

Court of King's Bench of Alberta

Citation: ATB v Real Industries 333 Corp, 2023 ABKB 598

Date: 20231023
Docket: 2201 13941
Registry: Calgary

Between:

ATB Financial

Applicant

- and -

Real Industries 333 Corp, Real Enterprises 333 Corp, Hardik Patel also known as Ashwingh Patel, Sonika Patel, SGVP Gurukul Canada, Spot Ads Inc, John Doe, Mary Doe, ABC Corporation, the Toronto-Dominion Bank and the Royal Bank of Canada

Respondents

**Endorsement
of the
Honourable Justice M.H. Hollins**

[1] ATB Financial was granted an Order directing that money in the bank accounts of Hardik and/or Sonika Patel at the Toronto-Dominion Bank (TD Bank) and in a TD Waterhouse Canada account (TDW) be impressed with a constructive trust and returned to ATB; 2023 ABKB 503.

[2] The parties have now asked that I make further decisions on the proper form of Order and the appropriate costs disposition.

The TDW Account

[3] The Patels take issue with the inclusion of the TDW account in the Order, saying that the money in that account (\$250,000) should remain in the possession of the accountholder, Sonika Patel, because TDW was not and is not a named Defendant in this Action.

[4] That is more than an issue with the form of Order. In my view, any arguments about which accounts were liable to attachment is a substantive issue that ought to have been at the hearing of this matter. However, in my view, the TDW account is properly included in the Order in any event.

[5] The Patels argue that to include the TDW account is to treat TD and TDW as the same entity when they are not. They rely on *Royal Bank v Rastogi*, 2011 ONCA 47. In that case, Mr. Rastogi's accounts at the Royal Bank had been frozen as a result of a suspected fraud. In addition to his two RBC accounts, the Royal Bank also froze his Royal Bank Direct Investing (DI) account, notwithstanding that DI was not a named party. Mr. Rastogi applied for summary judgment directing DI to allow him access to that account.

[6] The chambers judge granted that order and, in substance, that decision was upheld on appeal. The Patels rely on this passage from the appeal case:

The motion judge determined that RBC Direct had no claim against Rastogi and therefore no debt that it could purport to set off against the credit in Rastogi's accounts at RBC Direct. The motion judge also rejected the argument that because of the corporate affiliation between RBC and RBC Direct, RBC was entitled to treat Rastogi's accounts in RBC Direct as if they were accounts in RBC. The motion judge said at para. 13:

More importantly, Direct Investing ("DI") makes no claim against Rastogi. It has no legal basis, in set off or otherwise, for freezing his accounts and holding on to his funds, absent a court-granted injunction, which in all likelihood would not be granted on these facts. In any event, no such injunction has been sought by DI.

Royal Bank v Rastogi, 2011 ONCA 47 at para.13.

[7] In this case, I did not include the TDW account because TDW and TD Bank were treated as one entity. The TDW account was included because that is where the money subject to the constructive trust ended up.

[8] It is very important to note that, in the *Rastogi* case, RBC had not obtained any court ordered relief entitling it to money in the DI account. In fact, not only did it not have an injunction order, it had not even applied for one in the two years after initiating the lawsuit.

[9] In this case, ATB applied for and was granted the very kind of order - a constructive trust imposed on the TDW funds - that RBC did not have in the *Rastogi* case. The TDW funds are impressed with a constructive trust under my prior decision, not because TDW is a corporate affiliate of TD Bank but because the funds transferred out of the ATB RE3C account by Hardik and Sonika Patel to their own personal accounts at different institutions unjustly enriched them to the extent of all monies held by them anywhere.

[10] In her response to this argument, counsel for ATB explained that TD Bank was named as a party to trigger its ability to freeze the account under s.437(2) of the *Bank Act*, SC 1991, c.46.

