IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ishrat v. Anwar,*
2024 BCSC 125

Date: 20240129
Docket: S229144
Registry: New Westminster

Between:

Nabeela Ishrat

Plaintiff

And

Ali Anwar and Sheeraz Anwar

Defendants

And

Shahbaz Khan

Defendant by Counterclaim

Before: The Honourable Mr. Justice Riley

Supplementary Reasons for Judgment on Costs

Counsel for the Plaintiff Nabeela Ishrat and Defendant by Counterclaim Shahbaz Khan:	P.W. Cote
Counsel for the Defendants Ali Anwar and Sheeraz Anwar:	O. Stoklosa G.K. Biring
Date of Written Submissions of Nabeela Ishrat:	November 14, 2023
Date of Written Submissions of Ali Anwar and Sheeraz Anwar:	November 23, 2023
Date of Reply Submissions of Nabeela Ishrat and Shahbaz Khan:	November 29, 2023
Place and Date of Judgment:	New Westminster, B.C. January 29, 2024

Introduction

[1] This is a ruling on costs following a 20-day trial on a civil action arising from a dispute between two factions of an extended family. The plaintiff Nabeela Ishrat (Nabeela) and the co-defendant by counterclaim Shahbaz Khan (Shahbaz) are brother and sister, and are the aunt and uncle of the defendants Sheeraz Anwar (Sheeraz) and Ali Anwar (Ali). The trial involved multiple overlapping claims. Broadly speaking, one set of claims had to do with the beneficial ownership of a townhouse, acquired by Sheeraz and Ali and registered in their names, using funds obtained from a Guaranteed Investment Certificate ("GIC") that listed all of the parties as joint owners. Another set of claims involved a dispute about whether Sheeraz and Ali were properly compensated, or compensated at all, for work they performed at certain franchise businesses owned and operated by Nabeela and Shahbaz. For reasons explained in detail below, I find that success at trial was divided, such that neither the plaintiff nor the defendants were substantially successful. In the result, the parties should bear their own costs.

The Nature of the Claims

[2] As explained above, the action involved essentially two sets of inter-related claims, which I will call the townhouse claims and the franchise remuneration claims.

[3] The townhouse claims involved a townhouse unit in Maple Ridge, acquired by the defendants Sheeraz and Ali and registered in their name. At trial, Nabeela sought a declaration that she was the sole beneficial owner of the townhouse, claiming that she gave Sheeraz and Ali the funds to purchase the property on the understanding that they would acquire title in their name but that she would be the beneficial owner. The Anwars denied this and counterclaimed for a declaration that they were the sole beneficial owners, taking the position that they purchased the property in their own right, with funds given to them by Nabeela in compensation for their hitherto unpaid work at a Mucho Burrito restaurant in Regina, owned by Shahbaz and operated as a joint undertaking by Shahbaz and Nabeela.

[4] The franchise remuneration claims related to three businesses, namely a Mucho Burrito restaurant in Regina, a Mucho Burrito restaurant in Vancouver, and a Maaco Autobody shop in Abbotsford. Nabeela and Shahbaz owned and operated the Mucho Burrito franchises, and Shahbaz owned and operated the Maaco franchise. In their counterclaim, Sheeraz and Ali sought damages for conversion of wages, or unjust enrichment for failure to pay wages, in connection with their work at the two Mucho Burrito franchises, and Sheeraz brought a similar claim in connection with work that he allegedly performed at the Maaco franchise. In response to these claims, Nabeela and Shahbaz argued that Sheeraz and Ali were in fact paid for all of their work at the two Mucho Burrito restaurants. With respect to Maaco, Shahbaz took the position that Sheeraz never worked there, and that he simply used space at the Maaco shop to carry on his own car-flipping business.

