IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lawetz v. Wigboldus,*
2024 BCSC 2172

Date: 20241129
Docket: S227806
Registry: Vancouver

2024 BCSC 2172 (CanLII)

Between:

Tyrone Lawetz

Plaintiff

And

John Wigboldus

Defendant

Before: The Honourable Justice Whately

Reasons for Judgment on Costs

Counsel for the Plaintiff:	S.A. Sloane
Counsel for Defendant:	A.P. Morrison
Written Submissions of the Plaintiff:	November 7, 2024
Written Submissions of the Defendant:	October 24, 2024 November 14, 2024
Place and Date of Judgment:	Vancouver, B.C. November 29, 2024

Table of Contents

POSITION OF THE PARTIES **3**
ANALYSIS **4**
Special Costs 4
Increased Costs 6
Double Costs 7
CONCLUSION **10**

2024 BCSC 2172 (CanLII)

2024 BCSC 2172 (CanLII)

[1] On July 15, 2024, the parties appeared before me in Chambers. Mr. Wigboldus requested that I summarily dismiss Mr. Lawetz's claim against him pursuant to Rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[2] In my reasons for judgment, indexed as *Lawetz v. Wigboldus*, 2024 BCSC 1867, I dismissed Mr. Lawetz's claim in its entirety. As Mr. Wigboldus was the successful party, I awarded costs to him. However, at the request of Mr. Wigboldus's counsel, I also provided an opportunity for the parties to provide further written argument on costs. If the parties chose not to provide those submissions within the time frame I provided, I ordered that Mr. Wigboldus be granted costs at Scale B.

[3] The parties subsequently provided written submissions on costs. This is therefore my updated decision on costs, which will replace paras. 114−116 of *Lawetz v. Wigboldus*, 2024 BCSC 1867.

<u>Position of the Parties</u>

[4] I will not repeat all the facts of the case in this decision.

[5] In short, Mr. Lawetz claimed that Mr. Wigboldus defamed him because Mr. Wigboldus made comments about him to a third-party who was interviewing Mr. Lawetz for a position at her company. The crux of the decision was that Mr. Wigboldus made the comments in the context of providing a job reference and, as such, the comments were covered by qualified privilege. I also found that Mr. Lawetz did not establish that the comments caused the loss of the job opportunity and that Mr. Lawetz failed to adduce any evidence of malice on the part of Mr. Wigboldus.

[6] Mr. Wigboldus is now seeking special costs against Mr. Lawetz. Mr. Wigboldus argues that Mr. Lawetz pursued a meritless claim for an improper purpose and that this conduct was reprehensible and deserving of rebuke.

[7] In the alternative, Mr. Wigboldus seeks:

2024 BCSC 2172 (CanLII)

- increased costs due to unusual circumstances that would make an ordinary award of costs unjust; or

- double costs because Mr. Lawetz unreasonably rejected two offers to settle.

[8] Mr. Lawetz says that he pursued his claim without malice and that his sole intention was to uphold his rights and protect his reputation. He says that while the claim was ultimately dismissed, it was not so unreasonable as to attract an award of special costs.

[9] Mr. Lawetz says that Mr. Wigboldus has not established why ordinary costs at Scale B would be unjust, and further, that it was not unreasonable for him to reject the offers to settle.

[10] Mr. Lawetz also argues that he has not engaged in the sort of reprehensible or unreasonable conduct that would warrant a punitive, special, increased, or double cost award being made against him.

[11] He therefore argues that the appropriate cost award is an award of ordinary Scale B costs.

Analysis

[12] The usual costs rule, in accordance with Rule 14-1 ss. (1) through (5), is that the successful party is awarded costs. Except in specifically enumerated situations, those costs are to be assessed as party and party costs and the quantum is to be determined by the Registrar.

Special Costs

[13] The principles which guide the Court in awarding special costs are well-known and not in dispute. The court may make an award of special cost in the face of reprehensible conduct that is scandalous or outrageous, or in response to milder forms of conduct that is nevertheless deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242, 1994 CanLII 2570 (C.A.).

