# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1534 Harwood Street (St. Pierre) Ltd. v. McTavish,* 2023 BCSC 1079

Date: 20230623
Docket: S225494
Registry: Vancouver

Between:

**1534 Harwood Street (St. Pierre) Ltd.**

Petitioner

And

**Colin McTavish, Jon Gray, and Shirley Giggey**

Respondents

Before: The Honourable Justice Loo

## Reasons for Judgment
## Re: Costs

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|---|---|
| Counsel for the Petitioner: | J.L. Carpick<br>L. Zhang |
| Counsel for the Respondents: | A. Moore |
| Written submission of the respondents: | June 1, 2023 |
| Written submission of the petitioner: | June 8, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 23, 2023 |

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[1] I pronounced reasons for judgment in this matter on April 27, 2023, indexed at 2023 BCSC 675, following a two-day hearing on March 21-22, 2023.

[2] At the hearing, the petitioner 1534 Harwood Street (St. Pierre) Ltd. (the "Petitioner") sought judicial review of an interlocutory order of a Judge of the Provincial Court of British Columbia, Small Claims Court. The interlocutory order in question required the production of law firm accounts. I held that the order of the Small Claims Judge was to be quashed to the extent that it required further production at that time.

[3] Further, I held that costs of the application were payable at Scale B by Colin McTavish, Jon Gray and Shirley Giggey (the "Respondents") to the Petitioner. Subsequently, the Respondents sought leave to make submissions regarding costs. I invited the parties to make written submissions which I have now considered.

## Background

[4] The Petitioner is the owner of a property at 1534 Harwood Street in Vancouver (the "Property"), and a defendant in three small claims actions (the "Small Claims Actions") brought by the Respondents.

[5] The Respondents are three of more than forty tenants who lease units in the building on the Property from the Petitioner. Their tenancies are governed by 99-year leases (the "Leases") and are not subject to the *Residential Tenancy Act*, S.B.C. 2002, c. 78.

[6] The Leases provide for the payment by the lessees of operating expenses incurred by the Petitioner. The Respondents allege that the Petitioner overcharged them for operating costs from 2017 to 2020, and they seek judgment in the Small Claims Actions for these overcharges.

[7] It is common ground that some of the operating costs charged by the Petitioner included legal fees. The legal work was performed and the legal bills were rendered by the law firm representing the Petitioner in this proceeding.

[8] Two of the central questions to be determined in the Small Claims Actions (the "Entitlement Questions") are whether the Petitioner is entitled to charge legal fees to the Respondents at all, and if so, whether the Respondents are entitled to challenge the reasonableness of those fees.

[9] In these circumstances, the Small Claims Judge ordered that the law firm's legal accounts to the Petitioner be produced, and I held that her Order ought to be quashed, on the basis that any production ought to be deferred until the Entitlement Questions are determined.



## Analysis of the Parties' Submissions Regarding Costs

[10] The Respondents argue that no party-and-party costs ought to be awarded to the Petitioner unless the Petitioner first elects to abandon its purported rights under the Leases. They submit that the awarding of costs at Scale B in this proceeding would result in double compensation to the Petitioner, given that the Petitioner has claimed and continues to claim all of its legal expenses against the lessees of the Property.

[11] In support of the first of these submissions, the Respondents cite the decisions of the Court of Appeal in *Trenchard v. Westsea* Construction Ltd, 2017 BCCA 352 and *P&T Shopping Centre Holdings Ltd v. Cineplex Odeon Corp*, [1995] BCJ No 330, 3 BCLR (3d) 309, 37 CPC (3d) 294 *[P&T]*.

[12] In my view, although the facts of *Trenchard* bear some resemblance to those in this case, that decision is not particularly helpful to the issue before me. In *Trenchard*, on an application for disclosure of documents, the chambers judge was asked to construe the terms of a lease which purported to allow the lessor to charge its legal costs back to the leaseholders as operating expenses. He held that the legal costs of the petition before him did not fall within the lease terms and declined to award contractual costs. On appeal, the Court of Appeal determined the charge-back issue was not properly before the Court below on the document disclosure application as it was premature. Therefore, the interplay between contractual costs and party-and-party costs did not have to be directly addressed.

[13] In *P&T*, the underlying action concerned a lease dispute. The lease contained a term requiring the defendant to pay "as Additional Rent, any legal costs incurred by the Plaintiff as a result of any default by the Defendant" (the "Costs Provision"). The plaintiff (who was the respondent in the Court of Appeal) succeeded in its claims under the lease below and in the Court of Appeal, and then sought an order from the Court of Appeal for special costs based on the Costs Provision.

[14] Southin J.A. dismissed the plaintiff's special costs claim, stating:

> **22** The respondent's remedy is to send to the appellant a statement setting out its claim under the clause and demanding payment and, if the appellant refuses to pay, to sue for those costs as unpaid rent. As to what the appellant should do, *Re Holliday and Godlee*, *supra*, may give it a clue.
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> **23** If the Court ought not to order special costs, and I do not think it should, should the Court make any order as to costs? Again, my answer is "no". The respondent has its contractual remedy. It has no need of assistance from this Court. If the respondent, however, wishes to abandon its rights under the covenant, it would be entitled to the usual order for the party and party costs awarded to a successful respondent.

[15] In my view, *P&T* is distinguishable from the case at bar in that the Petitioner in this proceeding has not sought a special costs award or an indemnity award under the Leases. To require an election makes sense when a party purports to claim both party-and-party costs and contractual indemnity costs in the same proceeding; it seems clear that in those circumstances the party may not be awarded both.

[16] However, on this application, this Court was asked only to review the decision of the Small Claims Judge in respect of an order to produce legal accounts. No order was sought for the indemnity of legal costs under the Leases. The Respondents submit that it is not open to the court in this case to order indemnification costs to be assessed and I agree with them in that regard. The Entitlement Questions were not before me and they will be decided on another day and, indeed, by a different court.

[17] As the Petitioner points out, denying party-and-party costs now would amount to a premature finding that the Petitioner is entitled to recover its legal costs under the Leases. If no costs are awarded to the Petitioner in this Court and the Small Claims Judge ultimately determines that the Petitioner is not entitled to charge back

its legal costs under the Leases, the Petitioner would receive no compensation for its costs of this petition proceeding despite being successful in it. By contrast, the risk of the successful party being left with no costs at all does not arise when the claim for contractual costs and party-and-party costs are being advanced together in the same proceeding.

[18] In conclusion, in my view, there is no requirement in the circumstances of this case that the Petitioner abandon its right to indemnity for legal costs under the Leases before being entitled to Scale B costs in this proceeding.

[19] Further, it is my view that a costs award under Scale B in this proceeding would not result in double recovery. The Petitioner acknowledges that double compensation would be unjust, but observes that the contested lease provision provides that it can bill the lessees for legal charges which are “paid or payable”. The Petitioner will bill all of its legal costs to its lessees, but that amount will be net of any party-and-party costs recovered from the Respondents. In other words, any funds recovered from the costs award against the Respondents will not be payable by the lessees.

[20] For these reasons, I confirm that costs shall be payable at Scale B by the Respondents to the Petitioner.

“The Honourable Justice Loo”