

Mr. IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chao Yin Canada Group Inc. v. Xenova
Property Development Ltd.*,
2023 BCSC 390

Date: 20230315
Docket: 185569
Registry: Vancouver

Between:

Chao Yin Canada Group Inc.

Plaintiff

And

Xenova Property Development Ltd. and Xiao Bo Li also known as Polly Li
Defendants

And

Docket: 209442
Registry: New Westminster

Between:

Xenova Property Development Ltd.

Plaintiff

And

Chao Yin Canada Group Inc.

Defendant

Before: Master Keighley

Reasons for Judgment

Counsel for the Plaintiff:

S. Hannigan

Counsel for the Defendants:

No Appearance

Place and Date of Hearing:

New Westminster, B.C.
March 6, 2023

Place and Date of Judgment:

New Westminster, B.C.
March 15, 2023

The Assessment

[1] This hearing was scheduled by Chao Yin Canada Group Inc. (Chao Yin) to assess its special costs awarded as a result of the disposition of two actions tried together over nine Days in June of 2021. The respective styles of cause for the two actions are set out above.

[2] The trial judgement in both actions which dates from July 23, 2021, resulted in Chao Yin succeeding in its suit for damages for fraud and the defendants, Xenova and Li, (the “defendants”) failing in their action which counsel has correctly framed as a counterclaim against Chao Yin.

[3] On September 22, 2021, Verhoeven J., by oral judgement granted Chao Yin special costs of both actions on the basis that the conduct of the defendants leading up to and at the trial was reprehensible and warranted rebuke.

[4] Li was, at all material times, a principal of Xenova. Both Xenova and Li are now undischarged bankrupts. On November 17, 2022, Milman J. granted orders in Li's bankruptcy proceeding declaring that Chao Yin's fraud judgment in the Vancouver action bankruptcy including interest and special costs arising from the judgement and lifting the stay of proceedings resulting from bankruptcy such that Chao Yin might proceed with this special costs assessment.

[5] Despite having been served with the appointment, the attached draft bill of costs, a copy of the order of Master Muir providing directions for this assessment and copies of the affidavits of justification of Paul Kressock, the lawyer with conduct of the file, Li has not taken any issue with the bill of costs or raised any issues to challenge it. She did not appear at the assessment hearing before me.

[6] It is Chao Yin's position that special costs should be assessed at \$307,993.63 made up as follows:

- a) legal fees incurred up to February 24, 2023 of \$249,971.50 together with \$29,996.58 taxes;

- b) disbursements incurred up to September 30, 2021 of \$21,157.62 together with taxes of \$867.93; and
- c) a lump sum of \$6000 for legal fees, disbursements and taxes incurred by Chao Yin since February 24, 2023, for counsel's preparation for and attendance at the hearing before me, and including witness fees for Mr. Kressock who provided two affidavits of justification and testified on affirmation at the assessment.

Nature of the Dispute

[7] Both actions arise from Chao Yin's project to build and establish a private school in Richmond. Ms. Li was a friend of Mr. Zhang, the principal of Chao Yin. Between late 2016 and early 2018, Li provided informal advice and assistance to Zhang from time to time in relation to the school project. In this litigation, Zhang has conceded that Li introduced him to a local accountant and lawyer, assisted him in searching for potential school sites and assisted in liaising with the architect while Zhang was out of the country.

[8] Verhoeven J. found, as a fact, that there was never any formal engagement of Li by Zhang to fulfil any role on the project nor any expectation of remuneration on the part of Li.