[14] Counsel have referred me to the principles stated in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73, which enumerate guiding principles that may be considered when awarding special costs:

> a) the court must exercise restraint in awarding special costs;
>
> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
>
> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
>
> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
>
> e) special costs can be ordered against parties and non-parties alike; and
>
> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[15] Mr. Wigboldus's primary argument with respect to Mr. Lawetz's "reprehensible" conduct is that he pursued a meritless claim, and did so for an improper purpose, namely, to intimidate Mr. Wigboldus.

[16] He relies on excerpts from Mr. Lawetz's examination for discovery, in which Mr. Lawetz mused that by filing the lawsuit, he may have discouraged Mr. Wigboldus from making further comments about Mr. Lawetz. Mr. Lawetz also stated that he hoped Mr. Wigboldus "learned his lesson".

[17] This behaviour falls well below the evidence required to establish that Mr. Lawetz pursued a claim for an improper purpose.

[18] I dismissed Mr. Lawetz's claim because the comments at issue were made by Mr. Wigboldus during a job reference call, and I therefore found that they fell squarely within the boundaries of qualified privilege. It is certainly arguable that Mr. Lawetz faced an uphill battle to prove his claim. He perhaps should have reassessed his claim after learning more about the circumstances of the reference call during discovery, and after making certain admissions of his own during

2024 BCSC 2172 (CanLII)

examinations for discovery. These factors, among others, led me to dismiss his application under Rule 9-5.

[19] I accept that in some instances, courts have found that a party's failure to appreciate or accept the "manifest deficiency" of their claim can demonstrate a reckless indifference to the interest of the other party, and that such conduct occasionally warrants a special cost award. That being said, such cases generally also have an "extra element," such as misconduct or an abuse of process, which supports the special cost award: *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 53.

2024 BCSC 2172 (CanLII)

[20] Regardless of the summary dismissal of Mr. Lawetz's claim, Mr. Wigboldus has not established that Mr. Lawetz's conduct in pursuing his claim, or his conduct during the course of the litigation, was so recklessly indifferent that it rises to the threshold of reprehensible. He has not demonstrated any exceptional circumstances, abuses of the court's process, misleading of the court, or any other breaches of rules that prejudiced him.

[21] I therefore find that special costs are not appropriate in this context and I decline to make that award.

Increased Costs

[22] In the alternative, Mr. Wigboldus seeks increased costs against Mr. Lawetz. These are also known as "uplift costs". Sections 2(5) and (6) of Appendix B of the *Rules* read as follows:

> (5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3(1).
>
> (6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that

> party would be entitled under the scale of costs fixed under subsection (1) or (4).

[23] In *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462, Justice Maisonville held:

> [29] Costs under s. 2(5) are known as uplift costs. To award uplift costs, there must first be unusual circumstances and, second, the unusual circumstances must result in the award of costs being grossly inadequate or unjust: *Chandler v. Rasmussen*, 2013 BCSC 1461 at para. 39.

[24] Justice Maisonville then went on, at para. 34, to provide examples of unusual circumstances which may attract an award of uplift costs, these factors include:

- misconduct by the unsuccessful party;
- the serious nature of the allegations;
- the complexity or difficulty of the issues in the litigation; and
- the importance of the litigation to the parties or to the development of the law generally.

[25] I am unable to find that Mr. Lawetz's conduct in pursuing his claim, however unlikely to succeed, constituted an unusual circumstance that warrants uplift costs.

[26] The position taken by Mr. Lawetz during the summary trial was advanced in a reasonable manner, albeit unsuccessfully. The litigation was not unusually complex, nor was it characterized by incivility, or conducted in a manner that caused unusual or extraordinary expense to Mr. Wigboldus. While defamation is a serious allegation, the claims against Mr. Wigboldus were not such that he would have been subject to extraordinary difficulty, stigma, or scrutiny.

[27] In sum, none of the "unusual circumstances" described in *Shen* are present, nor am I persuaded that an ordinary award of costs would be unjust. Therefore, I decline to make an award for increased costs.