However, a bank can also refuse to return monies to the accountholder under s.437(2)(b) of the *Bank Act* which reads as follows:

Deposit acceptance

437 (2) Paragraph (1)(b) [payment of funds to the accountholder] does not apply if, before payment, the money deposited in the bank pursuant to paragraph (1)(a) is claimed by some other person

(a) in any action or proceeding to which the bank is a party and in respect of which service of a writ or other process originating that action or proceeding has been made on the bank, or

(b) in any other action or proceeding pursuant to which an injunction or order made by the court requiring the bank not to make payment of that money or make payment thereof to some person other than the depositor has been served on the bank,

and, in the case of any such claim so made, the money so deposited may be paid to the depositor with the consent of the claimant or to the claimant with the consent of the depositor.

[11] My decision imposing a constructive trust on the TDW funds and a direction that those funds be remitted back to ATB is certainly an “order” within s.437(2)(b). While no interim injunction application was made in this case, ATB, based on the result of its application for summary judgment, would likely have obtained one had it made that application instead.

[12] Lastly, I note as a practical matter that TDW, even though not a named Defendant, was represented by counsel for TD Bank, who acknowledged notice of ATB’s application and, like TD Bank, took no position.

[13] The TDW account and the money in that account are properly included in the form of Order.

Costs

[14] On costs, ATB seeks costs of \$28,574.70 which is double Column 5 of Schedule “C” to the *Alberta Rules of Court* for a contested Special Chambers application. ATB is not seeking costs of the whole Action as it intends to pursue the Defendants for the remaining amounts outstanding.

[15] The Patels object to any award of costs at this stage. They say that costs should be in the cause or at least reserved for the trial judge. There are two reasons put forth for this position.

[16] The first is that my decision granted an equitable remedy with no finding of wrongdoing. ATB chose not to apply for summary judgment based on its allegations of fraud against the Patels but rather on the basis of unjust enrichment. But the general rule is that the party which is successful, on whatever ground, is entitled to its costs. The fact that summary judgment was granted on the basis of unjust enrichment does not disentitle ATB, as the successful party, from claiming its costs of this application.

[17] The Patels also argue that costs should be reserved to trial in case the allegations of fraud made by ATB are not proven. Again, no allegations of fraud were argued on the application

before me, so findings made at trial regarding fraud have no bearing on the disposition of the application before me. If allegations of fraud are not proven at trial, the trial judge will have the ability to deal with costs of those proceedings as he or she sees fit.

[18] In terms of the calculation of costs, ATB seeks double Column 5 costs based on: (1) the complexity of the matter; and (2) the Patels' rejection of an offer of settlement. To this, the Patels respond that the matter was not particularly complex and that the offer of settlement referred to was not a genuine offer because the only compromise offered by ATB was a waiver of costs of the application.

[19] The Patels rely on *Willow v Boseke*, 2020 ABQB 579, in which Justice Neilson declined to double costs based on an initial formal offer of settlement, although he did treat a subsequent offer as a genuine offer. Neilson J said the first offer did not operate to trigger double costs because it was made before the parties had completed questioning, indeed while extensive written interrogatories and undertakings remained outstanding; para.10.

[20] There are many cases in which this court has confirmed that, depending on the circumstances of the case, a waiver of costs can be a genuine offer. The key consideration seems to be whether the offer is made at a stage of proceedings where the offeree has sufficient information to make an informed decision about the offer. If an offer to waive costs is made at the outset of an action, when the offeree has no ability to assess his liability, it may be unjust to penalize him for rejecting the offer.

