

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jeana Ventures Ltd. v. Garrow*,
2024 BCSC 33

Date: 20240109
Docket: S2012442
Registry: Vancouver

Between:

Jeana Ventures Ltd.

Plaintiff

And

Phil Garrow also known as Philip Deane Garrow, ADC Projects Ltd., ADC Holdings Ltd., 1449 Sandhurst Place Holdings Limited and 1103 Gilston Road Holdings Inc.

Defendants

**Jeana Ventures Ltd. and Leslie Louie Sallay
also known as Les Sallay**

Defendants by Counterclaim

Before: The Honourable Justice Winteringham

Reasons for Judgment

Counsel for the Plaintiff and Defendants by
Counterclaim:

R. Josephson
E. Chapman, Articled Student

Counsel for the Defendants:

D. Barker

Place and Dates of Hearing:

Vancouver, B.C.
December 11 and 12, 2023

Place and Date of Judgment:

Vancouver, B.C.
January 9, 2024

OVERVIEW

[1] Les Sallay and Phil Garrow, through their closely-held companies, invested together to develop two residential properties in West Vancouver, BC. The projects went badly, and both lost their investments or any hope of realizing the anticipated profits. Following a trial, I found the defendants had committed acts of civil fraud in Reasons indexed at *Jeana Ventures Ltd. v. Garrow*, 2023 BCSC 1831 [*Trial Decision*].

[2] In the *Trial Decision*, which should be read in conjunction with these Reasons, I ordered judgment in favour of the plaintiff in the amount of \$1,835,410.24 and dismissed the defendants' counterclaim.

[3] I also granted costs to the plaintiffs as the successful party, and granted leave to the plaintiff to make submissions about its entitlement to an award of aggravated and/or punitive damages.

[4] The plaintiff seeks aggravated damages in the amount of \$500,000 and punitive damages in the range of \$175,000 to \$185,000. The plaintiff also asks the court to assess costs as special costs.

[5] These reasons are intended to answer the following questions:

- a) Is the plaintiff entitled to aggravated damages?
- b) Is the plaintiff entitled to punitive damages?
- c) Should costs be awarded as special costs?

[6] For the reasons that follow, I find that the plaintiff is entitled to certain amounts for punitive damages and special costs, but not for aggravated damages.

Aggravated and Punitive Damages

[7] Aggravated and punitive damages operate distinctly, and each is intended to accomplish a different purpose. As Justice Fenlon stated in *Café La Foret Ltd. v. Cho*, 2023 BCCA 354:

[59] Aggravated and punitive damages are distinct remedies. Although both heads of damage are potentially available to a plaintiff in a wrongful dismissal claim, they have different objects and require distinct analyses: *Ojanen v. Acumen Law Corp.*, 2021 BCCA 189, at paras. 72-73.

[60] Aggravated damages are compensatory, intended to address the mental distress experienced by an employee resulting from the manner of termination. Punitive damages are intended to punish the employer for its egregious or outrageous behaviour and serve only the objectives of retribution, denunciation, and deterrence: *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 60, 62; *Ojanen* at paras. 72–73, 77–78.

[61] There are two reasons why a judge is required to assess the two heads of damages independently. First, the amount awarded in respect of aggravated damages is relevant to the assessment of whether punitive damages should be awarded and, if so, in what amount. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59, the Supreme Court of Canada directed that punitive damages should only be awarded “where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence”: at para. 196. In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the Court further explained that an award of punitive damages must be rationally proportionate to the objectives it serves, and that the other amounts already awarded against the employer, including compensatory damages such as aggravated damages, also serve as a “penalty” which must be taken into account. It said:

123 Compensatory damages also punish. In many cases they will be all the “punishment” required ... The key point is that punitive damages are awarded “if, but only if” all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.

[Emphasis in original.]

[62] In short, a judge must first determine compensatory damages, including aggravated damages, and then turn to the question of whether punitive damages are necessary because the total of the compensatory awards is not yet sufficient to achieve the goals of denunciation, deterrence and retribution: *Honda* at para. 69; *Ojanen* at para. 75.

[8] With Fenlon J.A.’s helpful summary in mind, I turn to examine the submissions advanced in this proceeding.

Aggravated Damages

[9] The plaintiff takes the position that Mr. Garrow's conduct was so egregious in this case that he is entitled to an award of aggravated damages in the amount of \$500,000.

[10] The plaintiff submits that the evidence presented at the trial established that he suffered significant financial loss, including a debt that he incurred to a small group of investors, as well as consequential personal harm. He submits that he suffered distress, anguish, grief, humiliation, damaged self-pride, loss of dignity, and humiliation as a result of Mr. Garrow's conduct.

[11] The defendants take the position that Mr. Sallay was fully compensated for his damages by the Court's award of over \$1.8 million.

[12] Before I turn to the authorities, I wish to address the evidence on this point. At the outset of this hearing, I dismissed the plaintiff's application to tender further evidence for two reasons.

