> [11] Special costs may be ordered in the following circumstances:
>
> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;

2023 BCSC 2275 (CanLII)

> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;
>
> (h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (i) where a party pursues claims frivolously or without foundation.

2023 BCSC 2275 (CanLII)

[17] Pre-litigation conduct should not be considered in deciding whether to award special costs because other suitable mechanisms exist for the censure of such conduct: *Smithies Holdings Inc. v. RCV Holdings*, 2017 BCCA 177 at paras. 128–134.

[18] The Gerow Defendants' counsel submits that they are entitled to special costs as a result of the following circumstances:

a) The conduct of the plaintiff in bringing a clearly unmeritorious claim alleging breaches, or fundamental breaches, of the sublease, such as non-payment of common costs and annual rents, impermissible renovations and failure to evacuate.

b) The conduct of the plaintiff of seeking termination of the sublease without providing the requisite notice of the alleged breaches to the Gerow Defendants.

c) The conduct of the plaintiff in making resolution of issues in the proceeding unnecessarily difficult by, for example, refusing to accept amounts of allegedly unpaid rent up to the date of the summary trial hearing.

d) The conduct of the plaintiff in resisting timely adjudication of the claim on its merits by, for example, seeking to avoid summary trial due to the Okanagan Indian Band's wish to intervene.

e) The conduct of the plaintiff in bringing the proceeding to impose a burden on the Gerow Defendants as retribution for criticizing the plaintiff's management of Parker Cove.

[19] The Gerow Defendants submit based on certain evidence in the record that the claim was commenced for an improper purpose, namely, because of personal animus between the individual who operates the plaintiff company and Mr. Gerow. They say the main purpose of the claim was to single out the Gerow Defendants for being the sublessees who were most critical and vocal in dealing with the plaintiff. The Gerow Defendants say the plaintiff sought to punish them by commencing and prosecuting the claim, thereby preventing them from selling their main asset, namely, their homes in Parker Cove.

[20] After considering the grounds advanced by the Gerow Defendants for seeking special costs, I conclude that most concern pre-litigation conduct. There is a bright-line preventing the Court from considering pre-litigation conduct as a ground for special costs. In my view, the pre-litigation conduct does not give rise to an award of special costs.

[21] Regarding the allegations of deliberately resisting timely adjudication of the claim, I do not regard the plaintiff's disagreement as to the appropriateness of the issue for summary determination to be a position that was taken in bad faith. Even if the plaintiff had agreed it was appropriate for summary trial determination, this remains a threshold issue for the Court to determine regardless of the parties' consent.

[22] I do not regard the submissions made by the plaintiff in summary trial as part of a bad faith effort to draw out, or thwart, these proceedings. The plaintiff was unsuccessful on its position regarding suitability for summary trial, among other things, but that does not make it a wrongful attempt to lengthen the proceeding or to thwart a timely adjudication.

[23] Regarding the allegation that the plaintiff brought the proceeding to impose a burden on the Gerow Defendants as retribution for criticizing the plaintiff's management of Parker Cove, this ground appears to be an allegation that the claim was brought for an ulterior purpose.

2023 BCSC 2275 (CanLII)

2023 BCSC 2275 (CanLII)

[24] While the evidence establishes that other residents remained at Parker Cove after the evacuation order and the plaintiff publicly identified individuals in addition to Mr. Gerow, as breaching their sublease, I do not conclude that the claim was brought for an entirely ulterior purpose or that it was utterly frivolous. The plaintiff claimed there was a breach of the sublease and I agreed, at least in respect of the failure to evacuate, there was a breach by the Gerow Defendants. The fact that the plaintiff might have brought a claim against others, does not mean the claim against the Gerow Defendants serves an ulterior motive or that it is frivolous.

[25] The authorities establish that reprehensible conduct deserving of rebuke is not established by the mere fact that a party pursued weak or unsuccessful claims or defences: *Long v. Thanas*, 2020 BCSC 2203 at paras. 38–49; *Lotimer v. Johnston*, 2020 BCSC 119 at para. 9.

