IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bollhorn v. Lakehouse Custom Homes Ltd,* 2023 BCSC 300

Date: 20230302
Docket: S221959
Registry: Vancouver

Between:

Robert Bollhorn

Plaintiff

And

Lakehouse Custom Homes Ltd.

Defendant

Before: The Honourable Mr. Justice Stephens

Reasons for Judgment re Costs

Counsel for Plaintiff:	D.J. Barker
Counsel for Defendant:	M.E.A. Danielson
Written Submissions of the Plaintiff:	December 14, 2022
Written Submissions of the Defendant:	December 22, 2022
Place and Date of Judgment:	Vancouver, B.C. March 2, 2023

Introduction

[1] This is a decision on costs following my judgment on summary trial, indexed at 2022 BCSC 2120 ("RFJ"), granting the plaintiff an order for specific performance of a contract of purchase and sale ("CPS"). That judgment at para. 95 invited written submissions on costs, which have been received.

[2] In his costs submissions, the plaintiff provided the Court a previous settlement offer (the "Offer") delivered on March 11, 2022 (open until March 24, 2022), where he offered to complete the purchase of the subject property and pay a 6% mark up on change orders. He now seeks costs until March 24, 2022, and double costs thereafter, or alternatively costs throughout.

[3] The defendant contends each party should bear their owns costs of this action, and contends that no costs consequences flow from the Offer.

[4] For the following reasons, I find that the plaintiff shall recover against the defendant costs at Scale B.

Discussion

[5] Three arguments have been made on costs: the plaintiff seeks (1) double costs or (2) alternatively, default costs, which is the obverse of (3) the defendant's argument seeking an order that each party bear their own costs.

Plaintiff's Request for Double Costs from March 24, 2022, Onward

[6] The notice of civil claim in this action was filed on March 10, 2022, and on March 11, 2022, counsel for the plaintiff transmitted an email to lawyers who he knew to have been acting for the defendant in relation to the CPS. The plaintiff's email attached two letters and the notice of civil claim; one of those letters was the Offer, written without prejudice.

[7] The plaintiff's Offer offered to purchase the subject property for a purchase price of $1,821,600 plus GST and to pay all change orders, including the defendant's 6% mark up, together with other related terms. The Offer was open for

consideration until 4:00 p.m. on March 24, 2022, following which time it was stated to be revoked. On March 16, 2022, counsel for the defendant advised by email that his firm would accept service on behalf of the defendant.

[8] The plaintiff seeks double costs from March 24, 2022, onward, which is the expiry date of the Offer.

[9] Rule 9-1(5)(b) gives the court a discretion to order "award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle", having regard to the following factors in R. 9-1(6):

> (6) In making an order under subrule (5), the court may consider the following:
>
> > (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
> >
> > (b) the relationship between the terms of settlement offered and the final judgment of the court;
> >
> > (c) the relative financial circumstances of the parties;
> >
> > (d) any other factor the court considers appropriate.

[10] In support of his claim for double costs, the plaintiff contends that the defendant had actual notice of the Offer by at least March 16, 2022; the Offer included paying to the defendant its 6% markup (which was ultimately ordered in the summary trial judgment: RFJ at para. 93); the defendant had a reasonable time to consider the Offer; and, even though the Offer lapsed on March 24, 2022 given the "positions taken by the defendant at trial there is, arguably, no reasonable possibility that the defendant would have accepted the offer to settle had it been open for acceptance for any longer".

[11] The legal issue involved when considering the factor specified in R. 9-1(6)(a) is not whether the offer itself was reasonable, but whether it was unreasonable for the other party to refuse it: *Bains v. Antle,* 2019 BCCA 383 at para. 34, citing *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 30. The court must consider this factor "without the benefit of hindsight" (*Bains*, para 34). The factors in that assessment include: "the timing of the offer; whether it had some relationship to

the claim; whether it could easily be evaluated; and whether some rationale for it was provided": *Bains* at para. 35, citing *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

[12] I agree with the defendant that the Offer was not one that reasonably ought to have been accepted. At the time of transmittal, the litigation was at a very early stage: the Offer was transmitted to counsel for the defendant on March 11, 2022, and revoked on March 24, 2022—all prior to the time for the defendant's filing of the response to civil claim. In addition, the Offer contained no rationale (other than the allegations contained in the enclosed notice of civil claim). It could not be reasonably evaluated in the absence of discovery between the parties (oral or documentary), which at that early stage had not taken place.

