IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mah Estate v. Lawrence,*
2023 BCSC 1256

Date: 20230724
Docket: S225674
Registry: New Westminster

Between:

Lynn Ma in her capacity as Executor of the Estate of Bailey Mah

Plaintiff

And

Braxton Lee Lawrence

Defendant

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment re: Costs

Counsel for the Plaintiff:	L. Vidovich
Representative for the Defendant:	T. Lawrence
Place and Date of Hearing:	New Westminster, B.C. June 16, 2023
Place and Date of Judgment:	New Westminster, B.C. July 24, 2023

I. Introduction

[1] This is an application brought by the defendant, Braxton Lawrence, contesting the amount of costs sought by the plaintiff, Lynn Ma, in her capacity as executor of the estate of Bailey Mah, her deceased brother. Mr. Lawrence was represented by his father, Mr. Tony Lawrence, both in the summary trial from which the costs arose and on this application. I understand that Mr. Tony Lawrence recently completed law school, but is not at this time a practicing lawyer.

[2] The costs at issue on this application were awarded to the plaintiff in a summary trial I heard on February 10, 2023. The issue at the summary trial was a dispute between the parties regarding the sale of a classic car: specifically, a 1969 Mustang Cobra (the "Mustang").

[3] In short, the plaintiff, Lynn Ma, as executor of the estate of her brother, entered into a contract of purchase and sale for the Mustang with the defendant. The agreed-upon sale price of the car was $35,000 and the defendant paid $2,000 as part of the purchase.

[4] The parties also entered into a promissory note for the remaining $33,000 owing on the car, to be paid by the defendant to the plaintiff (the "Promissory Note"). The defendant came to believe the car was worth less than he had agreed to pay, and so did not pay what was owing on the Promissory Note. Litigation ensued to collect the amount owing.

[5] In reasons indexed as *Mah Estate v. Lawrence*, 2023 BCSC 411 [*Trial Decision*], I concluded that the contract of sale and the Promissory Note were binding on the defendant. As such, I ordered that the plaintiff was entitled to recover the $33,000 owing on the note. The Promissory Note also included that the defendant would pay "all reasonable costs of collection and legal fees". I thus ordered that the defendant was responsible for the plaintiff's reasonable legal expenses.

[6] I further ordered that "if the parties are unable to agree to the amount of costs, they may make arrangements to appear before me for the purpose of resolving the amount of costs upon filing written submissions of no more than five pages at least five days before the appearance": *Trial Decision* at para. 116(d).

[7] The plaintiff issued a bill for the legal fees from September 30, 2019, to April 27, 2023, in the amount of $55,943.95. The defendant did not agree to the legal fees as presented to them. Since the parties could not agree, they appeared before me for a determination of the reasonableness of the costs.

[8] As I understood the defendant's position made in oral submissions, he asserts that the legal fees are excessive and unreasonable given the circumstances of this case, and that an appropriate amount of legal fees should be between $7,000 to $10,000.

[9] The plaintiff argues that she is entitled to her legal fees on a contractual basis under the Promissory Note. Further, the plaintiff asserts that the steps taken by the defendant in the litigation (for example, evading service) caused unnecessary expense. She points to this behaviour as a cause of additional legal fees that she incurred. The plaintiff further says that the circumstances of this case call for a costs award akin to special costs, based on the poor behaviour of the defendant.

II. Analysis

[10] In the *Trial Decision*, I awarded indemnity of legal fees to the plaintiff but held that the amount must be fair and proportionate, and could not be a "blank cheque". I stressed that the plaintiff's legal fees should be reasonable:

> [114] However, in respect of the quantum of costs in this matter, I emphasize that full indemnity costs awarded under a contractual basis must be fair, reasonable, and proportionate. An award on a full indemnity basis does not mean that the successful party is entitled to whatever costs were incurred, the amount must be fair and reasonable for what was involved in the particular proceeding: *United Soils Management Ltd. v. Mohammed,* 2019 ONCA 128 at para. 42. An award of full indemnity is not a complete recovery of legal fees and is still subject to review for reasonableness: *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459(Registrar) at para. 12. Put colloquially, courts caution that an award of full indemnity costs does not

> constitute a "blank cheque" for the successful party to recover disbursements and legal fees: *1353837 Ontario Inc. v. Pigozzo*, 2019 ONSC 4778 at para. 19. Further, I note that the language of the Promissory Note provides that the defendant is to pay all "reasonable" costs of collection and legal fees.