Double Costs

[28] Rule 9-1 allows the court to depart from the general costs rule where an offer to settle has been made. Rule 9-1(5)(b) provides: "In a proceeding in which an offer

2024 BCSC 2172 (CanLII)

to settle has been made, the court may […] (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”.

[29] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court of Appeal discussed the guiding principles of the double costs rule, stating:

> [25] An award of double costs is a punitive measure against a litigant for that party’s failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that 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”: [citations omitted.]

[30] Where the court considers making a double costs award under Rule 9-1(5), Rule 9-1(6) provides that the court may consider the following:

> (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.

[31] Absent compelling evidence to the contrary, I consider the relative financial circumstances of the parties to be a neutral factor and so I base my decision on the other factors.

[32] Mr. Wigboldus’s first offer, dated May 17, 2023, was provided to Mr. Lawetz prior to examinations for discovery, but after certain document disclosures that, in Mr. Wigboldus’s view, revealed critical weaknesses in Mr. Lawetz’s case.

[33] The offer was essentially a “walk-away” proposal. The terms set out that, in exchange for Mr. Lawetz abandoning his claim, Mr. Wigboldus would not make a payment to Mr. Lawetz, but he would also not seek costs against him. The offer was time limited to two days before examinations for discovery. Mr. Wigboldus advised

2024 BCSC 2172 (CanLII)

that if Mr. Lawetz's claims were dismissed, he would seek double costs against Mr. Lawetz beginning from the date of the offer.

[34] The second offer, dated June 14, 2024, was provided to Mr. Lawetz after the service of summary trial materials, one month before the application was heard in Chambers and after discovery was complete. This offer was framed as Mr. Lawetz's "last chance to avoid an award of costs", due to the likelihood of Mr. Lawetz's claims being dismissed.

[35] The June 14, 2024 offer again cited the documentary evidence that showed critical weaknesses in Mr. Lawetz's case, and outlined the law surrounding qualified privilege. The terms of the offer were the same as the previous offer.

[36] Mr. Lawetz did not respond to either offer.

[37] Mr. Lawetz says that the offers did not provide a genuine incentive to settle, and that they were not reasonably tied to the claim of defamation. He cites *Stuart v. Hugh*, 2011 BCSC 575, to support for his position that it was reasonable for him to reject Mr. Wigboldus's nominal offers. In *Stuart*, the court found that it was reasonable for the plaintiff to reject a nominal offer, absent an apology or another kind of engagement with the actual claim, as the offer constituted a "nuisance offer."

[38] I find that the offers made by Mr. Wigboldus to waive costs were not merely nuisance offers. In hindsight, both offers were reasonable as the inherent weaknesses in Mr. Lawetz's case were apparent after document discovery. Mr. Wigboldus tied the offers to the facts of the case, and the law that would be argued in defence of the defamation claim.

[39] That said, I accept that in the context of this case, <u>without</u> the benefit of hindsight, accepting a no-money/no apology offer may have seemed premature prior to examinations for discovery. I cannot go so far as finding Mr. Lawetz to be reckless or unreasonable in wanting to fully explore the facts, given his perception of the key events at the time.

2024 BCSC 2172 (CanLII)

[40] I find that following the examinations for discovery, and after reviewing the affidavit evidence of Ms. Maier, the third-party to whom Mr. Wigboldus made his comments, it ought to have sufficiently crystallized for Mr. Lawetz that his case had fatal weaknesses. Frankly, Mr. Lawetz's evidence from his own examination for discovery should have led to some self-reflection about his claim.

[41] In sum, I find that Mr. Lawetz had the time and the proper incentive to reconsider his claim by the time Mr. Wigboldus presented him with the second "walk away" offer, and he ought reasonably to have accepted it.

Conclusion

[42] Given the above, I find it is appropriate to award double costs beginning from the date of the second offer on June 14, 2024. The order for double costs will include the cost of any hearings before the Registrar to assess the costs owed to Mr. Wigboldus. The costs will be assessed at Scale B.

"J. Whately J."

2024 BCSC 2172 (CanLII)