[26] In my view, this is a circumstance of a plaintiff failing to discharge its burden and, as a result, having its claim dismissed. However, that does not rise to the level of the kind of reprehensible conduct that ought to attract an award of special costs.

[27] I therefore decline to award special costs to the Gerow Defendants.

Alternative Request for Increased Costs

[28] In the alternative, the Gerow Defendants request increased costs at Scale C. By referring to "increased costs", the Gerow Defendants appear to request, in addition to fixing the scale of costs at Scale C, that the Court also increase the value of the units.

[29] Rule 14-1(1) provides that, if costs are payable to a party, and—in the absence of certain specified circumstances, such as the court ordering that costs be assessed as special costs—the costs are to be assessed as party and party costs in accordance with Appendix B.

[30] The relevant portions of Appendix B are as follows:

2023 BCSC 2275 (CanLII)

Scale of costs

2 (1) If a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

(2) In fixing the scale of costs, the court must have regard to the following principles:

(a) Scale A is for matters of little or less than ordinary difficulty;

(b) Scale B is for matters of ordinary difficulty;

(c) Scale C is for matters of more than ordinary difficulty.

(3) In fixing the appropriate scale under which costs will be assessed, the court may consider the following:

(a) whether a difficult issue of law, fact or construction is involved;

(b) whether an issue is of importance to a class or body of persons, or is of general interest;

(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

…

(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

(6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[Emphasis added.]

[31] As indicated by s. 2(2)(c), to arrive at Scale C, the matter must be of “more than ordinary difficulty”.

[32] In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 6, Justice McEwan lists the relevant factors for deciding whether a matter is of “more than ordinary difficulty” to be appropriate for an award of costs at Scale C:

(a) Length of trial;

(b) Complexity of issues;

(c) Number and complexity of pre-trial applications;

(d) Whether or not the action was hard-fought with little or nothing conceded along the way;

(e) The number and length of examinations for discovery;

(f) The number and complexity of expert reports;

(g) The extent of the effort required in the collection of and proof of the facts.

[33] While not submitting that the matter was appropriate for Scale C, counsel for the plaintiff did make submissions to the effect that the matter was complex. The plaintiff's counsel said the matter raised questions of broader social importance, especially in an age of increasing wild-fire risk, and where the decision of one individual could place an entire neighbourhood at risk of catastrophic loss. I agree that this added complexity to what might otherwise be regarded as a straight-forward dispute concerning the application of a sublease.

[34] I also find that the matter was hard fought with little or nothing conceded along the way, especially by the plaintiff. While the Gerow Defendants conceded, for example, that Mr. Gerow failed to evacuate on August 1, 2021, the plaintiff made no concession concerning whether the sublease required notice to the Gerow Defendants for *any* of the various breaches alleged. In my view, the plaintiff's "new" submission in response to the summary trial application alleging that the Gerow Defendants had fundamentally breached the sublease is another example of the hard-fought nature of the application.

[35] Given that the issues in this proceeding were complex, including because of the broad implications alleged by the plaintiff, and the hard-fought nature of the application, I find that this is an appropriate case for Scale C costs.

2023 BCSC 2275 (CanLII)

2023 BCSC 2275 (CanLII)

[36] I turn now to whether the Gerow Defendants ought to have their costs at Scale C on an increased basis.

[37] Courts may award increased costs due to the presence of "unusual circumstances", rendering the costs awarded on the scale determined to be "grossly inadequate or unjust": *Kemp v. Vancouver Coastal Health Authority Ltd.*, 2016 BCSC 1541 at para. 26; *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at paras. 56–57.

[38] The Gerow Defendants submit that increased costs ought to be awarded because the plaintiff raised fundamental breach of the sublease for the first time in response to the application for summary trial. They submit that the plaintiff failed to advise them that the sublease was being terminated for fundamental breach and the plaintiff failed to allege fundamental breach in its claim.

