IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Buchan v. Moss Management Inc.,*
2010 BCSC 121

Date: 20100129
Docket: C945937
Registry: Vancouver

Between:

STEVEN THOMAS BUCHAN

PLAINTIFF

And

MOSS MANAGEMENT INC., ALAN FREDERICK WOLRIGE, PETER COLIN GRAHAM RICHARDS, 331609 B.C. LTD.

DEFENDANTS

Before: The Honourable Chief Justice Bauman

Reasons for Judgment

Counsel for the Plaintiff:	Gordon Turriff, QC
Counsel for the Defendants, Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards and 331609 B.C. Ltd.:	Timothy J. Delaney
Place and Date of Hearing:	Vancouver, B.C. 5 November 2009
Place and Date of Judgment:	Vancouver, B.C. 29 January 2010

[1] In reasons for judgment indexed as 2008 BCSC 285, I dismissed Mr. Buchan's claim against Moss Management Inc., Alan Frederick Wolrige, Peter Colin Graham Richards and 331609 B.C. Ltd. (collectively the "Moss defendants"). On 25 September 2008 (2008 BCSC 1286), I ordered that Mr. Buchan pay special costs to the Moss defendants.

[2] Mr. Buchan's appeal was dismissed by the Court of Appeal on 23 January 2009 (2009 BCCA 25). The Moss defendants now seek to have the award of special costs summarily assessed by the court. They do so with the object of avoiding a lengthy and detailed, but in the end, essentially fruitless assessment before the Registrar, which would add further expense and delay to this long extant litigation.

[3] Mr. Buchan raises a number of objections to such a summary procedure. His opposition raises at least these issues:

(i) Is there a "bill of special costs" presently before the court?;

(ii) Does the court have jurisdiction summarily, or otherwise, to fix a lump sum as special costs?; and

(iii) If it has such a jurisdiction is this a proper case for summary assessment?

[4] I will deal with these and some peripheral issues below, but I will first sketch out the background of this litigation.

[5] This action was commenced 15 years ago in 1994. It relates to events that took place in the late 1980s and early 1990s. Mr. Buchan was represented by four different lawyers during the proceedings and at times he represented himself.

[6] Some activity took place in the litigation in 1996 and 1997. It then lay basically dormant until about 2003. At this time, the defendants applied to have the action dismissed for want of prosecution. That application failed and the action came on for trial on 9 October 2007.

[7] Further details of the course of the proceedings are provided in the written submissions of the Moss defendants (and my reasons for judgment provide detail to the issues identified here):

(a) The trial occupied 24 days;

(b) Eleven witnesses testified at the trial. The plaintiff testified for more than seven days; Mr. Richards testified for six days;

(c) Examinations for discovery occupied eleven (11) days;

(d) The documentary disclosure was extensive. The plaintiff's list of documents covered 566 documents filling nine 3-inch binders. Ten volumes of binders of documents covering hundreds, if not thousands, of pages were filed into evidence at trial;

(e) There was a pre-trial video deposition of one witness which evidence was the subject of argument at trial;

(f) The action was started in November 1994 and brought to trial 13 years later in late 2007;

(g) There were several pre-trial applications including an application for Mr. Buchan to proceed with the action as a derivative action (this included lengthy cross-examination on affidavits [although it should be noted none of the bills before the court relate to proceedings taken before 2003]). There were a couple of pre-trial conferences, an application on the pleadings and two applications concerning want of prosecution of the proceeding (first there was an application before Mr. Justice Stewart which resulted in the derivative action application being dismissed for want of prosecution. Then there was the application to dismiss the entire action that has [*sic*] heard by Madam Justice Neilson. Then there was an application for leave to appeal that order that was heard by Madam Justice Prowse). Applications were made to strike pleadings, provide particulars and to add a defendant;

(h) The action was both vigorously pursued (after 2004) and defended;

(i) The length of time to prosecute the action resulted in added complexity in a number of ways. First, the action was the subject of a lengthy want of prosecution application and an application for leave to appeal. Second, several of the parties changed counsel over the years. Third, witnesses' memories were obviously impacted by the delay which meant significant additional effort went into the collection and proof of facts.

