IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0976820 B.C. Ltd. v. Dorset Realty Group Canada Ltd.,* 2023 BCSC 305

Date: 20230302
Docket: S166420
Registry: New Westminster

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Between:

0976820 B.C. Ltd. DBA Ackroyd Pets & Aquarium and William Wong

Plaintiffs

And

Dorset Realty Group Canada Ltd., Colin Schuss, Padilla Holdings Limited, Warrington Management Ltd., and 0998036 B.C. Ltd.

Defendants

\- and -

Docket: S195407
Registry: New Westminster

Between:

Dorset Realty Group Canada Ltd.

Plaintiff

And

William Wong

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

The Plaintiff, appearing in person and as Representative for the Plaintiff 0976820 B.C. Ltd.:	W. Wong
Counsel for the Defendants C. Schuss and Dorset Realty Group Canada Ltd.:	V. Reakes
Counsel for the Defendants Warrington Management Ltd. and 0998036 B.C. Ltd.:	N. Lapper
Place and Date of Hearing:	New Westminster, B.C. February 3, 2023
Place and Date of Judgment:	New Westminster, B.C. March 2, 2023

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Introduction

[1] This matter involves two actions: New Westminster Registry No. S166420 (the "Action") and New Westminster Registry No. S195407 (the "Parallel Action"). The actions were tried together in hearings spread out over several months.

[2] The Action arose out of a commercial lease between the plaintiff numbered company, doing business as Ackroyd Pets & Aquarium ("Ackroyd"), and the defendant Padilla Holdings Limited ("Padilla") for a commercial unit located at 140-8171 Ackroyd Road, Richmond, British Columbia (the "unit"). The plaintiff William Wong, is a director of Ackroyd.

[3] The defendant Colin Schuss acted as a dual leasing agent to Ackroyd and Padilla during the lease transaction.

[4] Mr. Schuss provided his services through the defendant company Dorset Realty Group Canada Ltd. ("Dorset").

[5] Heriatta Ho is not a party to these proceedings, but is a director and representative of Ackroyd.

[6] The Unit is located within a shopping centre known as the Richport Town Centre (the "premises"). The premises were managed by the defendant Warrington PCI Management ("Warrington"), incorrectly named in these proceedings as Warrington Management Ltd.

[7] In March 2014, an intermediary company, 0871951 B.C. Ltd. ("087"), entered into an agreement with Padilla to purchase the premises (the "Purchase Agreement") that included all of the landlords' rights and obligations arising under leases within the premises. In July 2014, 087 assigned all rights, interests and title under the Purchase Agreement to the defendant 0998036 B.C. Ltd. ("099").

[8] Ackroyd filed a notice of claim on November 25, 2014, against Dorset, Padilla, Warrington and 099. Mr. Schuss later became a party when a separate action initiated by Ackroyd and Mr. Wong on November 8, 2017, (New Westminster

Registry No. 196197) was consolidated with the Action by court order on April 4, 2019.

[9] Numerous procedural steps have taken place in this litigation, some of which are pertinent to this application. These include Dorset's delivery of a notice to admit to Ackroyd on March 7, 2017; Dorset's application to dismiss the Action on June 19, 2017; Dorset's delivery of two formal offers to settle on July 14, 2017, and August 18, 2021; and detailed trial briefs outlining Dorset's position and filed by Dorset on July 8, 2019, and May 12, 2021, each of which was discussed in at least two trial management conferences prior to the trial commencing in this matter.

[10] In each of its formal offers to settle, Dorset indicated a willingness to waive its costs in exchange for a consent dismissal order and release of Ackroyd's claims against them. The August 18, 2021, offer also agreed to waive their costs for a consent dismissal order and release of Mr. Wong's claims against them.

[11] The trial ultimately commenced on September 27, 2021, and proceeded for 12 days with the plaintiffs' case.

[12] At the close of the plaintiffs' case, Mr. Schuss and Dorset applied to have the case dismissed pursuant to R.12-5(4) and (5) of the *Supreme Court Civil Rules* because there was no evidence to support the case against them in the Action. Similarily, Warrington and 099 brought a "no evidence" application, also seeking to have the plaintiffs' claims against them dismissed.

[13] After carefully considering the matter—and despite Mr. Wong's strong views and argument concerning this case on behalf of himself and Ackroyd—I concluded in reasons for judgment dated June 13, 2022, indexed as 2022 BCSC 988 (the "Reasons"), that the plaintiffs had failed to adduce any evidence supporting their allegations. The plaintiffs' claims were, therefore, dismissed.