The Outcome of the Trial

[5] In reasons for judgment indexed as *Ishrat v. Anwar*, 2023 BCSC 1838, I reached the following conclusions with respect to the competing claims:

a) Sheeraz and Ali were not paid up front for their work at the Mucho Burrito restaurants because they had agreed to work at these businesses as part of a family joint venture in which they would receive lump sum compensation when Nabeela and Shahbaz were in a position to pay it.

b) In furtherance of this arrangement, Sheeraz and Ali's names were added as joint owners to a GIC in compensation for their work at Mucho Burrito Regina, and the GIC was then used to purchase the townhouse as a continuation of the family joint venture.

c) On this basis, I allowed Nabeela's claim for a declaration of beneficial ownership, in part, ruling that she was a beneficial owner, on behalf of herself, her husband, and Shahbaz, of a one-half interest in the townhouse.

d) I then found that in the next phase of the joint family venture, Sheeraz and Ali worked at Mucho Burrito Vancouver, but ultimately never received any renumeration because Mucho Burrito Vancouver was a financial failure. I therefore dismissed Sheeraz and Ali's counterclaim for conversion of wages or unjust enrichment in respect of the Mucho Burrito franchises.

e) I allowed Sheeraz and Ali's claim for occupation rent in respect of the Maple Ridge townhouse, on the theory that once the family joint venture came to an end and Sheeraz and Ali sought to take possession of the townhouse, Nabeela refused to vacate it and thus had to account for her exclusive use of the property.

f) I went on to find that Sheeraz in fact worked as a manager for Maaco and was never paid, and on that basis, I allowed his counterclaim against Shahbaz for unjust enrichment in respect of work performed at Maaco.

g) I dismissed all other claims and counterclaims, including Sheeraz and Ali's claim for punitive damages against both Nabeela and Shahbaz.

Legal Principles

[6] The starting point under Rule 14-1(9) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, is that costs follow the event. A trial is considered an "event". Thus, the party who succeeds at trial is generally entitled to costs. At the most basic level, the plaintiff is said to have attained success where liability is proven and a remedy is granted, and the defendant is said to have attained success where the claim is dismissed: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346, at para. 90 [*Sze Hang Holding*].

[7] Claims and counterclaims are generally regarded as distinct actions warranting discrete costs outcomes: *Litt v. Gill*, 2016 BCCA 288, at paras. 54–56. However, where the claims are "completely intertwined" or represent two sides of the same coin, the court may choose to consider them together when determining entitlement to costs: *Sze Hang Holding* at para. 96; *Belpacific Excavating & Shoring*

Limited Partnership v. Crown and Mountain Creations Ltd., 2022 BCSC 412 [*Belpacific*] at para. 10. All of this is once again consistent with the principle that costs should generally follow the event.

[8] In cases where neither party prevails on all of the matters litigated at trial, the principle that costs follow the event is sometimes difficult to apply: *Sze Hang Holding* at para. 96. In such circumstances, the court must ascertain which party was "substantially successful" at trial, having regard to the four-step analysis articulated in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, at paras. 45–46. The objective of this analysis is to determine which of the parties attained overall success so as to be entitled to costs, as a manifestation of the general principle that costs ought to follow the event.

[9] Under the four-step approach alluded to above, "substantial success" has been held to mean success on 75% of the central points or matters litigated at trial. However, the jurisprudence also cautions against applying a purely arithmetical analysis in assessing which party attained substantial success at trial. Rather, a global assessment is required, "looking at the various matters in dispute and weighing their relative importance": *Sze Hang Holding* at para. 91; see also *Belpacific* at para. 7.

[10] Finally, one must not lose sight of the fact that success is determined by reference to the outcome of the claims, not the quantum or dollar amount of any resulting judgment. Thus, the fact that a party obtains judgment for less than the amount sought will not, on its own, deprive that party of an entitlement to costs: *Cottrill v. Utopia Day Spas and Salons Ltd.,* 2019 BCCA 26, at paras. 18–19.

The Positions of the Parties

[11] Nabeela submits that she was successful in her claim for a declaration of beneficial ownership of the townhouse, and she also succeeded in resisting Sheeraz and Ali's counterclaim for damages based upon conversion of, or failure to pay wages. Thus, Nabeela submits that, as the successful party in both her claim and the counterclaim against her, she should be entitled to costs. Nabeela goes on to

argue that even if the court adopts the four-step "substantial success" analysis, she was the substantially successful party and ought to be awarded her costs.

