IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1025996 B.C. Ltd. v. Chahal,*
2024 BCSC 2235

Date: 20241210
Docket: S1710096
Registry: Vancouver

Between:

1025669 B.C. Ltd.

Plaintiff

And:

Harjit Singh Chahal, Simarjeet Kaur Chahal, Satish Kumar, and Prakash Kumar

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment
Costs

Counsel for the Plaintiff:	D. Moonje
Counsel for the Defendants:	J.A. Jaffer, K.C.
Written Submissions of the Defendants:	September 3, 2024
Written Submissions of the Plaintiff:	September 18, 2024
Place and Date of Hearing:	Vancouver, B.C. September 24, 2024
Place and Date of Judgment:	Vancouver, B.C. December 10, 2024

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Introduction

[1] The plaintiff purchased a blueberry farm (the "Property") from the defendants in 2014. It claimed that the defendants, or agents on their behalf, made a fraudulent misrepresentation regarding the total acreage of blueberries planted on the Property. In addition, the plaintiff alleged that the defendants failed to disclose that a ditch at 68th Avenue was constructed without the necessary permissions from the City and that the access point from 66th Avenue required entry through a neighbouring property owned by a third party.

[2] The trial of this matter took place in 2023 and early 2024. I dismissed the plaintiff's claim, finding that the defendants did not make any fraudulent misrepresentations regarding the total acreage of planted blueberries. My reasons are indexed at 2024 BCSC 1058 (the "Reasons").

[3] The plaintiff raised the issue that the claim respecting the ditch crossing was not directly addressed in the Reasons. I issued supplementary reasons, indexed at 2024 BCSC 1449 (the "Supplementary Reasons"). As set out in the Reasons and Supplementary Reasons, which should be read together, I concluded that the plaintiff had not established, on clear and convincing evidence, that the defendants had made any misrepresentations which Amritpal Toor relied upon to purchase the Property. This finding extended to the claims of misrepresentation regarding the ditch and access to the Property from 66th Avenue.

[4] The only outstanding issue is costs. The parties provided written submissions on costs and a short oral hearing was held on September 24, 2024.

[5] The defendants seek double costs on the ground that the plaintiff failed to accept the offer to settle made on May 11, 2023. The defendants also seek special costs for the allegations of fraud and deceit advanced in the proceeding.

[6] The plaintiff opposes any higher costs being awarded and submits that the defendants should be awarded costs at Scale B.

[7] Since the defendants and some witnesses all share the same last name, I will refer to some by their first names. In so doing, I mean no disrespect.

Offer to Settle

Relevant Facts

[8] Pursuant to R. 9-1 of the *Supreme Court Civil Rules* [*Rules*], on May 11, 2023, the defendants offered to settle this matter for the sum of $5,000 and waive all costs. The offer letter does not provide any justification for the amount offered. At the time the offer was made, the following pre-trial steps had been completed:

a. Examinations for discovery of Mr. Toor, as the representative for the plaintiff, and Mr. Kumar, one of the named defendants.

b. Discovery of documents, except for some further documents disclosed by the plaintiff shortly before the trial.

c. Multiple trial management conferences had been held and “Will Say” statements had been exchanged.

[9] In addition, the parties knew that both real estate agents had died. The plaintiff apparently received no cooperation and no documents from the City of Surrey.

Positions of the Parties

[10] The defendants argue that the plaintiff knew or ought to have known that there was virtually no evidence to establish a fraudulent misrepresentation and that the claims were likely to be dismissed. By accepting the defendants’ offer, the plaintiff would have saved significant costs. The defendants claim that the plaintiff simply ignored the offer.

[11] The plaintiff submits that, at the time of the offer, the credibility of the defendants was a live issue. In addition, Harjit Chahal had not been examined for discovery. At that discovery, the plaintiff learned that he had little evidence and that it

was his father, Amarjit Chahal, who handled everything. The defendants' trial briefs did not list Amarjit Chahal as a witness. The defendants did not allow the plaintiff to examine Amarjit Chahal under oath, but called him as a witness at trial. The plaintiff therefore points out that, at the time of the offer, it did not know what Amarjit Chahal's evidence would be.

