COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lee v. Wedekind,*
2023 BCCA 287

Date: 20230713
Docket: CA47699

2023 BCCA 287 (CanLII)

Between:

Joanna Lee

Appellant
(Petitioner)

And

Alison Wedekind and Scott Wedekind

Respondents
(Respondents)

Before: Registrar T.R. Outerbridge

Assessment of Special Costs

Lee v. Wedekind, 2021 BCCA 372 (Chambers), dated October 4, 2021

Counsel for the Appellant:	M. Scherr
Counsel for the Respondents:	W.E. Perkinson
Place and Date of Hearing:	Victoria, British Columbia June 26, 2023
Written Submissions Received:	June 29 and July 7, 2023
Place and Date of Decision:	Vancouver, British Columbia July 13, 2023

Summary:

Assessment of special costs by the Registrar arising from a stay application that was not particularly complex, difficult or novel. The respondents sought $12,530.11 in special costs. Held: Costs assessed at $9,078.45.

Reasons for Decision of Registrar Outerbridge:

[1] The respondents in this appeal, Alison and Scott Wedekind, seek an assessment of their special costs totalling $12,530.11. For the reasons below, I award a tax-inclusive amount of $9,078.45.

[2] The Wedekinds were landlords who rented an apartment to the appellant, Joanna Lee. On the basis of excessive noise complaints and other disturbances, they tried to evict her in February 2021. Ms. Lee unsuccessfully appealed to the Residential Tenancy Branch ("RTB") and an order for possession was issued on 16 July 2021. A second RTB arbitrator upheld that order on 27 July 2021.

[3] On 26 July 2021, Ms. Lee filed a petition in the Supreme Court and sought to stay the 16 July order. The trial judge refused and ordered costs: 2021 BCSC 1843. In August 2021, Ms. Lee appealed that refusal to this Court. Then, within her appeal, applied in chambers to stay the trial judge's order refusing to stay the arbitrator's order: 2021 BCCA 372.

[4] When dismissing that stay application, the chambers judge noted that Ms. Lee had filed another petition in Supreme Court seeking to review the second arbitrator's decision. Within that petition, she had brought *ex parte* proceedings, obtaining several additional stays.

[5] The chambers judge observed:

> [36] I agree with the Wedekinds that in light of Ms. Lee's duplicate active Petitions and multiple *ex-parte* orders, the request for a stay of a refusal to stay related to the same subject matter is frivolous and vexatious. It has great potential to cause delay, confusion, and procedural difficulty in the proceedings below. I would go even further and say it is an abuse of this Court's process. Ms. Lee has inappropriately attempted to manipulate the judicial process. In light of this, which has resulted in unnecessary time and

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costs spent for the Wedekinds (and the courts), the Wedekinds are entitled to special costs.

[6] In addition to special costs, because this appeal was dismissed as abandoned under Rule 50(1) in February 2023, the Wedekinds may also recover their ordinary costs of the appeal: *Fry v. Botsford* (1902), 9 B.C.R. 207 (C.A.); *Westsea Construction Ltd. v. Veale*, 2014 BCCA 217 at para. 20. However, I would note for Ms. Lee's benefit, that a claim to those costs has been abandoned.

[7] Rule 71 of the *Court of Appeal Rules* governs special costs. Rule 71(2) states that, "if costs of the proceeding are ordered to be assessed as special costs, the registrar must allow each fee the registrar determines was properly or reasonably necessary to conduct the proceeding."

[8] Under Rule 71, all of the circumstances are considered in making an assessment. The following non-exhaustive factors are considered:

a) the complexity of the proceeding;

b) the difficulty or novelty of the matters involved;

c) the amount involved in the proceeding;

d) the time reasonably spent in conducting the proceeding;

e) the importance of the proceeding, or of the result obtained, to the party whose costs are being assessed;

f) the benefit, to the party whose costs are being assessed, of the services rendered by the party's lawyer;

g) the skill, specialized knowledge and responsibility required of the lawyer of the party whose costs are being assessed; and

h) any party's conduct that tended to shorten or unnecessarily lengthen the duration of the proceeding.

