IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reid v. Reid,*
2015 BCSC 889

Date: 20150528
Docket: E38713
Registry: New Westminster

Between:

Denise Isabelle Reid

Claimant

And

Mark Christopher Reid

Respondent

Before: The Honourable Mr. Justice Myers

Reasons for Judgment on Costs Issues

Counsel for the claimant:	Russell S. Tretiak, Q.C. Carol W. Hickman, Q.C. Sarah H. Jo
Counsel for the respondent:	Tracey L. Jackson O. Stoklosa, articled student
Written Submissions:	March 17, 2015 April 20, 2015 May 6, 2015
Place and Date of Judgment:	New Westminster, B.C. May 28, 2015

[1] This is a decision on costs following a family law trial. Ms. Reid claimed that a 2008 separation agreement should be set aside for "fraud, non-disclosure or other common law circumstances". Alternatively, she asked that the separation agreement be declared "unfair" and that it be varied pursuant to sections 56 and 65 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. She also claimed retroactive and prospective variation of child support and retroactive variation of spousal support.

[2] Ms. Reid was unsuccessful on all issues. My decisions on the trial issues are indexed as 2014 BCSC 1691 and 2015 BCSC 86. The latter judgment dealt with the support issues, with respect to which I asked for further submissions after my decision on the other issues. This costs judgment is meant to be read in conjunction with those decisions as I will not repeat what I said in them.

[3] Mr. Reid asks for special costs based, in part, on unfounded allegations of fraud or in the alternative double costs based on offers to settle. He asks that these costs be determined on the basis that the case was one of more than ordinary difficulty. Finally he asks that I fix the costs. His bill of costs for party-party costs is for $222,000 and for special costs is for $628,000.

I. BASIC COSTS

[4] Mr. Reid was successful on <u>all</u> points. In the usual course, he would be entitled to his costs. However, the court retains a discretion to decline to award costs: *Gold v. Gold*, [1993] B.C.J. 1792 (C.A.). Ms. Reid says no costs should be ordered and relies on the following factors: hardship; the earning capacity of the parties; and the conduct of the parties in the litigation.

A. The conduct of the parties

[5] Both parties relied on conduct of the other to justify their positions on costs. Mr. Reid argues that Ms. Reid pursued a claim that was bound to fail and that there is no justification for costs not to be awarded against her. (He makes the same point in relation to double costs and increased costs.) Ms. Reid says that Mr. Reid was

not forthcoming with respect to document production. She blames Mr. Reid's non-disclosure as the cause of her lawsuit. In her written argument she says:

> 55. As set out above, the Respondent was not forthcoming with disclosure of his income information when the Claimant requested a review of support in 2009 and again after she learned that Cityfone had been sold in 2010. The Claimant had to retain counsel to obtain the Respondent's income information which he produced only after two months of repeated request from the Claimant's lawyer.
>
> 56. These factors caused the Claimant to commence this law suit. Had the Respondent produced his financial information, as requested by the Claimant and required by the Separation Agreement, this litigation may have been avoided entirely. Accordingly, it is submitted that the Respondent is not without blame.

[6] This ignores that, by far, the dominant issue was the value of Cityfone Telecommunications Inc. Under the separation agreement Mr. Reid assumed ownership of that company. Its value was taken from a valuation prepared by PwC, which pre-dated the separation agreement by approximately 17 months. Approximately 20 months after the separation agreement, Cityfone was sold to Rogers Communications Partnership Ltd. for a sum significantly higher than the value arrived at by PwC. Ms. Reid argued that at the time of the separation agreement, Mr. Reid was aware the company was under-valued and he did not disclose several events that took place at the company. Those allegations were dismissed.

[7] Ms. Reid points out that in my judgment I noted Mr. Reid could have been more forthcoming with respect to board meetings regarding a change in his compensation package that was a virtual certainly at the time of the separation agreement. This concerned salary and stock options. Nevertheless, I concluded that these had no financial consequences. Compared to the valuation of Cityfone these were minor issues in terms of trial time and the complexity of the trial.