[39] In my reasons, I concluded that the allegation of fundamental breach was not clearly pled in the claim. I concluded this was a further basis to dismiss the claim. As I have already taken this, and all of the other relevant circumstances into account when determining the scale of costs, I do not find the kind of "unusual circumstances" that would support an order for increased costs.

[40] Therefore, I grant the request for costs at Scale C pursuant to s. 2(2)(c) of Appendix B of the *Rules.* For clarity, I deny the request for increased costs at Scale C.

Claim for Contractual Costs

[41] In paras. 19(g) and (h) of part 2 of the claim, the plaintiff seeks "damages for legal fees and disbursements incurred by the plaintiff pursuant to section 6 of the Sublease" and "costs of the action pursuant to the Rules", respectively.

[42] The plaintiff submits that despite the application for summary trial on the claim, its claim for contractual costs against the Gerow Defendants remains alive due to the appeal and due to the fact that it has not yet elected to seek those costs.

[43] The Gerow Defendants ask the Court to determine the plaintiff's potential claim for contractual indemnity for costs on its merits. They submit that it is an abuse of process for the plaintiff to argue that despite the summary trial, their claim for contractual costs, if elected for, may be advanced in this or another proceeding.

2023 BCSC 2275 (CanLII)

[44] The parties referred me to *P&T Shopping Centre Holdings Ltd. v. Cineplex Odeon Corporation* (1995), 3 B.C.L.R. (3d) 309,1995 CanLII 448 (C.A.) [*P&T*] where our Court of Appeal considered a claim for contractual costs arising under a lease, or alternatively, costs pursuant to the *Rules*. On appeal, the successful party, in whose favour the Court construed the lease, requested special costs on the basis that special costs were bound to be less than what it could recover under the contractual costs covenant.

[45] The Court of Appeal refused the request, finding it inappropriate to proceed as suggested as "it is not for us to construe the covenant" or predict the outcome of an assessment of special costs: *P&T* at para. 19. As the claim in *P&T* pleaded the covenant and asked for judgment that included interest and costs, the Court construed the claim as both a demand for payment of what may become due under the covenant for costs and a prayer for specific performance: *P&T* at para. 21.

[46] The Court concluded the successful party's remedy was to send the unsuccessful appellant a statement with its contractual claim and demand payment, and failing payment, it could sue for those costs as unpaid rent: *P&T* at para. 22. Finally, the Court found it inappropriate to make any order as to costs because the successful party had its contractual remedy and it was for the successful party to elect between its contractual remedy and the usual order for party and party costs awarded to the successful party: *P&T* at paras. 23 and 24.

[47] The Gerow Defendants submit that based on the authority in *P&T*, the plaintiff's claim for contractual costs is potentially premature since it has not made its election.

[48] The plaintiff points out, and it is not disputed by the Gerow Defendants, that entitlement to costs arises from the terms of the contract and not from the statutory costs regime: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 52.

[49] The plaintiff agrees that to date, it has made "no election as to whether it was to pursue its contractual indemnity or its costs under the Rules" and since no demand has been made, the issue of contractual indemnity is simply not before the Court on this application. The plaintiff submits that once the appeal is determined, it will elect at that time.

[50] The plaintiff submits that it would be inappropriate for the Court to determine the contractual right to legal costs and disbursements where no election has been made and where there is no evidence concerning those costs.

[51] *P&T* states that the proper course for a party who elects under such a clause, is to issue a demand and if payment is not made, bring suit for the costs. As the plaintiff asserts that a claim for contractual indemnity for costs is not before the Court including because no election or demand has been made, I decline to address the issue at this juncture.

Disposition

[52] As the successful party, the Gerow Defendants shall recover against the plaintiff costs at Scale C to be assessed. Their request for special costs and increased costs at Scale C is denied.

"E. McDonald J."

2023 BCSC 2275 (CanLII)