(j) The plaintiff's pleadings introduced significant factual complexity and difficulties for the action. The pleading put in issue many disparate transactions and events (for example, the bankruptcy proceedings concerning Mr. Fredrick Marsh became an issue; the transfer and re-transfer of assets between Prospectors Airways, Pacific Geo-Roc and 331609 B.C. Ltd., etc.)

[8] I turn to resolve the issues which I have identified.

(i) Is there a "bill of special costs" properly before the court?

[9] The Moss defendants have filed the affidavit of a legal assistant in the office of their counsel. She exhibits the firm's statements of account rendered to Moss Management Inc. between 30 May 2003 and 30 April 2009.

[10] Each account details professional services provided by date and sets a lump sum fee. Disbursements are detailed and applicable taxes are noted.

[11] The totals are:

Fees:	$286,878.00
Disbursements:	$38,243.40
Taxes:	$39,542.54

[12] Mr. Turriff, counsel for Mr. Buchan, submits that the Moss defendants simply have not put a proper "bill of special costs" before the court. I disagree and I accept Mr. Delaney's submission for the Moss defendants. He notes that there is no prescribed form for a bill of special costs (unlike that prescribed for a party/party bill – Form 67) and he cites this passage on *Practice Before the Registrar* (2009: CLEBC):

> A bill of special costs is prepared in the same form as a bill from a lawyer to her or her own client under the *Legal Profession Act*. This means that a single fee may be stated as a lump sum (see Rule 57(34)), as opposed to stating fees for components of the work done. A lump sum bill must contain a description of the nature of the services and of the matter involved, as would, in the opinion of an assessing officer, afford any lawyer sufficient information to advise a client about the reasonableness of the charge made (Rule 57(35); but see *Wright v. Wright* (1984), 58 B.C.L.R. 89 (C.A.)). Particulars may be demanded, and they may be ordered if no sufficient description is given.

[13] To the same effect, the editors Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) at 33-26 state:

> A bill for special costs is presented in the same form as a bill between a solicitor and his client under

the *Legal Professions Act*.

[14] There would be little utility in requiring the Moss defendants to simply reproduce the solicitor/client accounts with the heading "Bill of Special Costs". I would not give effect to this objection.

(ii) Does the court have jurisdiction, summarily or otherwise, to fix a lump sum as special costs?

[15] This issue was reviewed by Justice Parrett in *ICBC v. Eurosport Auto Co. Ltd.*, 2008 BCSC 935:

> [6] In any event, the issue of jurisdiction to assess special costs was dealt with by our court of appeal in *Harrington v. Royal Inland Hospital*, (1995) 131 DLR (4th) 15. In that case the issue for consideration was whether the court had jurisdiction to review the reasonableness of the solicitor's fee arising out of a contingency fee agreement and secondly to determine the amount of special costs themselves.
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> [7] After considering various authorities, Mr. Justice Hinds at paragraph 192 wrote the following:
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>> In my view there is no distinction between the inherent jurisdiction of a superior court to review a solicitor's bill of costs and the inherent jurisdiction to review the reasonableness of a solicitor's fee arising out of a contingency fee agreement.
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> [8] He went on at paragraph 237 to consider the trial judge fixing the amount of special costs rather than referring the matter to a registrar. At that point he said the following:
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>> The inherent jurisdiction of the court to award special costs includes, in my view, the power to determine the amount of the special costs. If the registrar has jurisdiction to determine the amount of special costs that is not reasonable to suggest that a judge of the Supreme Court, exercising the court's inherent jurisdiction, would not have equivalent jurisdiction. That is not to say that generally a judge, rather than the registrar, should make the determination as to the amount of special costs. But in some circumstances, such as existed in this case, it is appropriate for the Judge, who has been involved on seven separate days dealing with the application to obtain court approval of the infant settlement and approval of the solicitor's contingency fee, to determine the amount of the contingency fee and the percentage thereof payable to the Public Trustee. The Judge did not err in respect of this aspect of the third issue.