[12] Sheeraz and Ali contend that the Court ought to apply the "substantial success" analysis, and under that approach they were the successful parties. Sheeraz and Ali submit that "their evidence was accepted on all of the contentious issues", and they were at least 75% successful in their claims. In particular, Sheeraz and Ali were successful in resisting a declaration that Nabeela was the sole beneficial owner of the townhouse; the Court found that Sheeraz and Ali were in fact beneficial owners of a one-half interest in the townhouse, based on their evidence about unpaid work for Mucho Burrito. Sheeraz succeeded in his claim for unjust enrichment in respect of his work at Maaco. Sheeraz and Ali were also successful in obtaining an order for occupation rent. Finally, Sheeraz and Ali argue in the alternative that if the Court does not agree that they were substantially successful, no one attained substantial success, such that each party should bear their own costs.

[13] Neither Nabeela nor Sheeraz and Ali argued for a separate costs order either for or against Shahbaz, the defendant by counterclaim. This is perhaps not surprising, in that Nabeela and Shahbaz were represented by the same counsel, filed a single response to the counterclaim, and presented their evidence at trial together.

Analysis

[14] I do not agree with Nabeela that she was entirely successful in her claim for a declaration in relation to the townhouse. She sought a declaration that she was the sole beneficial owner of the property, and in the end the Court granted an order that she was a beneficial owner of one-half of the property, on behalf of herself, her husband, and Shahbaz. Nor do I agree that Nabeela was entirely successful in resisting the claim for unpaid wages. Again, she was partially successful, in that no monetary order was made against her, but the Court found that she added Sheeraz and Ali's names to the GIC as compensation for the work they performed in Regina,

which in turn played into the result in respect of the competing claims to the townhouse. My focus here is not on the factual findings, but on the manner in which those factual findings impacted on the claims and the outcomes of those claims.

[15] To be clear, this is not a case where Nabeela's key claim was successful but the quantum of the monetary award was less than she sought. Rather, Nabeela was only partially successful in her claim. She sought a declaration that she was the sole beneficial owner of the townhouse, and did not get it. Similarly, in defending the franchise remuneration claims brought against her, Nabeela argued that Sheeraz and Ali were paid wages for their work at Mucho Burrito, and that their names were added to the GIC as bare trustees, but I rejected that position and found that Sheeraz and Ali were not paid wages and that their names were added to the GIC as joint beneficial owners in recognition of their work at Mucho Burrito Regina. Hence, while I dismissed the claims against Nabeela relating to unpaid wages, the underlying findings contributed to my conclusion that Nabeela was not the sole beneficial owner of the townhouse. This demonstrates the extent to which the claims were inter-related.

[16] I find that since there were multiple issues at play, and since success was divided, this is a proper case in which to apply the "substantial success" analysis.

[17] I consider that the two key issues at trial were the question of beneficial ownership of the townhouse (per paragraphs 291(a) and (b) of the reasons), and the question of remuneration or compensation for Sheeraz and Ali's allegedly unpaid work at the three franchise businesses (per paragraphs 291(d), (e), and (f) of the reasons). Neither party was entirely successful on either of these issues.

[18] With regard to the townhouse, neither the plaintiff nor the defendants were successful in the relief they sought, namely a declaration that they were the sole beneficial owner of the property.

[19] With regard to remuneration for work performed by Sheeraz and Ali at the three franchises, Sheeraz and Ali succeeded to the limited extent of establishing that

they were added to the GIC as a means of compensation for their work at Mucho Burrito Regina (which played into the finding on the townhouse claims), but Sheeraz and Ali were ultimately unsuccessful in their claims for conversion or unjust enrichment in respect of either Mucho Burrito Regina or Mucho Burrito Vancouver. Sheeraz was, however, successful in his claim for unjust enrichment in respect of work performed at Maaco.