[13] First, there was insufficient notice provided to the defendants. In the application, the plaintiff sought to testify or tender an affidavit setting out the intangible harm that he had suffered. I was advised that the defendants were provided with a copy of the affidavit on the Saturday (December 9th) before the Monday hearing (December 11th).

[14] Second, in light of the lack of notice, it would have been unfair to the defendants to have to respond to the new evidence. Although there was not a formal application to re-open the plaintiff's case, the further evidence was, in my view, an attempt for the plaintiff to reopen the case. In my view, these parties had engaged in a long, protracted legal battle that needed to come to an end. I thus dismissed the plaintiff's application to tender further evidence on the point.

[15] I turn to the authorities and the submissions regarding aggravated damages.

[16] Aggravated damages are the proper vehicle to consider any additional harm caused to a plaintiff's feelings by any reprehensible or outrageous conduct on the part of the defendants: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 116.

[17] Aggravated damages serve the traditional corrective purpose of the common law, being to make a plaintiff whole for injuries to interests that are not properly compensable by ordinary damages: *Whiten* at para. 157.

[18] In support of its position that \$500,000 would be an appropriate amount, the plaintiff relies on *Hrynkiw v. Central City Brewers & Distillers Ltd.*, 2020 BCSC 1640. In *Hrynkiw*, a wrongful dismissal action, the court awarded \$35,000 in aggravated damages. The plaintiff also relies on *Chu v. China Southern Airlines Company Limited*, 2023 BCSC 21, another wrongful dismissal action, where the court awarded \$50,000 for aggravated damages. In *Chu*, the Court found the defendant had engaged in a broad and sustained pattern of bad faith abusive conduct toward the plaintiff.

[19] I have reviewed the testimony of Mr. Sallay about the impact Mr. Garrow's fraudulent conduct had on him. I accept that he had to initiate his own investigation to try uncover Mr. Garrow's fraud. I accept as well that this business relationship was an incredibly stressful one wherein Mr. Garrow lead him down a road that was confusing, precarious, and ultimately, disappointing.

[20] With that said, I am not satisfied that Mr. Sallay has established that he suffered more than the ordinary distress that one can expect in a failed investment opportunity, even where the other side has been found to have engaged in fraud. As Justice Verhoeven found in *Chu*, "the authorities make clear, the ordinary distress, emotional upset and injured feelings that can be expected to accompany [dismissal] are not compensable losses" though "actual psychological injuries caused by the employer's breach of duty are compensable": at para. 150.

[21] Mr. Sallay received judgment in the amount of \$1.8 million, the full amount of his investment. Although I accept that he has suffered as a result of this failed business venture, he has not established an entitlement to aggravated damages.

Punitive Damages

[22] The plaintiff seeks punitive damages in the amount of \$175,000 to \$185,000. This position is based on the court's findings that Mr. Garrow committed multiple acts of fraud and the court's credibility findings, including finding that Mr. Garrow had lied.

[23] The defendants contend there is no basis for the award of punitive damages. The defendants submit that they too suffered catastrophic losses as a result of the failed investment, and suggested that market conditions also played a role in the material events. More specifically, the defendants submitted market conditions had a devastating effect on the business plan, that Mr. Garrow did not "take the money and run", and that he continues to be out of pocket a significant sum of money.

[24] Punitive damages may be awarded when "the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196. An award of punitive damages is exceptional, and limited to circumstances where there is "misconduct that represents a marked departure from ordinary standards of decent behaviour": *Whiten* at para. 36.

[25] Moreover, as set out above, punitive damages are not compensatory in nature. Rather, they are punitive and intended "to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened": *Whiten* at para. 94. Thus, punitive damages should only be awarded when "the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence": *Hill* at para. 196.

[26] Punitive damages target conduct, not loss: see *Hill* at para. 196. Other forms of damages consider the loss of the plaintiff, but punitive damages refer essentially to the degree of culpability of the defendant's action: *Whiten* para. 157. To this extent, the defendant's wrong must be considered directly and separately in order to assess its severity and, accordingly, the appropriate degree of punishment.

[27] If awarded, punitive damages should be assessed to be reasonably proportionate to “such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, having regard to any other fines or penalties suffered by the defendant for the misconduct in question”: *Whiten* at para. 94. The amount should be no greater than needed to rationally accomplish their purpose: *Whiten* at para. 94.

[28] In this case, I find that Mr. Garrow’s conduct supports an award of punitive damages. I make this finding having considered the law set out above and the applicable factors set out in *Whiten* at para. 94.

[29] Mr. Garrow engaged in fraudulent conduct on three occasions that enticed Mr. Sallay to continue their relationship and, at times, to deliver more funds. Mr. Sallay trusted Mr. Garrow and was willing to enter into a second investment project with him. Mr. Garrow was granted access to Mr. Sallay’s investment funds over a period of time, without, I found in the *Trial Decision*, providing Mr. Sallay with a proper accounting or an accurate and complete picture of the status of the projects.