[16] The Court of Appeal reiterated this view in *Graham et al. v. Moore Estate et al.*, 2003 BCCA 497 at paras. 45-46:

> There remains the issue whether the plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protection of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.
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> It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington v. Royal Inland Hospital* (1995), 131 D.L.R. (4th) 15 (B.C.C.A.). As in *Harrington*, the trial judge in the present cases did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.

[17] Mr. Turriff submits that the Court of Appeal's comments in *Graham v. Moore* were *per incuriam* because the court (and others before it) failed to consider the effect of Rule 57(13) which provides:

> **Lump sum costs**
>
> (13) With the consent of the parties, the court may fix a lump sum as the costs of the whole proceeding, either inclusive or exclusive of disbursements and expenses.

[18] Relevant here, as well, is Rule 57(13.1). It reads:

> **Lump sum costs of interlocutory application**
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> (13.1) The court may award lump sum costs of an interlocutory application and may
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> (a) fix those costs, either inclusive or exclusive of disbursements, or
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> (b) order that the costs amount be in accordance with Schedule 3 of Appendix B and fix the scale of those costs in accordance with section 2(2), (4.1) and (4.2) of that Appendix.

[19] Mr. Delaney submits that Rule 57(13) has no application to a summary assessment of special costs. They are to be assessed under Rule 57(3) and the form of the bill is regulated by Rules 57(34) and (35):

> **Form of bill in certain cases**
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> (34) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.
>
> **Description of services**
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> (35) A lump sum bill shall contain a description of the nature of the services and of the matter involved as would, in the opinion of the registrar, afford any solicitor sufficient information to advise a client on the reasonableness of the charge made.

[20] The thrust of Mr. Delaney's submission is that Rule 57(13) has application only to the fixing of party and party costs in a sum certain rather than following an item by item assessment under the tariff. This is made clear in the companion provision found in Rule 57(13.1) which refers specifically only to Schedule 3 of Appendix B.

[21] Essentially, there is a distinction to be drawn between fixing "a lump sum as the costs" of the whole or a portion of a proceeding (Rules 57(13) and (13.1)) and rendering a bill for special costs "on a lump sum basis" under Rule 57(34). This was a distinction drawn by Justice Burnyeat in *Jack Pine Forest Products Ltd. (Ruling No. 1),* 2004 BCSC 20, 27 B.C.L.R. (4th) 332 (see in particular para. 16). In the former, a line by line assessment is foregone by the fixing of a lump sum. In the latter situation, an assessment of a lump sum is carried out in light of the considerations set out in Rule 57(3).

[22] I agree with this submission. I note, in conclusion on this issue, that the plaintiff relied on the Court of Appeal's decision in *Snarpen Contracting Ltd. v. Arbutus Bay Estates Ltd.,* [1996] B.C.J. No. 2370 (C.A.). I find no assistance in that decision as it was a case where the court awarded party and party costs and declined to fix them as a lump sum under Rule 57(13).

(iii) Is this a proper case for a summary assessment?

[23] I have related the submission of the Moss defendants on this issue.

[24] Mr. Buchan's response is essentially caught in this part of his written submission:

> 31. In fairness to the Plaintiff, he should be given particulars of the special costs claim he has to meet and he should be given a reasonable opportunity to test the Defendants' costs proofs, when proofs are presented. This Court should ensure that he receives those particulars and has that opportunity by following the course chosen by Madam Justice Kirkpatrick in the *CNR* case. There, Her Ladyship concluded that:
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>> "The simple presentation of the clients' bill to the trial judge (as occurred in *Edwards v. Bell*) combined with counsel's submissions would not adequately allow [the costs payor] to challenge the reasonableness of CN's legal costs."
>>
>> *Canadian National Railway Company v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559, at para 28, Plaintiff's Book of Authorities, Tab 14
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> 32. The Defendants have revealed some, but only some, information about the work their lawyers did for them in connection with the action. The work descriptions in the bills attached to the Defendants' Appointment reveal communications between lawyer and client (e.g. ... "12 Sept 07 conference with P. Richards" but do not reveal what subjects were discussed or whether advice or instructions were given and, if so, what the advice or instructions were). How, in these circumstances, can the Plaintiff be assured that the Defendants acted reasonably in their employment of their lawyers, as the *Bradshaw* judgments require?
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>> *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991) 54 B.C.L.R. (2d) 309 (S.C.), at pp. 318-19; Plaintiff's Book of Authorities, Tab 17
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>> *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1992) 73 B.C.L.R. (2d) 212 (C.A.), at pp. 232-233; Plaintiff's Book of Authorities, Tab 18