[20] Sheeraz and Ali were also successful in the occupation rent claim (per paragraph 291(c) of the reasons), but I agree with Nabeela's counsel that this was a relatively minor issue in the litigation, and that the outcome was largely bound up with the conclusion that Sheeraz and Ali were beneficial owners of one half of the townhouse.

[21] Finally, Sheeraz and Ali were unsuccessful in their claim for punitive damages (per paragraph 291(g) of the reasons), and Nabeela successfully resisted this claim.

[22] Considering all of the issues raised at trial and viewing the outcome globally, I conclude that neither party was substantially successful. In reaching this conclusion, I take guidance from case law instructing that the assessment of which party enjoyed substantial success is not a matter of simply cataloguing the issues and listing which party succeeded on each of them to determine whether either party hit the 75% mark in terms of some overall tally of claims and corresponding outcomes. As Justice Burke put it in *Belpacific* at para. 9:

> [W]here there are multiple issues at trial, the court should identify which issues were of the greatest importance to the parties and determine, on a global basis, whether any litigant obtained substantial success on these grounds. As the Court stated in *Aschenbrenner v. Yahemech*, 2010 BCSC 1541, "[s]ubstantial success is not determined by counting up the number of issues and allocating success on each, or by comparing dollar amounts, but by assessing success in the major issues of substance": para. 17.

[23] Having determined that neither party was substantially successful, I accept Sheeraz and Ali's alternative position that since success at trial was truly divided, each party should bear their own costs. Counsel cites two cases where the court determined that in the absence of either party attaining substantial success, each

party should bear their own costs. See *Grape Expectations Wine Emporium Inc. v. Baker*, 2010 BCSC 1069, at para. 14; *Toor v. Dhaliwal*, 2010 BCSC 1065, at paras. 146–148. There are many more cases where this has been the result, including the more recent decisions *Sze Hang Holding* (at para. 96), and *Belpacific* (at para. 22).

[24] I conclude by noting, as pointed out above, that none of the parties suggested there should be a separate costs order either for or against Shahbaz. I take this to be a considered position, which makes a certain amount of sense considering that Nabeela and Shahbaz filed a single response to counterclaim and were represented by the same counsel at trial. There is no "overarching formula" in such circumstances: *West Lonsdale Medical Clinic Inc. v. 0706394 B.C. Ltd.*, 2020 BCSC 170 at para. 24, citing *Seaport Crown Fish Co. v. Vancouver Port Corp.*, 2000 BCSC 68 at paras. 33–34; *Lettuce Serview Limited Partnership v. Western Delta Lands Partnership*, 2008 BCSC 859, at paras. 15–16. The court will consider a variety of factors such as whether co-parties were jointly represented, whether they shared a common interest, and how much time and complexity the unsuccessful co-party's case added to the trial: *Mainland Sawmills Ltd. v. IWA-Canada Local 1-3567*, 2008 BCSC 454, at paras. 6–12. I have certainly factored Sheeraz's success in his counterclaim against Shahbaz into the conclusion that, when looking at matters globally, no party to this proceeding was substantially successful at trial.

Request to Correct a "Possible Clerical Error" in the Trial Order

[25] The order after trial has not yet been entered. Counsel for Sheeraz and Ali says there is a "possible clerical error" or mathematical error in the order. Counsel submits that there is an inconsistency between the factual findings at para. 216 of the reasons and the quantum of damages awarded to Sheeraz for unjust enrichment at para. 288, and that if this is reflective of a "clerical error", it should be corrected before the order after trial is entered.

[26] I agree with counsel for Nabeela that a submission on costs is not the appropriate forum to address such concerns. If counsel has a concern that there is a manifest error in the order after trial, then an application should be made to correct

the order or even re-open the case in some limited manner to address the error. Any such application must be made before the order is entered. Given the passage of time, I would direct that any such application be filed no later than 21 days after the release of these reasons, and that the parties schedule the matter for hearing by contacting Supreme Court Scheduling to arrange a date before me, at 9:00 a.m., on any date when I am available to hear it.

"Riley J."