[9] In January and February 2018, Li began requesting payments from Zhang. In the most significant instance, Li sent several WeChat messages to Zhang telling him that the sum of \$150,000 was "urgently required" for "government fees" and that the funds should be sent to Li's company Xenova. Li intimated that if the fees were not paid the government could halt the project. These representations were false and were found to be so by Verhoeven J. The funds sent by Zhang to Xenova were promptly misappropriated by Li. In early March 2018, Zhang advised Li that he required that she end any further involvement with the project and asked for the return of any funds she was holding on behalf of Chao Yin. Ms. Li then fabricated an invoice for \$174,510 and asserted that she had been formally engaged as project manager of the project through Xenova and that she was retaining the funds

received from Chao Yin as her fees. She added that Chao Yin, in fact, owed her a further \$24,510 for services she had provided. In the Vancouver action Chao Yin sought to recover \$154,597, the net amount of payments made to the defendants that had not been applied to a legitimate project expense.

[10] The New Westminster action was, as indicated, essentially a counterclaim whereby Xenova sought to recover the \$24,510 it claimed remained owing for services, or alternatively *quantum meruit*.

[11] At trial, Verhoeven J. found that Li had fraudulently misrepresented to Zhang that money was urgently required for the project and that she did so to induce Zhang to forward funds to Xenova with the intention of misappropriating those funds (*Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.*, 2021 BCSC 1445).

Illuminating portions of the trial judgment are as follows:

103 All of these elements are established in this case. While some of the monies paid by the plaintiff were required for legitimate project expenses, Ms. Li's representations to Mr. Zhang went much farther than this. The demand for payment of \$150,000 was unconnected to any actual project expenses. While there were also references to consultants' fees, the central representation was that these monies were required for government fees, which, if not paid, would bring the project to a halt.

104 I accept the evidence of Mr. Zhang that this was his understanding of the statements made to him. These were false representations of fact, which Ms. Li knew were false. She intended for the plaintiff to rely on them by paying the money, which it did. No money was owing to the government in January 2018 when the representations were made, nor were any funds required for that purpose imminently. There was no urgency, and the project was not going to be brought to a halt if the money was not paid.

105 On examination for discovery, Ms. Li stated that she could not recall what the urgency was for the January 11, 2018 request for \$150,000. At trial, she suggested that she was simply relaying a message from Mr. Cheng that \$150,000 would be required to pay for various engineering consultants' fees in the future. This assertion was never put to Mr. Cheng. It is also inconsistent with her representations to Mr. Zhang that the money was required for government fees, and that the project would come to a halt should the money not be paid.

...

109 The real reason for Ms. Li's representations concerning urgent need for \$150,000 was that the defendants needed money for other purposes, urgently. Their conduct in immediately paying the money out to themselves demonstrates this.

...

129 It may be that Ms. Li had some unstated hope of remuneration or reward. If at some stage Ms. Li felt that her efforts deserved remuneration, because they had extended beyond what she had offered to do, or what she had agreed to do as a friend, she ought to have said so, and ought to have requested remuneration. She did not do so. Instead, she fraudulently extracted monies from the plaintiff, and fabricated a claim for services in order to avoid the consequences of her fraud. She took advantage of the trust that she had fostered with Mr. Zhang and the plaintiff.

[12] Verhoeven J. awarded Chao Yin damages for fraud against both the defendants in the amount of \$154,597, the full amount sought in the action. Verhoeven J. also found there was no contract between Chao Yin or either of the defendants and that the defendants were barred from any *quantum meruit* award by virtue of their fraud and the "clean hands" doctrine.

Conduct of the Defendants

[13] At the special costs application made in September 2021, Chao Yin submitted that the conduct of both defendants had dramatically increased the costs of litigation. The defendants changed counsel five times during the course of the litigation and ultimately appeared without counsel at trial. The cost of litigation, I am satisfied, was increased as a result of the delays, adjournments and increased the workload of counsel for Chao Yin as a result of the conduct of the defendants, which included:

- a) disclosing volumes of unlisted documents and an undisclosed expert report during the trial;
- b) instructing counsel not to accept service on behalf of Ms. Li following service on Xenova even though counsel already represented Xenova, resulting in an unnecessary chambers application;
- c) failing to disclose or list relevant documents resulting in an unnecessary chambers application and late disclosure;
- d) in the case of Ms. Li, repeatedly refusing to answer questions put to her on discovery despite no objections having been made by her counsel with respect to such questions;

e) in the case of Ms. Li failing to respond to outstanding discovery requests resulting in two additional unnecessary chambers applications; and

f) in the cases of Xenova filing an amended Notice of Civil Claim in the New Westminster action without consent or leave in January 2021, resulting in yet another unnecessary chambers application.