[30] Importantly, Mr. Garrow took steps, during the trial, to manufacture a document that could have altered the course of the proceedings: see *Trial Decision* at paras. 292-313. Regarding this document – a purported trust document – I find Mr. Garrow’s conduct was reprehensible. He was in a position to control and disburse Mr. Sallay’s considerable investment and he did so without accurate accounting and without being forthright to him. I am not satisfied that an award of costs would address this conduct, and Mr. Garrow has not been otherwise sanctioned for this misconduct.

[31] I am satisfied that Mr. Garrow’s misconduct, control, and dissipation of the investment funds together with his creation of a false document to support his counterclaim, in the circumstances, is malicious and oppressive conduct that markedly departs from ordinary standards of decent behaviour. An award of punitive damages is warranted in part to adequately address retribution, deterrence, and denunciation.

[32] Under all the circumstances, and considering the authorities cited by the plaintiff, I conclude that a punitive damages award is appropriate in this case in the amount of \$75,000.

SPECIAL COSTS

[33] The plaintiff was successful at trial and has established an entitlement to an award of costs.

[34] The plaintiff now seeks special costs. The plaintiff takes the position that this case epitomizes one in which special costs should be awarded, and that that award should cover the entirety of the litigation. In support of this position, the plaintiff submits that Mr. Garrow repeatedly lied to Mr. Sallay, repeatedly lied to the court, and created a false document.

[35] The defendants submit that, in its entirety, this case is not so exceptional as to warrant special damages. They concede, however, that, based on the Court’s finding regarding the trust document, a partial award of special costs may be justified for a “few days” of trial.

[36] To attract special costs, a party’s behaviour during the litigation process must involve positive, scandalous, outrageous or reprehensible misconduct which makes such costs desirable as a form of chastisement: *R.A.C. v. V.L.C.*, 2009 BCSC 1207 at para. 11. “Reprehensible,” as a word capable of wide interpretation, sets a threshold encompassing any conduct deserving of reproof or rebuke from which the court might wish to disassociate itself: *R.A.C.* at para. 11.

[37] The plaintiff says the conduct exhibited in the litigation easily exceeds this threshold.

[38] The *Supreme Court Civil Rules*, BC Reg 168/2009 set out the basis for Special Costs under Rules 14-1(3) and 14-1(15). While various mechanisms, including punitive damages, are intended to address pre-litigation conduct, special costs are intended to punish and deter reprehensible conduct in the course of the litigation: *Smithies Holdings Inc. V. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 134.

[39] I have considered the authorities on this issue as presented by the parties. Justice Gropper's decision in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 was particularly assistive. In *Westsea*, Gropper J. reviewed the jurisprudence on special costs and summarized the proper approach:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[40] I find that the steps Mr. Garrow took to defend the claim against him and his company were done for the legitimate purpose of his defence. I do not agree with the plaintiff, for example, that the Court found as a “lie” a particular affidavit Mr. Garrow tendered at the interlocutory applications. Rather, in my view, Mr. Garrow was merely embarking on a defence of the claim of fraud brought against him. Mr. Garrow specifically denied the fraud allegations against him and the Court found otherwise.

[41] In the litigation itself, the Court’s adverse credibility findings, but for the trust document, were based on the proof of the elements of fraud required to establish the claim.

[42] The manufacture of the trust document is, however, conduct worthy of rebuke and an award of special costs. I am satisfied that issues associated with the trust document lengthened the trial proceedings, including requiring the plaintiff to call rebuttal evidence in response to this evidence. The plaintiff was also required to address what could have been a significant document in their closing address.

[43] I agree with the defendants, however, that there is no basis for granting a special costs award for the entirety of the litigation. I also appreciate that the punitive damages I awarded above address aspects of this conduct.

[44] Based on the foregoing, I award special costs to the plaintiff from April 18, 2023 through to the conclusion of this proceeding. April 18, 2023 is the date that Mr. Garrow commenced his testimony and deliberately sought to address the problem that had been identified regarding his buy/sell offer, critical to the counterclaim.

[45] Finally, the plaintiff submits the Court, and not the Registrar, should assess costs because this court is “intimately familiar” with the proceedings. I disagree. I was the trial judge, but there was much that occurred before the commencement of the trial. In my view, the Registrar is best equipped to deal with the costs assessment in this case.

CONCLUSION AND ORDERS

[46] For the reasons set out above, I find that Mr. Garrow’s conduct, significantly with respect to the trust document, establishes an entitlement for punitive damages. I am satisfied that the plaintiff has been otherwise fully compensated and that the evidence does not establish an entitlement to aggravated damages. As such, the claim for aggravated damages is dismissed. I am also satisfied that costs should be awarded to the plaintiff as special costs from the date specified.

[47] In summary, I grant the following orders:

- a) The plaintiff is entitled to ordinary costs to April 18, 2023, to be assessed by the Registrar;
- b) The plaintiff is entitled to special costs from April 18, 2023 to be assessed by the Registrar;
- c) The plaintiff is granted punitive damages in the amount of \$75,000; and,
- d) The plaintiff’s claim for aggravated damages is dismissed.

“Winteringham J.”