[21] In *Union Square Apartments Ltd v Academy Contractors Inc*, Justice Topolinski reviewed the guidance of our Court of Appeal on "genuine offers" and said in summary:

Nominal settlement offers that include a waiver of costs incurred to the date of service may be 'genuine' if they adequately reflect the relative strength of the parties' positions at the material time: *Carbone v. Whidden*, 2015 ABCA 255, [2015] A.J. No. 894 (Alta. C.A.) at paras 36-39; *Breitkreuz v. Alberta (Minister of Infrastructure)*, 2016 ABQB 377, [2016] A.J. No. 765 (Alta. Q.B.); *Mraz v. Herman*, 2016 ABQB 14, [2016] A.J. No. 19 (Alta. Q.B.) at paras 16-17; *Blaze Energy* at paras 92-93; *H. (S.G.) v. Gorsline*, 2001 ABQB 671, 292 A.R. 329 (Alta. Q.B.) at para 13; *Jama v. Bobolo*, 2002 ABQB 216, 311 A.R. 362 (Alta. Q.B.) at para 19.

However, nominal offers to waive costs that are made early in the litigation will not be considered to be 'genuine' if the offeror could not possibly know the strength of their position at that time. An example of this scenario is *Marathon Canada Ltd. v. Enron Canada Corp.*, 2008 ABQB 770, 447 A.R. 89 (Alta. Q.B.), where the Plaintiff offered to settle if the Defendant paid the full amount of its claim and discontinued its counterclaim in exchange for the Plaintiff waiving costs. The offer came early in the litigation before questioning, and after only two of twenty-one affidavits of records exchanged.

Union Square Apartments Ltd v Academy Contractors Inc, 2017 ABQB 151 at paras.18, 19

[22] ATB's offer was to discontinue this application, without costs, if the Patels returned the money available in the TD accounts to ATB. The offer was made on June 21, 2023 with express reference to its use respecting costs after the matter was decided. Given that the application

proceeded on August 22, 2023, I infer that most of the evidence was in place by the time of the offer as the parties' Briefs would have been due well in advance of the hearing date. In addition, this was a situation in which the Patels had full knowledge of all the circumstances surrounding the transfer of these funds because they completed the transfers themselves.

[23] Further, ATB notes that the offer did not include the payment at that point of pre-judgment interest. I do not assign a great deal of weight to that, as there was no express waiver or deferral of pre-judgment interest; it is simply not mentioned. It may not have been in the contemplation of either party at that point although it has arisen now. Further, even ATB describes it now as a deferral, not a waiver, of pre-judgment interest.

[24] On the issue of double costs, I note that the amount sought and recovered was approximately \$30M, many times higher than the Column 5 floor amount. Further, in my view, the matter was significantly complex to justify double Schedule "C" costs, particularly in light of the total claimed of roughly \$28,000.

[25] ATB will have its costs of \$28,574.70.

Pre-Judgment Interest

[26] ATB has included pre-judgment interest of \$798,356.33 (to September 1, 2023) in its form of Order. The Patels object to the inclusion of any pre-judgment interest because they again assert that no findings of wrongdoing were made against them and that pre-judgment interest should await the findings at trial.

[27] While I agree that the Notice of Application was deficient in failing to identify summary judgment as the form of relief sought, both counsel agreed at the hearing that this was in fact an application for summary judgment. It is therefore not correct for counsel for the Patels to say that no judgment was granted against them – it was.

[28] The pre-judgment interest included in the proposed form of Order is calculated only on the amounts effectively included in the summary judgment, namely \$31,199,150. Any further pre-judgment interest on remaining amounts claimed will await trial but the Order properly includes pre-judgment interest on the judgment amount I awarded.

Conclusion

[29] The form of Order submitted by ATB (Tab 1 to Ms. Deering’s correspondence of September 21, 2023) is proper in respect of the inclusion of the TDW account, the calculation of costs and the inclusion of pre-judgment interest. A signed copy will be provided to counsel forthwith.

Heard on the 3rd day of October, 2023.

Dated at the City of Calgary, Alberta this 23rd day of October, 2023.

M.H. Hollins
J.C.K.B.A.

Appearances:

Jordan Deering
for the Applicant, ATB Financial

Ryan Henriques
for the Real 333 Companies and Hardik and Sonika Patel