[14] At the special costs application in September 2021, Chao Yin also referred to other alleged “reprehensible conduct” on behalf of the defendants, or either of them, which included:

- a) the defendants made repeated and unfounded allegations that the trial that Chao Yin and its counsel had destroyed evidence. Verhoeven J. found that these allegations were unfounded;
- b) the defendants provided false testimony at trial and “concocted” a schedule purporting to show that Li had spent 349 hours working on the school project; and
- c) the defendants recklessly pursued meritless claims and defences and pinned their case at trial on false oral testimony and unfounded allegations.

[15] Chao Yin also advised the court that it had tendered several formal settlement offers in an attempt to settle both actions and avoid further litigation expense. The defendants rejected these offers and made no settlement offer of their own.

[16] An additional factor which led to increased costs was the fact that the two principals, Zhang and Li, speak Mandarin and have only limited capabilities in English. This and the need for interpreters led to increased costs in providing advice and obtaining instructions throughout the litigation, conducting examinations for discovery, preparing for trial, as well as increase trial length resulting from the need for interpretation of testimony.

The Plaintiff's Position

[17] By way of preliminary matter, the plaintiff submits that the award of special costs in this case must be taken to include special costs of this assessment as well. I am satisfied that when the court orders the costs of the proceeding to be paid on special cost basis, that award includes the cost of any special costs application and any subsequent proceedings to assess costs unless the court orders otherwise: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69. I am also satisfied that a party may claim legal fees, disbursements and taxes associated with the assessment hearing that have not yet been invoiced by counsel: *VI Fitness Centres Inc. (Re)*, 2022 BCSC 216.

Principles Applicable to the Assessment of Fees

[18] Pursuant to Rule 14-1(3), on an assessment of special costs, the registrar must allow fees that were properly or reasonably necessary to the conduct of the proceeding having regard to the following factors:

- a) The complexity of the proceeding and the difficulty/novelty of the issues involved;
- b) The skill, specialized knowledge and responsibility required of the lawyer;
- c) The amount involved in the proceeding;
- d) The time reasonably spent in conducting the proceeding;
- e) Conduct that tended to shorten or unnecessarily lengthen the proceeding;
- f) The importance of the proceeding to the party whose bill is being assessed, and the result obtained;
- g) The benefit to the party whose bill is being assessed of the services rendered by the lawyer;
- h) Rule 1-3 (*i.e.* proportionality) and any case plan order.

[19] Work for which fees are claimed will be deemed to be “necessary” if that work was indispensable to the conduct of the proceeding. Work for which fees are claimed will be deemed “proper” if while not strictly necessary, it is nevertheless reasonably undertaken or incurred for the purpose of the proceeding: *Brown v. Goodacre*, 2019 BCSC 1008.

[20] Whether work for which fees are claimed was “proper or reasonably necessary to the conduct of the proceeding” is assessed on an objective basis. Special costs are intended to capture “the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill”: *Bradshaw Construction Ltd. v. Bank of Nova Scotia*, 1991 CarswellBC 52 (B.C.S.C.), *Gichuru v. Smith*, 2014 BCCA 414.

[21] Although they are assessed objectively according to a standard of reasonableness, special costs are nonetheless intended to substantially indemnify the successful litigant. As stated by the Court of Appeal in *Gichuru*, “[t]he close relationship between actual legal fees and special costs is well documented in the jurisprudence”: *Gichuru*, paras. 91 and 122.

[22] In *Bradshaw*, Justice Bouck opined that “in most instances, a bill for special costs will usually be about 80% to 90% of a similar bill assessed under the Legal Profession Act”: *Bradshaw*, para. 45.

