IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heffel v. Cole,*
2023 BCSC 2140

Date: 20231121
Docket: S-202684
Registry: Victoria

Between*:*

Barrett Heffel

Plaintiff

And:

Shane Alexander Cole and Robert Vern Marsh

Defendants

Before: The Honourable Justice Morley

Oral Reasons for Judgment (Costs)

In Chambers

Counsel for the Plaintiff (appearing by videoconference):	M.J. O'Connor, K.C. D. Blanchard, Articled Student
Counsel for the Defendant Shane Cole (appearing by videoconference):	C.N. Christie
For the Defendant Robert Marsh:	No appearance
Place and Date of Trial:	Victoria, B.C. October 3-6, 2023
Written Submissions of Plaintiff:	October 30, 2023
Written Submissions of Defendant Shane Cole:	October 24, 2023
Place and Date of Judgment:	Victoria, B.C. November 21, 2023

I. INTRODUCTION

[1] These are edited oral reasons.

[2] In this case, the plaintiff Barrett Heffel alleged that his former friend and partner, Shane Cole, fraudulently or, alternatively, negligently misrepresented that he already had all necessary mortgage financing to close a land transaction when Mr. Heffel agreed to invest $60,000 in that transaction.

[3] In oral reasons given on October 17, 2023, I dismissed the action on the basis that no such representation was established on the evidence.

[4] I gave the parties leave to make written submissions as to costs. I have now received those submissions and am ready to make a ruling on costs.

[5] Both parties agree that Mr. Cole, as defendant, had substantial success and would therefore normally be awarded party and party costs. They also agree that this case was of ordinary difficulty and so would ordinarily attract Scale B costs. The differences are as follows:

a) First, Mr. Cole says that because Mr. Heffel made an unsuccessful allegation of fraud without reasonable basis, costs should be awarded as full indemnity “special costs”. While such an award is *sometimes* made when allegations of fraud are not established, as Mr. Heffel points out and Mr. Cole accepts, this is only if the conduct of making the allegation can be said to be “reprehensible” and thus worthy of a punitive award.

b) Second, even if an award of special costs is too punitive in these circumstances, I may still consider the possibility of awarding an uplift, according to which the tariff rate is raised up to 1.5 times its normal amount, to compensate Mr. Cole for having to defend against an allegation of fraud.

c) Third, and somewhat separately, Mr. Cole says that I should award double costs under Rule 9-1(5) for those costs accrued after settlement offers

made to Mr. Heffel on March 18, 2021 (for consent dismissal without costs), November 10, 2022 (ditto) or February 14, 2023 (for dismissal and assignment of any cause of action against the parties' realtor in return for $10,000). Mr. Heffel responds that these offers were not ones that "ought reasonably to have been accepted", as required by Rule 9-1(6)(a), viewed, as formal offers must be, from the perspective of Mr. Heffel as the party receiving the offer.

[6] For the reasons that follow, while I agree with Mr. Cole that the allegations of fraudulent misrepresentation were without foundation, I decline to make the punitive award of special costs. I instead order an uplift in costs to 1.5 times the unit costs that would otherwise be applicable under ss. 2(5)-(6) of Appendix B to the Rules. The purpose is to indemnify Mr. Cole for Mr. Heffel's misconduct in making unfounded allegations of fraud. I agree with Mr. Heffel that none of Mr. Cole's formal offers to settle were ones he reasonably ought to have accepted in light of his own assessment of his case and so I decline to order double costs at any stage of the litigation.

II. SPECIAL COSTS

[7] The first issue I must address is whether this is an appropriate case for an award of special costs under Rule 14-1(1)(b)(i).

[8] Special costs are a punitive measure designed to punish parties for reprehensible conduct in the course of the litigation: *Young v. Young,* [1993] 4 S.C.R. 3 at pp. 134-136; *Grewal v. Sandhu,* 2012 BCCA 26 at para. 106.

[9] Conduct in the course of litigation includes the allegations made in a notice of civil claim. Meritless allegations of fraudulent conduct *can* be considered reprehensible and therefore appropriately deserving the sanction of solicitor-and-client costs: *Roussy v. Savage,* 2020 BCSC 487 at para. 17. However, the fact that an allegation of dishonest conduct ultimately proves unsuccessful is not, in itself, enough to justify such an award: *Roussy* at para. 19. There is a discretion, to be governed by whether the plaintiff's conduct was "reprehensible".

[10] On an application for special costs because of an unfounded allegation of fraud, a court will consider whether the allegations were “obviously unfounded”, “recklessly made” or “made out of malice.” The assessment that must be made from the point of view of the plaintiff at the time the allegations were made or maintained: *Roussy.*

[11] This test has also been stated as a matter of whether the party’s allegations were “reasonable” at the time they were made, but it is important to interpret the reasonableness standard in light of the punitive, as opposed to compensatory, character of special costs in British Columbia. Special costs play the role in relation to litigation conduct that punitive damages play in relation to the substantive conduct. “Unreasonableness” in the context of special costs is thus a high standard, in light of the punitive nature of an award of special costs. It must rise to the level of something like recklessness, malice or an obvious failure to consider the basis of serious allegations such that the overall conduct is worthy of punishment.