[12] The plaintiff argues that there were several contentious issues for trial and the ultimate result was not a foregone conclusion. The Court should consider the offer through the plaintiff's eyes. In the circumstances of this case, the plaintiff says that it did not persist in a claim it ought to have known was unsound.

Legal Principles

[13] Rule 14-1(9) of the *Rules* provides that the "costs of a proceeding must be awarded to the successful party unless the court otherwise orders." Rule 9-1(4) provides that the court may consider offers to settle when exercising discretion in relation to costs. Double costs rules are in place "'to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer'": *Hartshorne v. Hartshorne,* 2011 BCCA 29 at para. 25, quoting *A.E. v. D.W.J.*, 2009 BCSC 505 at para. 61; *Khan v. School District No. 39*, 2021 BCSC 2611 at para. 10.

[14] Rule 9-1(5) of the *Rules* provides that the court may do one or more of the following in a proceeding in which an offer to settle has been made:

> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (b) 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;
>
> (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
>
> (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps

> taken in the proceeding after the date of delivery or service of the offer to settle.

[15] Rule 9-1(6) sets out the factors the court may consider when deciding whether to make an order pursuant to R. 9-1(5):

> (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.

[16] With respect to factor (a), the court must determine whether the offer to settle was one that the recipient ought reasonably to have accepted. This inquiry does not involve an assessment of whether the offer was itself reasonable, but rather whether it was unreasonable for the plaintiff to refuse it: *Cottrill v. Utopia Day Spas and Salons Ltd*., 2019 BCCA 26 at paras. 30–31, citing *Kobetitch v. Belski*, 2018 BCSC 2247 at paras. 24–25.

[17] Further, this inquiry has both subjective and objective components: *C.P. v. RBC Life Insurance Company,* 2015 BCCA 30 at para. 97, leave to appeal to SCC ref'd, [2015] S.C.C.A. No. 136. Reasonableness is to be assessed by considering factors including "the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided": *Hartshorne* at para. 27. The court is entitled to take into account the reasons why a party declined to accept an offer to settle, but it must consider whether those reasons are objectively reasonable: *C.P.* at para. 97.

[18] An additional factor to consider when assessing the reasonableness of the decision to accept or reject an offer of settlement is whether the recipient had any uncertainty about the credibility of witnesses set to testify at trial: *Noori v. Hughes*, 2019 BCSC 139 at paras. 38–42.

[19] The results at trial may also be considered, as they provide the court with an objective measurement of the reasonableness of the offer and the decision to reject it: *C.P.* at para. 99.

[20] The court may consider any other relevant factors: *C.P.* at para. 103.

Analysis

Reasonable Acceptance

[21] The plaintiff had information in the Lewis Memorandum that there were 72 acres of planted blueberries as well as contradictory information from the Ministry of Agriculture (the "Ministry") in the Zebroff Notes that there were only 54.68 acres of planted blueberries: see Reasons at paras. 28–31, 77. In light of this information, it was not unreasonable for the plaintiff to reject the offer.

[22] In my view, the key witness for the defendants was Amarjit Chahal. He provided evidence at trial regarding what representations, if any, were made during the Property tour that took place shortly before the offer to purchase the Property was made. At the time of the offer, the plaintiff did not know what his evidence was. It was not until Amarjit Chahal was called as a witness at trial that his evidence became known.

[23] Similarly, the admissibility of the Lewis Memorandum and the Zebroff Notes, both of which were hearsay, was only determined at trial. I ultimately decided that procedural reliability and substantive reliability were not met: Reasons at paras. 116–118. I was unable to find the necessary threshold reliability for either document to be admitted for the truth of its contents.