[23] Counsel notes however, the comments from Kirkpatrick J. in *Canadian National Railway Co. v. ABC Recycling Ltd.*, 2005 BCSC 1559, at paragraph 15:

There are, of course, different considerations that may arise on a review under the Legal Profession Act (see, for example, ss. 71(2) and (3)) that would not arise on an assessment under Rule 57. However, all other things being equal, an award of special costs may approximate a bill reviewed under the Legal Profession Act. Thus, I would not preclude the possibility that the registrar, on a comprehensive assessment of the reasonableness of the legal costs incurred by CN, could find that CN was entitled to the same costs from ABC as CN would be obliged to pay its lawyers under a Legal Profession Act review. In other words, the assessment of CN's objectively reasonable legal costs is just that. It is not an exercise in determining CN's actual legal costs and then deducting some artificial percentage. CN is entitled to its objectively reasonable legal costs: no more and no less.

[24] The reader should also note that in *Kooner v. Kooner*, 2007 BCSC 532 registrar Sainty noted that the “rule of thumb” is simply a rule and that taxing officers have awarded as little as one half or close to the full amount claimed in special costs.

[25] Finally, says counsel, it must be kept in mind the special costs are not merely compensatory include a punitive element and that they are meant to express the court’s disapproval of misconduct in litigation.

Should Chao Yin be Awarded 100% of its Legal Fees Incurred and Paid?

[26] I reviewed the statements of account delivered to Chao Yin up to February 24, 2023. In light of the nature and complexity of these proceedings and find that the fees charged were entirely appropriate and proportionate. The fees charged were based upon the hourly rates of Mr. Kressock, counsel for Chao Yin, and various others from his office who contributed work to the file and whose hourly rates are reflected in the invoices. I know that Mr. Kressock was called to the bar of this province in April 2015. At the time the Vancouver action was commenced he had been a lawyer for three years and his hourly rate was \$300. I find the selection of Mr. Kressock as counsel, and his hourly rate, were appropriate and proportionate in the circumstances. In retrospect the case, as it unfolded, may have warranted more senior counsel and Chao Yin may well have benefited from a lower charge for the quality services provided by Mr. Kressock.

[27] It may seem to the reader that the expenditure of over 1/4 million dollars in fees pursuing a claim for \$154,597, was ill-advised but counsel points out that it was important to Chao Yin to pursue the Vancouver action in order to recover funds solicited and misappropriated by the defendants. In circumstances where the defendants defrauded it, Chao Yin was forced to decide whether to discontinue the litigation (that is letting the defendants get away with fraud) or incur significant costs in taking the Vancouver action to trial. Chao Yin made the decision, says counsel, not to walk away from the fraud claim simply because the cost of taking the case to trial was significant. Chao Yin considered it important to hold Li accountable for her

actions. With respect to the New Westminster action, Chao Yin of course had no choice but to incur the cost of defending it.

[28] Counsel indicates that his law firm, Lawson Lundell LLP (“Lawson Lundell”) took steps to reduce the overall fees charged by providing Chao Yin with a discount of \$35,000 against the invoice associated with the trial. This was equivalent to a “write off” of time spent by an articling student in assisting with preparation for and attendance at trial.

Decision

[29] I have reached the conclusion that Chao Yin should be awarded 100% of its actual legal fees on the following basis:

- a) The proceedings involved the prosecution of a fraud claim for \$154,597 and the defence of a debt/*quantum meruit* claim at a 9-day trial. The proceedings lasted 3.5 years between the start of the Vancouver Action in April 2018 and the post-trial special costs application in September 2022. The overall legal fees incurred by Chao Yin were reasonable in the circumstances;
- b) Mr. Kressock’s work and hourly rate, and those of other timekeepers who assisted him, were reasonable in light of the nature of the case and the amount at stake;
- c) Chao Yin has actually paid the invoices claimed (except for the most recent invoices);
- d) It was important – and indeed necessary – for Chao Yin to pursue this litigation through trial;
- e) The defendants took various steps which dramatically increased the cost of the litigation;
- f) A full indemnity for legal fees is consistent with the punitive nature of an award of special costs; and

- g) The reasonableness of Chao Yin's legal fees has not been challenged by Ms. Li.