[11] The plaintiff argues that all of the legal steps taken in the litigation were necessary and, importantly, were largely (if not entirely) caused by the actions of the defendant. The plaintiff points to several applications that she says she either had to bring or to which she had to respond solely because of the defendant's conduct. These included an application brought by the defendant to have his father act as his representative in this matter, and an application brought by the plaintiff for substituted service, because the defendant was evading service.

[12] For his part, the defendant argues that a costs award of $55,943.95, arising from the collection of a debt of $33,000, is excessive and not in proportion with the amount at issue in this case. Further, the defendant argues that he is self-represented, or represented by his father, who is not yet a lawyer. As such, he says that any missteps in the litigation were not taken out of malice or for a strategic purpose, but instead were mistakes based on his misunderstanding of the legal process.

[13] As I held in the *Trial Decision*, the obligation for contractual costs must be reasonable, and the assessment of those costs should be guided by the factors set out in s. 71 of the *Legal Profession Act*, S.B.C. 1998, c. 9:

> [108] The plaintiff argues that because the Promissory Note provides that the defendant will pay all reasonable costs of collection and legal fees, she is entitled to costs on a contractual basis and should be fully indemnified for her legal costs expended to resolve this matter. In support of this argument, the plaintiff referred me to *Sequoia Mergers & Acquisitions Corp. v. Camacc Systems Inc.,* 2022 BCSC 272 [*Sequoia*]. In *Sequoia*, the court held that if costs on an indemnity basis are contractually incurred, then:
>
> > [4] The parties also agree that costs on an indemnity basis are not costs pursuant to the Supreme Court Civil Rules, B.C. Reg. 168/2009, such as party and party costs or special costs. Rather, costs on a full indemnity basis are contractually incurred. The parties further agree that the principles related to the assessment of full indemnity costs are most similar to an assessment of costs on a solicitor and own client basis, and that the factors considered in determining such costs are essentially the same as those considered in the taxation of legal

> fees pursuant to s. 71 of the Legal Profession Act, S.B.C. 1998, c. 9 [*Legal Profession Act*]: see *Hobbs v. Warner*, 2020 BCSC 1180 at paras. 37, 41; *Pallot v. Douglas*, 2018 BCCA 315; *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459.

[14] Section 71 of the *Legal Profession Act* calls for consideration of the following factors, which guide the assessment of costs on a solicitor and own client basis:

> (4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including
>
> (a) the complexity, difficulty or novelty of the issues involved,
>
> (b) the skill, specialized knowledge and responsibility required of the lawyer,
>
> (c) the lawyer's character and standing in the profession,
>
> (d) the amount involved,
>
> (e) the time reasonably spent,
>
> (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
>
> (g) the importance of the matter to the client whose bill is being reviewed, and
>
> (h) the result obtained.
>
> (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's client.

[15] The factors to be considered under the *Legal Profession Act* in assessing solicitor and own client costs also largely mirror the considerations that apply when assessing special costs under Rule 14-1(3) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009:

> (3) On an assessment of special costs, a registrar must
>
> (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
>
> (b) consider all of the circumstances, including the following:
>
> (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
>
> (ii) the skill, specialized knowledge and responsibility required of the lawyer;
>
> (iii) the amount involved in the proceeding;
>
> (iv) the time reasonably spent in conducting the proceeding;

> (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
>
> (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
>
> (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;
>
> (viii) Rule 1-3 and any case plan order.
>
> [Emphasis added.]