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Costs

[14] In the Reasons, the parties were granted leave to seek direction from the Court in the event that they were unable to reach an agreement on costs.

[15] As they have not been able to do so, the applicants Dorset and Mr. Schuss, now bring an application to be awarded double costs at scale B for all steps taken in this proceeding as against the plaintiff Ackroyd from July 14, 2017, or in the alternative August 18, 2021, and as against the plaintiff Mr. Wong from August 18, 2021. Alternatively, the applicants seek uplift costs for all steps taken in the Action and the Parallel Action.

[16] Warrington and 099 also seek costs in this matter.

[17] The issue in this application is whether costs should be awarded against the plaintiffs, and, in particular, whether double or uplifted costs are appropriate in this matter.

Legal Principles

Double Costs

[18] Rule 9-1(5)(b) empowers the Court to award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of an offer to settle. As set out in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25, "[a]n award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted."

[19] As noted by the applicants, in addition to indemnifying the successful litigant, the costs rules are intended to encourage the advancement of legitimate actions or defences, conduct that reduces the duration and expense of litigation, settlement whenever possible to free up judicial resources, and the careful assessment by litigants of the strength of their cases: *Hartshorne* at para. 26, referring to *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74.

[20] An award of double costs is a discretionary remedy. As set out in R. 9-1(6), in considering whether double costs ought to be awarded, the Court will consider a number of factors including:

> (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.

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[21] In considering this matter, the first question the Court must consider is whether the plaintiffs ought to have been accepted Dorset and Mr. Schuss's offer.

[22] In this case, the applicants pointed out reasonableness is assessed by considering such factors as the timing of the offer, whether the offer had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether the offer could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne* at para. 27.

[23] The applicants say that Dorset's first offer to Ackroyd was delivered on July 14, 2017. At that point in time, Dorset had filed a response to the action; a list of documents had been issued by Dorset, and Warrington and 099; trial was scheduled to commence within six months of the offer on January 29, 2018, and Dorset had issued a notice to admit to which Ackroyd had responded; and Dorset had filed a notice of application to dismiss the action together with two affidavits of Mr. Schuss in support.

[24] Importantly, the applicants point out that in the affidavits, Mr. Schuss gave evidence that was confirmed by Ms. Ho at trial four years later. This original evidence did not change, and there was consistency in the evidence both at the time of the offer and at the time of trial.

[25] In particular, Mr. Schuss said in his affidavit that before the plaintiffs executed and entered into the lease, no one asked him any questions about the additional rent

to be paid under the lease or regarding any of the other tenants at the premises. Furthermore, he said at no time was he aware of any information to suggest that the plaintiffs misunderstood or had any misapprehension regarding the additional rent provisions payable over the lease term.

[26] At trial, Ms. Ho admitted that she had asked no questions, engaged in no discussions, and received no advice from Dorset or Mr. Schuss in respect of additional rent, property taxes, common area expenses, the terms of the lease of either anchor tenant, or the lease itself. This is despite admitting that she did not understand the terms of the final offer and the lease before signing these documents. She did not, however, relay her confusion or ask any questions of Mr. Schuss or Mr. Wong to clarify the instructions provided by Mr. Schuss. There is no evidence that Dorset or Mr. Schuss ought to have known of Ms. Ho's misunderstanding.

[27] In his affidavit of July 14, 2017, Mr. Schuss also said he had no knowledge regarding the future leasing plans of the premises' other tenants. The evidence at trial established there was no evidence Mr. Schuss knew that Chapters would not renew its lease, and an email exchange in November 2013 indicated that Mr. Schuss and Mr. Spear were still unclear whether Chapters would or would not renew its lease. This situation was similar to that of City Fresh. As noted by the applicants, it appeared Ackroyd essentially assumed the anchor tenants' leases would be ongoing, and there was no evidence of any inquiries by the plaintiffs into the status of those leases.

[28] In the July 14, 2017, offer to settle, the applicants indicated they would waive their costs in exchange for a consent dismissal order and release of Ackroyd's claims against them.

[29] The applicants say the July 14, 2017, offer was not a nuisance offer as it clearly demonstrated a relationship to the claim and could easily have been evaluated. The basis of the offer reflects reasoning similar to that ultimately found by the Court, i.e. that there was no evidence supporting the allegations of the claim.

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[30] The applicants say Ackroyd ought to have realized by July 2017 that it could not establish the elements of their claims and assessed that it had no chance of success at trial. It ought to have accepted the offer at that time.