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[9] Reasonable disbursements necessarily or properly incurred and payable taxes are also recoverable: Rule 72.

[10] In this case, the order for special costs is made on the basis that Ms. Lee has abused the Court's process. Special costs of this nature are not compensatory, they are punitive and exist to "deter and… express the court's disapproval of litigation misconduct": see *Morriss v. British Columbia*, 2021 BCCA 451 at para. 22; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56.

[11] On any assessment of special costs, a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding. While there may be a close relationship between actual legal fees and special costs, they are not necessarily identical: *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110; *Prescott Strategic Investments Limited Partnership v. Flair Airlines Ltd.*, 2022 BCCA 443 at para. 27.

[12] In assessing the special costs here, I also observe the comprehensive review of the applicable principles within *Gichuru v. Smith*, 2014 BCCA 414, leave to appeal ref'd [2014] S.C.C.A. No. 547.

[13] Informed by these principles, I turn to assess the appropriate award.

[14] The $12,530.11 sought is divided as follows:

a) $9,119.65 in relation to the stay application, which includes $886.48 for settling the order; and

b) $3,410.46 in relation to the assessment itself.

[15] Dealing first with the factors under Rule 71, there is very little affidavit evidence on most of the factors that I must consider, other than a generic assertion that the accounts tendered were reasonable in relation to the services provided. While not fatal, this is not always ideal because it does not provide a clear basis for those fees and disbursements to be fully understood or challenged: see, for example, in the context of disbursements, *British Columbia (Attorney General) v. Le*,

2023 BCCA 200 at para. 39. As such, I would not draw any inference from Ms. Lee's decision not to cross-examine the Wedekinds' affiant in this particular case.

[16] That said, my own review of the record does not reveal anything complex or difficult about Ms. Lee's stay application. It plainly arises out of a set of unique facts, given the duplicative litigation that took place in the court below.

[17] There is not a significant sum involved in the litigation, nor is there any evidence before me about the importance of the proceeding. The respondents achieved a good result on this application, succeeding on it entirely and obtaining an award of special costs. There is nothing here suggesting conduct that would unnecessarily lengthen the stay application.

[18] The lead solicitor in this case, James A.S. Legh, is an experienced counsel of 34 years' call and his colleague, Mr. Perkinson, is a lawyer of 17 years' call to the bar of British Columbia. The rates charged by these counsel were reasonable in the circumstances.

[19] While their skill and knowledge exceed what may have been required for the purpose of this application, they were generally judicious with their time. That said, I agree with Ms. Lee's assertion there is some overlap between Mr. Legh and Mr. Perkinson's efforts. The evidence does not establish this was an application of sufficient complexity to warrant the efforts of two senior counsel conducting similar tasks consistently throughout: *Bassett v. Magee*, 2016 BCCA 329.

[20] For this reason, some reduction is warranted; however, I would not go as far as to deduct all of Mr. Legh's billings as suggested. I would instead remove time entries as follows: entries of 23 September totalling $585.00; entry of 27 September totalling $180.00; entries of 28 September totalling $270.00; and the entry of 28 September totalling $450.00, for a tax-inclusive amount of $1,663.20.

[21] In addition, there is one entry on 5 October 2021 that post-dates the stay application but does not seem clearly connected to the stay, the settlement of the order arising from the stay, or the assessment of costs. It is a discussion between

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counsel “re: Court of Appeal” in the sum of $378.00 (taxes included), which appears to fall properly within the ordinary costs of the appeal.

[22] With a reduction of $2,041.20, the costs in relation to the stay application and settlement of the order arising from that application are fixed at $7,078.45.

[23] I now consider the costs of the assessment itself.