[16] Given the similarities between assessing solicitor and own client costs and special costs, I conclude that I may take guidance on this application from cases that concern the assessment of special costs. I find support for doing so in *Prescott Strategic Investments Limited Partnership v. Flair Airlines Ltd.*, 2022 BCCA 443, where our Court of Appeal noted that when special costs are ordered, they approximate an indemnity of actual legal fees and costs incurred, but are subject to assessment by the registrar: at para. 27. Accordingly, I find it appropriate to assess full indemnity costs on a contractual basis, using a similar analysis to the one the court would employ if it were assessing special costs.

[17] That said, I also remain mindful that special costs and full indemnity costs are distinct concepts with distinct analytical focuses. Namely, indemnity costs are best understood as synonymous with solicitor and own client costs, since their concern is with the relationship between the solicitor and their own client, rather than the relationship between the parties. The overarching question is whether, on examining the bills of the solicitor in a particular matter, the charges are reasonable in the circumstances. The analysis is subjective, and does not simply entitle the successful party to whatever costs they incurred. See *Hobbs v. Warner*, 2020 BCSC 1180 at paras. 40, 42–43.

[18] To that end, in regards to the quantum of costs, I emphasize that s. 71 of the *Legal Profession Act* (or an analysis akin to it) does not require mathematical precision, nor must the registrar or judge address every item of evidence. Instead, the assessor is entitled to employ a global approach to reach a “fair fee”, in the circumstances: see *Smith Hutchison v. Victoria Golf Course*, 2009 BCSC 644 at

paras. 79–81; and *Mulder Estate (Re)*, 2022 BCSC 406 at para. 83. I reiterate that the costs awarded on a full indemnity basis must ultimately be "fair, reasonable and proportionate": *Hobbs* at para. 43.

[19] In light of the above, I must consider whether, in the circumstances of this case, it is reasonable that the plaintiff be entitled to legal fees of almost $56,000.

[20] First, I note that the amount in issue was $33,000. On its face, this amount is lower than the threshold of $35,000 for claims to be brought under the *Small Claims Act*, R.S.B.C. 1996, c. 430. As referenced in the *Trial Decision*, Rule 14-1(10) of the Rules of Court provides that:

> (10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

[21] In the *Trial Decision*, I accepted that the plaintiff brought the action in the Supreme Court because by the time she had engaged a lawyer, the amount owing on the Promissory Note and the legal fees had exceeded the $35,000 limit: see *Trial Decision* at para. 112.

[22] While I accept that the plaintiff was entitled to bring the proceeding in the Supreme Court, it is relevant to my consideration of proportionality that the amount in issue is close to the small claims limit. Put another way, if the claim had been pursued in Small Claims Court, the plaintiff would have been limited to recover only $35,000 from amounts owing on the Promissory Note and legal fees. However, given the streamlined and efficient nature of Small Claims Court, I would expect the plaintiff's legal fees to have been significantly lower. The point of referencing these facts for my analysis is simply to emphasize that the amount in issue was relatively small. The relationship between the resources expended and the amount in issue, in my view, is at the heart of the principle of proportionality and the reasonableness of costs.

[23] Further, as I examine the specific legal expenses claimed by the plaintiffs, some steps appear unwarranted. For example, the plaintiff seeks reimbursement for preparation for examinations for discovery. This litigation was always brought as a summary trial, for which no discoveries would be held. Counsel argued that at the time of preparation, the plaintiff was unsure how the matter would progress. However, I find that this submission somewhat evinces a “blank cheque” mentality, in that additional legal steps were taken on the basis that the plaintiff was aware she could recover her legal fees.

[24] Turning to the complexity of the issue, in my view this was not complex litigation. The trial required resolution of an alleged breach of contract and a determination of the terms of the contract. The nature of the litigation should not have warranted excessive legal expenses.

[25] In making these comments, I acknowledge that I must be careful not to second-guess how counsel saw fit to prepare her case. It is much easier in hindsight to judge what steps were necessary and which were not, and so I will not cast harsh judgment on the plaintiff for taking the steps she deemed fit to pursue collecting on the Promissory Note.