[31] Dorset notes a second offer with similar terms was made on behalf of both applicants and delivered to Ackroyd and Mr. Wong on August 18, 2021. By this time, further additional steps had taken place in the litigation: Dorset had commenced the Parallel Action seeking contribution and indemnity for Mr. Wong; Dorset had issued its amended list of documents; Mr. Wong had filed a response to the Parallel Action and filed his counterclaim; Ackroyd and Mr. Wong had filed a new action (ultimately consolidated with, and largely repetitious of, the Action) to which Dorset and Mr. Schuss had responded; Dorset had filed an application to strike the new action; despite Ms. Ho's evidence on discovery, Ms. Ho filed a counterclaim; Dorset had detailed its position and the challenges faced by the plaintiffs in its two trial briefs; Dorset's position and the challenges faced by the plaintiffs was specifically reviewed during four trial management conferences; and Ms. Ho submitted to an examination for discovery during which she recanted much of her claim.

[32] The applicants point out Ms. Ho's evidence on discovery is a critical consideration in assessing whether the plaintiffs ought reasonably to have accepted the formal offer to settle. By its amended notice of civil claim in the Action, the plaintiffs alleged that Dorset made negligent or deceitful misrepresentations to the plaintiffs regarding operating costs and property taxes being the additional rent payable under the offer to lease and the lease itself. The plaintiffs relied on these misrepresentations and said they amounted to fraud or conspiracy to induce the plaintiffs to enter into the lease. In addition, the plaintiffs alleged that Dorset failed to advise the plaintiffs of the terms of Chapters' and City Fresh's leases or that each would vacate the premises in 2014. In the Parallel Action, Mr. Wong further alleged that Mr. Schuss and Dorset breached their fiduciary obligations by misrepresenting the additional rent in failing to advise that the anchor tenants would vacate the premises.

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[33] Contrary to this, however, Ms. Ho gave evidence during the examination for discovery of June 28, 2018, that at no time prior to the lease being signed did she ever have discussions with Mr. Schuss about the additional rent nor did she ask whether any of the major tenants would be leaving. In the Reasons, the court made findings consistent with Ms. Ho's evidence on discovery. The court also confirmed the evidence of Mr. Wong that he did not ask Mr. Schuss about the tenants.

[34] The applicants maintain the plaintiffs' evidence, confirmed in their own testimony at trial, was known to them: when the Action and Parallel Action were commenced; when they received Mr. Schuss's affidavits; at the time of Ms. Ho's discovery; when the settlement offers were made on July 27, 2017, and August 18, 2021. There was never any evidence that Mr. Schuss or Dorset made the misrepresentations alleged. The plaintiffs were in possession of all this information when they commenced the actions.

[35] Accordingly, the applicants say there was, in the circumstances, no reasonable basis to reject the applicants' offers to refrain from pursuing their costs against the plaintiffs. Had either of the offers been accepted, the plaintiffs would have fared better than they did as a consequence of the trial judgment.

[36] With respect to the factors listed under R. 9-1(6)(c) and (d), the applicants say first that while Ackroyd is no longer operating, there is no evidence of the financial circumstances of Mr. Wong. There is also no evidence that the applicants used a superior financial position in an oppressive way, so this factor is neutral.

[37] Finally, the applicants point out that the manner in which the plaintiffs conducted the trial added considerable length and expense. After eight days of evidence and over two days of argument, the court found the plaintiffs had failed to call any evidence to establish their claim. The applicants point out that much of the time was taken up by Mr. Wong's commentary throughout the proceedings.

[38] Accordingly, the applicants maintain double costs should be awarded.

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Uplift Costs

[39] In the alternative, the applicants seek an order to uplift costs at 1.5 times the value that would otherwise apply under Scale B.

[40] An award of uplift costs requires there be unusual circumstances resulting in the tariff costs being “grossly inadequate or unjust”: *Chandler v. Rasmussen*, 2013 BCSC 1461 at para. 39. Uplift costs are meant to indemnify the successful party where there are unusual circumstances, not to punish the unsuccessful party: *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462 at para. 30, referring to *Sheppard v. Vancouver Coastal Health Authority*, 2021 BCSC 539 at para. 56.

[41] In this case, the applicants maintain the manner in which the trial was conducted significantly prolonged the trial and warrants an award of uplift costs. In particular, they point to the unfavourable evidence of which the plaintiffs were aware and the time dedicated to Mr. Wong’s commentary as compared with evidence given under oath despite significant guidance by the court.

[42] In response, Mr. Wong says he does not accept the court’s judgment that no evidence to support the plaintiffs’ allegations was presented, and he has appealed the judgment on behalf of both Ackroyd and himself. He argues for fairness and, once again, reiterates that the plaintiffs are only seeking to recoup their losses and someone needs to bear responsibility for these losses. Mr. Wong also argues that costs should not be awarded at this time as this matter should await the outcome of the appeal.