[24] Even where the order is silent on the subject, an assessment of special costs typically includes “the costs of the special cost 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 at para. 141 (my emphasis), leave ref’d [2020] S.C.C.A. No. 140. The reasoning in *Le Soleil* forms a basis for allowing the costs of the assessment to also be assessed as special costs, absent an order to the contrary: *Wang v. The Owners, Strata Plan LMS2970*, 2021 BCCA 150 at para. 32.

[25] Ms. Lee argues that the circumstances here are different because these are the costs of an application rather than an appeal. In particular, she suggests that because the costs were not ordered payable “forthwith”, they should be considered part of the respondents’ now abandoned claim for ordinary costs in the cause of the appeal under s. 44(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6. I do not agree.

[26] Section 44(1) provides that, “[u]nless the court or a justice orders otherwise, a party who is successful on an appeal is entitled to costs of the appeal, including the costs of all applications made in the appeal.” Here, a chambers judge has “ordered otherwise” and awarded special costs for a specific application.

[27] Although the order is silent on the costs associated with the assessment flowing from that award, the costs of the assessment are special costs because they are a subsequent proceeding as contemplated in *Le Soleil*: at paras. 138, 141. In my view, it is immaterial whether that award originates from all or part of the proceeding for three reasons: firstly, as described in *Le Soleil,* it is the order that dictates the scale of the subsequent costs assessment within the proceeding: at para. 139.

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Secondly, it has been suggested that to conclude otherwise can create an injustice, depriving a party of special costs of an assessment on the more technical ground that they relate to only part of the proceeding: see, e.g., *Singh v. Devi*, 2021 BCSC 444 (Registrar). Thirdly, and most importantly, *Le Soleil* seems to contemplate both circumstances in any event:

> [140] …If a trial judge makes an order of special costs of the proceedings or <u>part of a proceeding</u>, it is open to the party who will have to pay those costs to apply to the trial judge to exempt the cost assessment in whole or in part from the order. I would note that such an application should be brought prior to the entry of the trial judge's costs order because once that order is entered, the trial judge will be *functus* in regards to this issue. Further, it must be remembered that an order of special costs is by its nature punitive. The order has usually been made because of misconduct in the litigation. If the order is in anyway unfair, the party has only itself to blame…
>
> [Emphasis added.]

[28] I see no basis to distinguish this reasoning in the appellate context, whether in relation to the costs of an appeal or specific application. A party who has had special costs ordered against them enjoys similar remedies in this Court and may seek, in advance, an order relating to the assessment. That was not done here.

[29] Finally, I am aware that in *Waters v. Mitchie*, 2019 BCCA 218, this Court observed that the term "application" did not incorporate the costs of an assessment; however, that case was focused on the interpretation of the ordinary costs tariff under the *Supreme Court Family Rules.* There, the legislature made an express decision to omit a separate tariff item for an assessment. In those circumstances, set by statute, it is obvious that the costs of the assessment cannot be "rolled into" the costs of the application. The reasoning in *Waters,* delivered in a very different context, is distinguishable and cannot overtake the practical approach in *Le Soleil.*

[30] Reviewing the amounts claimed for the assessment itself, I would observe the following:

a) The assessment itself was not complex, difficult or novel;

b) The amount involved was not significant;

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c) The Wedekinds employed a student to assist in the work, properly allocating the time between more senior and junior lawyers; and

d) On the assessment itself, the bill was reduced to an extent, so it cannot be fairly said that the Wedekinds achieved the full results of their efforts.

[31] In addition, Ms. Lee raises some valid objections to some of the time billed in that, chronologically, there seems to have been some errors made in the bills submitted. I agree with Ms. Lee that the time preparing written submissions should be disallowed, given the matter could have been managed more efficiently at the hearing. I would fix the costs of the assessment at a tax-inclusive amount of $2,000.00.

[32] I will sign a certificate of costs in the amount of $9,078.45.

“T.R. Outerbridge, Registrar”

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