[26] The plaintiff stresses that the defendant’s actions caused the plaintiff to incur additional legal expenses. My review of the correspondence between the parties indicates that at one point the communication between the parties broke down. The plaintiff’s counsel, determining that it was no longer productive discussing matters with Mr. Tony Lawrence, refused to communicate with him and opposed an application for Mr. Tony Lawrence to act for Mr. Braxton Lawrence. I find, given the relative simplicity of the issue in the litigation and the amount in dispute, that severing communication with the defendant’s father caused additional legal expenses, and prevented possible resolution of the matter outside of court.

[27] While I do not have the benefit of understanding the relationship between the defendant’s father and the plaintiff’s lawyer, I conclude that it could be viewed as an unwarranted step that likely increased the plaintiff’s legal fees unnecessarily.

Further, I am aware that full indemnity costs are "focused on the relationship between the solicitor and their own client, rather than as between the parties": *Wanson (Bristol) Development Ltd. v. Sahba*, 2019 BCCA 459 at para. 14. Although it may have been frustrating for plaintiff's counsel to deal with the defendant's father, knowing the ultimate amount in issue, a more reasonable approach for the plaintiff, in my view, would have been to not oppose Mr. Tony Braxton's representation of the defendant, and thereby avoid additional legal expenses in opposing his role in the litigation.

[28] I return again to the principle of proportionality. In *Universe v. Fraser Health Authority*, 2022 BCCA 201, our Court of Appeal discussed proportionality, albeit in a different context related to a party that sought to bring many applications. Madam Justice Newbury held that parties must have regard for the nature of their applications and not lose sight of the proportionality of the steps taken to the amounts in issue:

> [78] The objective of 'proportionality' is now expressly recognized as an important part of civil litigation. This objective reflects that no one litigant or group has the right to demand that unlimited time and resources be devoted to a particular case, no matter how important it is. The rights and interests of other litigants in other cases waiting to be heard must be balanced in a fair way against litigants who are before the court, and measures designed to increase efficiency must generally be followed, both in the form of court rules and in judges' management of trials.

[29] In my view, the number of litigation steps taken by the plaintiff appears out of proportion with the amount in issue in this litigation. Spending $55,943.95 to recover a debt of $33,000 does not appear proportional. In saying this, I am aware that once litigation commences the steps taken may be necessary in order to see the litigation through to the end. However, I nonetheless find the amount of costs sought are excessive, considering all of the circumstances of the case, including especially the lack of complexity and the amount in issue.

III. Determination and Order

[30] Based on the foregoing, and considering the amount in issue, the complexity of the matter and the general circumstances of the litigation, including that it was

ultimately a one day summary trial, I find that a limit should be placed on the costs sought by the plaintiff. I find that legal expenses in the amount of $20,000 are proportionate, fair, and reasonable in the circumstances. I reiterate that the wording of the Promissory Note included that the parties agreed that the defendant would be liable for all “reasonable” legal fees. Accordingly, I order that the defendant is required to pay the plaintiff’s legal fees in the amount of $20,000.

[31] I acknowledge that I am applying a somewhat blunt approach to the costs in this matter. I also acknowledge that the costs I am awarding are substantial and may feel excessive from the defendant’s perspective. However, the Promissory Note, which the defendant voluntarily entered into, clearly stipulated that the defendant would be liable for legal fees and costs of collection if he did not honour the terms of the Promissory Note. He was, or should have been, aware of the risks he faced when he accepted the terms of the Promissory Note. As I explained in the *Trial Decision*, at the beginning of the dispute between the parties, the plaintiff also provided the defendant with a number of opportunities to be let out of the agreement. The defendant decided not to avail himself of those offers and instead chose to litigate the matter. As such, I consider the defendant to be largely the author of his own misfortune.

[32] For clarity, there will be no order for costs for this particular application, as I have factored what I deem to be the defendant’s success on this application into the $20,000 costs award.

“Gibb-Carsley J.”