[30] Fees, disbursements and taxes incurred after February 24, 2023, associated with this hearing and particularly in relation to preparation for it, have not yet been invoiced. They include preparation of written submissions by Mr. Kressock at \$515 per hour, preparation time and attendance at the hearing before me by Ms. Hannigan at \$450 per hour. Chao Yin conservatively estimates these costs at \$5000. Chao Yin also claims a fee of \$1000 for Mr. Kressock's attendance as a witness in lieu of his hourly rate. Counsel notes that this approach was taken by my colleague Master Bilawich in *VI Fitness, supra*.

[31] I am therefore satisfied that it is appropriate to award a lump sum of \$6000 for legal fees, disbursements and taxes incurred by Chao Yin since February 24, 2023, associated with this assessment hearing.

Disbursements

[32] Pursuant to Rule 14-1(5) on assessment of costs I must determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding and allow a reasonable amount for those disbursements.

[33] Master MacNaughton summarized the principles to be applied on the assessment of disbursements in the case of *Turner v. Whittaker*, 2013 BCSC 712 as follows:

1. Rule 14-1(5) requires an assessing officer to determine which disbursements were necessarily or properly incurred in the conduct of a proceeding and to allow a reasonable amount for those disbursements.
2. The consideration of whether a disbursement was necessarily or properly incurred is case-and circumstance-specific and must take into account proportionality under Rule 1-3. (*Fairchild v. British Columbia (Vancouver Coastal Health Authority)*, 2012 BCSC 1207).
3. The time for assessing whether a disbursement was necessarily or properly incurred is when the disbursement was incurred not with the benefit of hindsight. (*Van Dael v. Van Dael*, 56 B.C.L.R. 176 (SC) rev'd 56 B.C.L.R. 178 at para. 4 (CA))

4. A necessary disbursement is one which is essential to conduct litigation; a proper one is one which is not necessary but is reasonably incurred for the purposes of the proceeding. (*McKenzie v. Darke*, 2003 BCSC 138, para. 17-18)
5. The role of an assessing officer is not to second guess a competent counsel doing a competent job solely because other counsel might have handled the matter differently. (*McKenzie v. Darke*, 2003 BCSC 138, para. 21)

[34] I have reviewed the disbursements claimed by Chao Yin in both actions prior to September 30, 2021, and I note that Li does not challenge the propriety or reasonableness of any of the disbursements claimed. In his first affidavit Mr. Kressock sets out evidence relating to every disbursement incurred prior to September 30, 2021 and for all disbursements attaches supporting invoices, receipts and accounting records from his firm. His evidence is that in his judgement all the disbursements claimed were necessary or properly incurred. In his second affidavit Mr. Kressock explains that to avoid any confusion about which post-trial disbursements are attributable to the actions, as opposed to disbursements relating to Li's appeal, communications with Li's trustee in bankruptcy and the application made in these bankruptcy proceedings, Chao Yin has not claimed any disbursements incurred after September 30, 2021.

[35] I am satisfied that Chao Yin should be awarded 100% of the disbursements incurred and claimed.

Conclusion

[36] I assess Chao Yin's special costs for both actions at \$307,993.63 made up as follows:

- a) legal fees incurred up to February 24, 2023, of \$249,971.50 plus taxes of \$29,996.58;
- b) disbursements incurred up to September 30, 2021 of \$21,157.62 together with taxes of \$867.93; and

c) a lump sum of \$6000 for legal fees disbursements and taxes incurred by Chao Yin since February 24, 2023, relating to preparation for and attendance at the hearing before me, together with a \$1000 witness fee for Mr. Kressock.

“Master Keighley”