[12] While a lack of an arguable case for fraud at the time the allegations were made would typically be *necessary* for an award of special costs, it is thus not *sufficient.* Even when there was no arguable case or real merit to the allegation, I must still consider whether we are in a situation that is worthy of *punishment*. The ultimate issue is whether the litigation conduct of the plaintiff alleging fraud can properly be characterized as “reprehensible”, which is of course a higher standard than merely “unreasonable”: *Roussy* at para. 31.

[13] In this case, I find that there was no objective arguable basis for the allegations of fraud. The decision to make the allegation was in no way *justified* and was in that sense unreasonable. However, it can to some extent be *excused* or at least *mitigated* by the circumstances that gave rise to the breakdown of the relationship between Mr. Cole and Mr. Heffel. I therefore do not find it to be *reprehensible.*

[14] The allegation of fraud in the notice of civil claim was that Mr. Cole told Mr. Heffel and/or his stepfather that all the necessary mortgage financing was in

place to buy the subject property at a time when Mr. Cole must have known that this was not true. This claim was in fact contradicted by the written partnership agreement Mr. Cole presented to Mr. Heffel that evening and by the conversation Mr. Cole's stepfather had on his behalf with Bruce Hallsor, the partnership's solicitor. Mr. Heffel could have accessed the financing documents at the time and chose not to.

[15] I found that no such statement was made, although Mr. Cole no doubt expressed what turned out to be unfounded optimism that such financing would be forthcoming.

[16] Since the only source of the allegation was an oral conversation to which Mr. Heffel was a party and since there were multiple objective indicia that pointed against the possibility that Mr. Cole fraudulently claimed more financing commitments than he had, the allegation was *objectively* without merit and should not have been made.

[17] I thus do not think a *prima facie* case of fraud existed at the time the allegation was made and I do consider that Mr. Heffel maintained his unfounded allegations when its lack of merits must have become even clearer as a result of discovery and exchange of witness statements. Unlike in *Roussy,* in which Watchuk J. declined to award special costs in the face of an unproven allegation of behaviour that amounted to fraud, there were no special complexities that can be attributed to the defendant's conduct or litigation strategy.

[18] On my interpretation of the evidence, however, Mr. Heffel sincerely did not expect the transaction to be as risky as it turned out to be and no doubt sincerely resented that he had put his life savings towards this venture with his friend. His feelings of betrayal led him to reconstruct a self-justifying narrative.

[19] In one respect, therefore, this case is like that of *Roussy*. As Watchuk J. noted there, sometimes the breakdown of a relationship between business partners has "some of the indicia of the toxic breakdown of a marriage": para. 58. Some of

the emotion that leads to questionable decisions in family law cases can also arise when friendships dissolve as a result of a failed business deal. That certainly happened here.

[20] Mr. Heffel had feelings of betrayal that at least arguably had a root in Mr. Cole's excessive optimism about their prospects. I accept that Mr. Cole underplayed the risk, although in my view he did so based on a sincere, if misguided, belief. Mr. Heffel's allegations were unfounded, but they were not instrumentally thrown at a counterparty in a bloodless business deal. They arose out of a breakdown of a relationship and I must take that into account in considering whether Mr. Heffel's response of alleging fraud was reprehensible.

[21] Without understating the impact on Mr. Cole of an allegation of fraud based on what I have found to be honest dealings or to excuse Mr. Heffel completely, I do not think this case is one that warrants *punishment,* as opposed to *compensation.* I will therefore not make what is a punitive award of special costs.

[22] Since there is no dispute that this case was one of ordinary difficulty, I therefore make an order for costs on a party-and-party basis and fix the scale at Scale B.

III. UPLIFTED COSTS

[23] I have, however, decided that this case, like *Roussy,* is one that calls for "uplifted costs under s. 2(5) of the Appendix B to the *Rules*.

[24] Section 2(5) states as follows:

> 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 […] be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).

[25] What constitutes "unusual circumstances" is a fact-based inquiry driven by the nature of the litigation and the conduct of the parties. Allan J. set out the

following factors to guide the analysis in *380876 British Columbia Ltd. v. Ron Perrick Law Corp.,* 2009 BCSC 1209 at para 37:

a) litigation misconduct by the unsuccessful party;

b) the serious nature of the allegations;

c) the complexity or difficulty of the issues in the litigation; and

d) the importance of the litigation to the parties or to the development of the law.

[26] While this litigation was important to the parties, the factors that are really at issue in this case are (a) and (b).

[27] As Watchuk J. noted in *Roussy* at para. 66, these factors overlap with those applicable to an award of special costs, with the difference being that the purpose of uplifted costs (formerly referred to as “increased costs”) is not to punish, but to indemnify. Since the purpose of an uplift is to *compensate* a party for unnecessary expense caused by another’s litigation misconduct, such an award may be appropriate even if that misconduct does not rise to the level of being “reprehensible” and therefore deserving of the punitive award of special costs.