[24] This decision was a significant blow to the plaintiff's position that the defendants, through their real estate agent, had represented that there were 72 acres of planted blueberries. Since both real estate agents were deceased at the time of trial, these documents were the only evidence the plaintiff had to support the claims as to what the realtors had been told.

[25] I cannot consider the defendants' offer with the benefit of hindsight. Instead, I must look to the circumstances that existed at the time the offer remained open for acceptance: *Miller v. Emil Anderson Maintenance Co*. *Ltd.*, 2014 BCSC 1399 at para. 9. Through this lens, the plaintiff's assessment that the amount of the offer was trifling in relation to the amounts claimed was understandable.

[26] I further accept that Mr. Toor sincerely believed that he had been misled. When he attended at the Ministry, he was shocked to learn of the actual number of planted acres. His belief was neither groundless nor frivolous: *Miller* at para. 16.

[27] The defendants' argued that Mr. Toor's credibility was seriously undermined at trial because he gave conflicting evidence. I rejected that argument and found that, while all the key witnesses provided evidence that favoured their theory of the case, none of them deliberately lied or created a false narrative.

[28] In all of the circumstances, I find that it was not unreasonable for the plaintiff to reject the defendants' "nuisance offer". This factor favours the plaintiff.

Relationship between the Terms of the Settlement Offer and the Final Judgment of the Court

[29] Since the defendants were successful in defeating the plaintiff's claim, it is clear that the plaintiff would have benefited from accepting the offer. This factor weighs in favour of the defendants.

Relative Financial Circumstances of the Parties

[30] Neither of the parties made submissions on this factor. I have no evidence in support of any discrepancy in the financial positions of the parties. This factor does not apply to this case.

Any Other Factors

[31] I note that the plaintiff was successful in defending against the defendants' limitation argument.

Conclusion

[32] On balance, I am not persuaded that an award of double costs would be appropriate in this case. The application for double costs is dismissed.

Special Costs

Positions of the Parties

[33] The defendants seek an award of special costs on the basis that, from the inception of this case up until trial, the plaintiff "castigated" all of the defendants as fraudulent and deceitful (the "Fraud Allegations"). The defendants submit the Fraud Allegations were very serious and, since there was no reasonable basis on which to assert fraud or deceit, the Court should sanction the plaintiff with special costs. The plaintiff showed a callous disregard for the seriousness of the allegations and caused the defendants a great deal of humiliation and embarrassment. Finally, the defendants say that the plaintiff's attack on Mr. Kumar's credibility undoubtably caused Mr. Kumar further humiliation and embarrassment.

[34] The plaintiff relies on the decision in *Lui v. 0880984 B.C. Ltd*., 2020 BCSC 1342 at paras. 42–43, in support of this position that special costs should not be awarded because Mr. Toor had a subjectively genuine belief in the Fraud Allegations, even if though that belief was wrong.

[35] The plaintiff submits that even a weak or unsuccessful action in which fraud and dishonesty is alleged does not necessarily lead to an award of special costs. There must also be an element of reprehensibility, such as obviously unfounded allegations or an improper motive: *Port Coquitlam Building Supplies Ltd. v. 494743 B.C. Ltd.*, 2019 BCSC 540 at paras. 14–16.

Legal Principles

[36] Rule 14-1(1)(b)(i) of the *Rules* provides as follows:

> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in

> accordance with Appendix B unless any of the following circumstances exist:
>
> …
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

[37] In *Port Coquitlam Supplies Ltd.*, Justice Norell summarized the onus of proof and purpose of special costs as follows:

> [12] The party who seeks an order of special costs bears the onus of establishing the basis for such an award: *Hollander v. Mooney*, 2017 BCCA 238 at para. 96, leave to appeal ref'd [2017] S.C.C.A. No. 356.
>
> [13] Costs are awarded to partially indemnify a successful party for legal expenses, but are also awarded to encourage conduct that reduces the duration and expense of litigation, and to deter certain conduct that has the opposite effect: *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330, 1995 CanLII 1537 at para. 28 (C.A.).
>
> [14] Special costs may be awarded where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. An unsuccessful action alleging serious allegations of fraud or dishonesty does not necessarily lead to an award for special costs. In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 26, the Court stated:
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> > 26 In *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M.

> Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at para. 219.

[38] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.), where Lambert J.A. determined that the single standard for an award of special costs is reprehensible conduct during litigation: see also *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177 at para. 134; *Tanious v. The Empire Life Insurance Co.*, 2019 BCCA 329 at para. 53. The word "reprehensible" includes scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at para. 17.

[39] Special costs are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. Their purpose is to censure and deter litigation misconduct: *Tanious* at para. 53. They may be awarded in a wide range of circumstances, including:

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
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> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
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> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
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> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;
>
> (h) where a party maintains unfounded allegations of fraud or dishonesty; and
>
> (i) where a party pursues claims frivolously or without foundation.
>
> [Citations omitted.]

See *Mayer v. Osborne Contracting Ltd.,* 2011 BCSC 914 at para. 11.

[40] An allegation of fraud must be made cautiously and have some evidentiary basis. Mere belief and speculation is not sufficient: *Fibercom Systems Inc. et al v. Rogers Cable Inc. et al*, 2005 BCSC 673 at para. 22 [*Fibercom*]; *Mayer* at para. 17. The allegation should be abandoned if supporting evidence is not disclosed during discovery or fails to materialize at trial: *Fibercom* at para. 11.

[41] However, the fact that an action is weak or ultimately dismissed is not by itself sufficient to award special costs. Something more is required to make the conduct sufficiently reprehensible, such as making obviously unfounded allegations or having an improper motive for bringing proceedings: *Garcia* at para. 23. As this Court stated in *Hung v. Gardiner et al*, 2003 BCSC 285:

> [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations (see *Native Citizens Fisheries et al. v. James Walkus*, (July 10, 2002) 2002 BCSC 1030).

Analysis

[42] I find that Mr. Toor did not engage in any reprehensible conduct in pursuing his claims. Although I ultimately decided against him, a significant reason for this was my decision not to admit the Lewis Memorandum and Zebroff Notes under the principled exception to the rule against hearsay. It was understandable for him to be concerned about being mislead after he learned from the Ministry that the number of acres of planted blueberries was lower than what he had originally understood from these documents.

[43] With respect to the claims of fraudulent misrepresentation, I do not find that Mr. Toor engaged in reprehensible conduct of the type required for an award of special costs against the plaintiff. I specifically found that Mr. Toor was neither lying nor creating a false narrative: Reasons at para. 96.

[44] Plaintiff's counsel's decision to reference another case in which Mr. Kumar was found to be an unreliable witness was unhelpful. However, I agree that plaintiff's counsel did not forcefully argue that I should use that decision to impeach Mr. Kumar's credibility. This ill-advised strategic decision by counsel is not one for which his client should be punished through an award of special costs.

[45] I am not persuaded that the plaintiff's claims were so obvious lacking in foundation so as to constitute reprehensible conduct, nor can I ascribe any type of improper motive to Mr. Toor. I reject the argument that Mr. Toor's allegations were motivated by spite, vindictiveness, or any other form of ill-will: *Animal Welfare International Inc., v. W3 International Media Ltd*., 2016 BCCA 372 at para. 46. Rather, I find that these claims were motivated by his honest belief that he was sold something less than what he bargained for.

[46] On this basis, I dismiss the defendants' application for special costs.

Conclusion

[47] I award costs to the defendants at Scale B, except for the written submissions on costs and the appearance on September 24, 2024. In the Reasons at para. 171, I presumptively awarded costs to the defendants at Scale B, yet they chose to seek higher costs. They were unsuccessful and ought not recover costs for the written submissions and attendance required to advance same.

"Forth J."