Application of the Legal Principles

[43] With respect to double costs and whether the plaintiffs should have accepted the offers proffered, I note at the outset the answer to this question is difficult to ascertain. It is not apparent to what extent the plaintiffs understood the legal requirements they needed to meet to establish their case.

[44] There is however no doubt that the lack of evidence of their claim was known to the plaintiffs at the time of the first offer and, more particularly, the second offer. Indeed, Ms. Ho's evidence at the examination for discovery evidence was clear that at no time prior to the lease being signed did she ever have discussions with Mr. Schuss about the additional rent nor did she ask whether any of the major tenants would be leaving. It is troubling, therefore, that the plaintiffs continued to maintain their position up to and throughout the trial.

[45] During the trial, Mr. Wong strongly alleged that various parties were responsible for the adverse business consequences suffered by the plaintiffs. He continued to maintain this position despite making similar admissions to Ms. Ho over the course of the trial. There is no doubt that, as per his submissions, Mr. Wong sought to hold someone responsible for these adverse business consequences, and the plaintiffs sought to recoup their business losses from the defendants. Unfortunately, as reflected in the Reasons, there was no evidence upon which to ground holding these particular defendants responsible for these losses. Mr. Wong does not, however, accept this and continues to maintain his position to this day.

[46] In considering whether the offer to settle was one that ought reasonably to have been accepted, I note how one of the rationales for the award of double costs is encouraging the appropriate use of limited judicial resources. Individuals who represent themselves, by choice or necessity, now occupy a significant portion of the court's finite time and resources.

[47] I am therefore instead inclined in this case to award uplift costs to accomplish a similar objective.

[48] As per *Chandler* and *Shen*, a party's conduct may represent unusual circumstances underpinning an award of uplift costs.

[49] What conduct constitutes an unusual circumstance is not defined, being determined through "a fact-based inquiry driven by the nature of the litigation and the conduct of the parties": *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at

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para. 42. Examples of factors relevant to determining whether to award uplift costs include the seriousness of the allegations and the complexity or difficulty of the issues in the litigation: *Shen* at para. 34, referring to *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37.

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[50] There is no doubt this matter represents an unusual case. Mr. Wong's presentation was protracted and unnecessarily complicated, driving up the expenses incurred by the defendants and consuming an unjustifiable amount of court time and resources. In addition, the plaintiffs made serious allegations of misrepresentation against the defendants without any evidence.

[51] While the applicants do not allege misconduct by the plaintiffs—rightly, in my view—Mr. Wong did use extensive commentary in making his case despite repeatedly being guided by the court to focus on pertinent evidence. Mr. Wong's approach was challenging for all concerned. Counsel were, however, extremely patient with Mr. Wong and worked hard to assist him whenever they could.

[52] In my view, the unnecessarily protracted nature of this case leads me to conclude the entitlement of costs at Scale B is grossly inadequate in the circumstances.

[53] Mr. Wong submits that because the judgment has been appealed, a decision regarding costs should await any decision from the Court of Appeal. There is, however, no real evidence of that matter proceeding, and it may well not be heard in view of what Mr. Wong says with regards to the expense of procuring trial transcripts. There is at present no timeline, and this matter has been generally delayed for some significant period of time. Accordingly, as per the jurisprudence cited above, I award uplifted costs in this matter to Dorset and Mr. Schuss.

[54] In addition, as per the application of Warrington and 099, I award costs at Scale B.

[55] Mr. Wong also referred to his Parallel Action and indicated he wishes to proceed with this action. As noted by counsel for Dorset, however, this action was consolidated and dismissed as part of these proceedings.

[56] In particular, I note my finding at para. 148 of the Reasons:

> I find the Plaintiffs have brought no evidence reasonably capable of proving any of the claims in the Action or Parallel Action. The First and Second Applicants' applications under R. 12-5(4) and (5) are granted and the Action and Parallel Action are dismissed.

[57] The two matters, including the plaintiffs' counterclaim in the Parallel Action, were consolidated and tried together as per a court order of April 4, 2019. The above finding is applicable to that action, which is part of the Parallel Action. Accordingly, Mr. Wong's action has been dealt with and dismissed as a result of the above court order.

[58] In conclusion, I award Dorset and Mr. Schuss uplifted costs against the plaintiffs. In addition, I award costs at Scale B against the plaintiffs to Warrington and 099.

"Burke J."

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