[13] With respect to R. 9-1(6)(b), the RFJ found that the "contract stipulated a purchase price of $1,865,000 but added to this must be the cost to the plaintiff buyer of the change orders" (para. 86) and that "the total purchase price for this transaction shall include the amount on signed change orders, including a 6% mark up and taxes" (para. 93). The Offer did propose payment of the change orders to the defendant, including the defendant's 6% markup, consistent with the percentage ultimately ordered by the RFJ at para. 93. However, the Offer was made at a base purchase price of $1,821,600 (net of the financial amount of change orders, including the 6% markup), and $1,821,600 was materially less than the comparable amount of $1,865,000 reflected in the RFJ at paras. 1, 9, and 86.

[14] The defendant further contends that R. 9-1(1)(c)(ii) requires that an offer to settle be "served on all parties of record", and as of March 11, 2022, the defendant was not properly "served" with the Offer. As at March 11, the defendant was not a party of record (having not yet filed a responsive pleading in the action) and did not have an email address for service. On this point, the plaintiff contends that the defendant had actual notice of the Offer, and this suffices to engage R. 9-1(5).

[15] I need not decide the service issue: assuming, but not deciding, the Offer was served in accordance with R. 9-1(1)(c)(ii), I find that double costs ought not be

ordered to the plaintiff, since it was not unreasonable for the defendant to have refused the Offer (R. 9-1(6)(a)), and considering the relationship between the terms of the proposed settlement and the judgment of the Court as referenced above (R. 9-1(6)(b)).

Defendant's Request that Each Party Bear Their Own Costs

[16] However, I do not accept the defendant's submission that each party should bear their own costs.

[17] Costs of a proceeding must be awarded to the successful party unless the court otherwise orders: R. 14-1(9). The onus is on the party who seeks to displace the usual rule that costs follow the event: *LeClair v. Mibrella Inc*., 2011 BCSC 533 at para. 10, citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24. To depart from this general rule, the court must find the successful party engaged in disreputable conduct: *McKay v. Marx*, 2012 BCSC 484 at para. 30.

[18] At its most basic, the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or the defendant who obtains a dismissal of the plaintiff's case: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at para. 90 [*Sze Hang*], citing *Loft v. Nat*, 2014 BCCA 108 at para. 46. The fact that a plaintiff obtained a judgment in an amount less than the amount sought is not, itself, a proper reason to deny them costs: *Loft* at para. 47, citing *3464920 Canada Inc. v. Strother*, 2010 BCCA 328 at para. 43. Nor must a successful plaintiff succeed on every issue to be entitled to an order for costs: *Robbins v. Pacific Newspaper Group Inc. et al.*, 2006 BCSC 872 at para. 17.

[19] Where there are multiple causes of action, the more flexible "substantial success" test is usually more appropriate. The Court of Appeal in *Sze Hang* at paras. 91–92, quotes *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, which describes "substantial success" as about 75% or better:

> [45] *Gold* now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is

> around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
>
> [emphasis added.]

[20] The defendant contends there were two main issues in dispute before the Court: (a) whether the plaintiff was entitled to specific performance; and if so (b) whether the plaintiff was required to pay the extra charges presented by the defendant. The defendant contends that the plaintiff was successful on specific performance but not on the extra charges point since the Court ordered no adjustment to the alleged downgrades and credit: RFJ at paras. 90–93. The defendant submits that, looked at globally, success was divided and the parties should bear their own costs.

[21] I do not agree with the defendant. There were more than just two issues at play on the summary trial: in addition to the whether the plaintiff was entitled to specific performance (RFJ at paras. 75–85), the Court also addressed the proper interpretation of the CPS (RFJ at paras. 50–61); the defendant's argument that the CPS was void and unenforceable (RFJ at paras. 45–49); whether there was a breach of the CPS by the plaintiff (RFJ at paras. 62–67), including whether the defendant could rely on a letter written by the plaintiff, which I ultimately concluded was protected by settlement privilege (RFJ at paras. 63–66); and whether there was a breach by the defendant (RFJ at paras. 68–71). The plaintiff was successful on most of these issues, and the Court granted specific performance.

[22] While the plaintiff did not succeed on certain discrete quantum items with respect to the total sale price, I find that, looked at holistically, the plaintiff was more than 75% successful and he therefore achieved substantial success.

[23] The plaintiff being the successful party is entitled to costs.

Order Granted

[24] I order that the plaintiff shall recover from the defendant costs on Scale B.

"Stephens J."