[25] Mr. Buchan obviously contemplates a microscopic review of the services undertaken by counsel for the Moss defendants. In the circumstances of this case, I ask: to what realistic end? On the summary assessment, the Moss defendants note that Justice Southin in *Interclaim Holdings Limited v. Down*, 2002 BCCA 632, 222 D.L.R. (4th) 521 adopted a "rough and ready" approach in summarily assessing costs. Justice Southin accepted that $5,000 per each half day of court proceeding "seems right to me" (at para. 40).

[26] Justice Southin justified a summary assessment at paras. 27 and 38:

> As this division is also the division which heard the appeals mentioned in paragraph 13, we are substantially familiar with what happened below. I have in mind also that these litigants have taken unto themselves, from the pool of judicial resources available in this Province, more than can be said to be their fair share. They are not alone in doing such things but litigants must be encouraged to be economical of judicial time.
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> ...
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> This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good.

These comments are apposite in this case.

[27] The Moss defendants also note that in many cases an award for special costs will be made in the range of 75% to 90% of the actual costs charged. Counsel then produces this table:

1. Actual Legal Costs	The actual legal fees were $286,878.00. Fees plus disbursements and taxes total $364,663.94.
2. The rough-and-ready ($5,000 per half day) approach	The $5,000 per half day approach leads to $240,000.00 for fees based on a 24 day trial. Alternatively, using all 28 days of court appearances, this approach leads to $280,000.00. Taxes and disbursements would be added to these amounts.
3. The percentage of actual legal costs approach	Actual legal fees were $286,878.00. Thus 75% equals $215,158.50. 90% equals $258,190.20. Taxes and disbursements would be added to these sums.

[28] In my view a special costs award of $240,000.00 plus taxes and disbursements in this matter is an award that represents an inherently reliable assessment of the value, on a special costs basis, of the work performed on this file by counsel for the Moss defendants.

[29] It is an award which clearly reflects an appropriate application of the factors set out in Rule 57(3) in the circumstances of this litigation.

[30] While one could argue that $10,000 more or less in fees would also be reasonable, that is just quibbling. A detailed line by line review of the services rendered by counsel for the Moss defendants could not reasonably be expected to alter the final result in any meaningful way. In my view, this is one of those extraordinary cases where a summary assessment is appropriate and in the interests of justice.

[31] Mr. Buchan finally argues that no proof has been proffered by the Moss defendants that the fees and disbursements were reasonably and necessarily incurred.

[32] As to the fees portion, a mere statement by counsel in an affidavit that the services were reasonable and necessary is a little like counsel opining on the ultimate issue, which I must determine in light of the circumstances of the litigation and the considerations set out in Rule 57(3). In this regard, there can be no doubt that I have a full record upon which to make that assessment.

[33] The same can be said on the disbursements side, but I agree that there should be evidence to the effect that the disbursements were actually incurred (there is evidence that they were charged to the Moss defendants). I grant the Moss defendants leave to adduce that evidence and upon doing so, they will have special costs assessed in accordance with these reasons.

[34] Finally, Mr. Buchan complains that the order for special costs included the other Moss defendants, while the bills rendered by counsel were only directed to Moss Management Inc. The evidence in this case suggests that the other defendants were jointly instructing counsel and the award for special costs should be made in favour of all of the Moss defendants.

"The Honourable Chief Justice Bauman"