[28] In *Roussy* itself, Watchuk J. found that the allegations of fraud, while not sufficiently reprehensible to warrant special costs, did constitute litigation misconduct which forced on the defendant a burden of unnecessary expense and that it would be unjust to leave the defendant with the very-partial indemnity of party-and-party costs at the ordinary tariff.

[29] This case is like *Roussy* in that there were unwarranted allegations of fraud, driven by the toxic emotions of a breakdown in a business relationship. To preserve his reputation, Mr. Cole had no real option but to fight the allegations and his need to do so was entirely the result of Mr. Heffel’s litigation misconduct in alleging fraud without an evidentiary basis to do so.

[30] I recognize that this case can be distinguished from *Roussy* in that the allegations were very simple here compared with the complex financial transactions at issue in that case. While that mitigates somewhat the injury to Mr. Cole of having to defend, it increases the culpability of Mr. Heffel in bringing the case. A very straightforward investigation or even honest introspection could have avoided the entire thing.

[31] Since the proceedings were comparatively straightforward, the financial impact on Mr. Heffel of an uplift will be less than it would be in a more complex case. I therefore do not consider the difference in complexity to be particularly important in my decision. In my view, it would be unjust not to recognize the additional burden on Mr. Cole of facing a public allegation of fraudulent behaviour by his former friend and having to defend that in court.

IV. THE SETTLEMENT OFFERS

[32] Since I have not ordered special costs, but only an uplift of 1.5 times the tariff amount, I must also consider whether double costs should be awarded under Rule 9-1(5)(b) for steps taken after Mr. Cole's offers to settle since that would increase the amount of costs owing.

[33] The factors to be considered in making such orders are set out in Rule 9-1(6). Considering those factors, I do not think this is an appropriate case for double costs for failing to accept a formal offer to settle.

[34] I believe I can fairly summarily address Mr. Cole's offers to settle without costs on March 18, 2021 and November 10, 2022. It will be an extremely rare case where an offer by a defendant to dismiss without costs would give rise to double costs when a plaintiff does not accept that offer. To say Mr. Heffel "ought reasonably to have" accepted such an offer is really the same as to say he ought never to have brought (or maintained) the action in the first place. These arguments are better addressed in relation to special or uplifted costs. The Rules provide a 1.5 multiple for the circumstance in which an allegation has been improperly, but not reprehensibly, brought, and that is what I have already ordered. It would be anomalous to suggest

that this multiple would become a doubling by the simple expedient of offering to agree to dismissal without costs on receipt of a notice of civil claim.

[35] Under Rule 9-1, “reasonableness” has to be understood from Mr. *Heffel's* perspective. I would not criticize Mr. Cole for making these offers, but from the perspective of Rule 9-1(6), they can be understood (non-pejoratively) as “nuisance offers” that should not be considered: *Hartshorne v. Hartshorne,* 2011 BCCA 29 at para. 27. The issue is not whether it was reasonable to *make* the offer but whether it was *unreasonable* to have refused it, which necessarily involves taking the perspective of the party receiving the offer: *Cottrill v. Utopia Day Spas and Salons Ltd.,* 2019 BCCA 26 at para. 30.

[36] The same analysis ultimately, if less obviously, applies to the offer of February 14, 2023. On that date, Mr. Cole’s counsel emailed Mr. Heffel’s with a proposal to resolve the action as follows:

a) payment by Mr. Cole to Mr. Heffel of the all-inclusive sum of $10,000,

b) assignment by Mr. Heffel to Mr. Cole of the right to seek recovery of the amount of the settlement funds in a collateral action against the partners′ realtor, her personal real estate corporation and her employer, and

c) a full mutual release and dismissal of the claim and counterclaim without costs.

[37] This offer was a creative attempt to resolve the trial and of course in retrospect Mr. Heffel would have been better off to have accepted it*,* but since the amount of Mr. Heffel’s investment was six times the settlement amount, it was not surprising or, in the context of Rule 9-1, “unreasonable”, that he did not. While not as obviously a “nuisance” offer as an offer to agree to dismissal without costs, in the circumstances it was almost as unlikely to be viewed as a compromise by Mr. Heffel in light of his subjective understanding of the merit of his claim.

[38] Since this is the appropriate perspective under Rule 9-1, I do not consider a double costs award to be warranted.

V. ORDER

[39] I therefore order that the plaintiff, Barrett Heffel pay costs to the defendant Shane Cole of this action on the following terms:

a) costs are payable as party-and-party costs;

b) the scale of costs is fixed at Scale B; and,

c) the value for each unit allowed for the action, or for any step in the action, shall be 1.5 times the value that would otherwise apply to a unit in that scale under s. 3(1) of Appendix B to the Supreme Court Civil Rules.

"The Honourable Justice Morley"