[8] Moreover, as I noted in my second judgment dealing with support, the separation agreement only provided for a review of child support, and then on delivery of a written notice. That notice was not given until March 11, 2011 and

Mr. Reid's 2008, 2009 and 2011 financial statements were delivered to Ms. Reid's counsel in May, 2011.

[9] Ms. Reid also argues that the documents were not forthcoming once the litigation was commenced:

> 57. Obtaining documents from the Respondent in this litigation has been extremely difficult. As set out above, the Claimant had to bring four interlocutory applications to obtain relevant documents in these proceedings. The Claimant submits that many of these items were the items the Respondent could have produced or directed Cityfone, David Jennings or Brian Simmers to produce. However, that did not occur, which caused the Claimant to incur unnecessary legal fee and time. Again, it is submitted that the Respondent is not without blame, as his submissions suggest.

However, as is apparent, the complaint relates in large measure to documents in the hands of third parties. Mr. Reid took no position on applications to obtain these documents. Further, Mr. Reid consented to pre-trial depositions of Mr. Simmers and Mr. Jennings and another third-party witness, Mr. Lacavera.

[10] A major complaint of Ms. Reid is with respect to the delivery of the Cityfone board minutes (which were not in the control of Mr. Reid). All the Cityfone minutes were delivered by September 19, 2013. The trial did not start until six weeks after that. Therefore the production of the documents cannot justify the trial itself.

[11] While the sale of Cityfone at a value substantially greater than that assigned to it in the separation agreement may have raised Ms. Reid's suspicions, by the time of trial, Ms. Reid had received the relevant documentation, and had availed herself of pre-trial mechanisms to obtain evidence from some of the key witnesses.

[12] Ms. Reid argues that at the time of the separation agreement she was "naïve, vulnerable and emotionally fragile". This was rejected as a ground upon which to set aside the separation agreement and it should not be re-litigated in a costs application. She was certainly not in that state when the trial commenced.

[13] I conclude that the conduct of Mr. Reid cannot justify refusing to order costs in his favour.

B. Financial hardship and the parties' earning capacities

[14] Ms. Reid submits that any amount of costs would cause her financial hardship. She points to the fact that liabilities in her October 2013 financial statement were $122,000 and they are now $378,000. There is no explanation for that increased debt.

[15] She also relies on the expenses she pays for the children.

[16] In the context of a costs application, financial hardship must be something more than feeling financial pain or constraint. It is a truism that if money goes to costs, it cannot be used for something else. But that applies in reverse; if costs are not recouped by the successful party they will be under the same constraint. Cost applications are also not meant to be forensic accounting exercises; the financial situation of the parties must be looked at somewhat broadly, especially where the parties own businesses.

[17] Two of the children are no longer children of the marriage. In my judgment dealing with retroactive child support, I stated:

> [32] In the present case, there is no basis to conclude that the children's needs were not met, nor did Ms. Reid argue otherwise. She did not go into debt to provide for the children. In her financial statements she showed expenses for the children for three years. For 2008 they were $21,000 and for 2011 they were $31,000, less than the child support she received. For 2013, she showed an increased amount of $70,000, but that was unexplained. As pointed out by Mr. Reid, by 2013 spending more on the children was within Ms. Reid's discretion given that her own income was steadily increasing; Columbia Business Systems had almost $1 million in retained earnings; she had paid off her mortgage; and she had over $650,000 in RRSPs.

[18] Ms. Reid makes an income over $200,000 and owns Columbia Office Systems with retained earnings of over $1 million. While she says that she cannot withdraw earnings from Columbia without harming it, no reason is provided. Ms. Reid has over $650,000 in RRSPs and owns her home mortgage-free.

[19] I conclude this is not a case where financial hardship can govern.

[20] I also do not think this is a case where earning capacity is a significant factor. It is true that Mr. Reid has more business experience, but he has started a new company. Ms. Reid has significant earning capacity through Columbia.

C. Scale of costs

[21] The factual issues were complex. As I said in the trial judgment, the lack of disclosure alleged was not as simple or straightforward as an allegation of failure to disclose a specific asset or income source; rather, it involved alleged non-disclosure of specific events at Cityfone, and these were numerous. Ms. Reid left no stone unturned in the corporate machinations of Cityfone.

[22] When the trial started, it was estimated to be a two-week hearing. It ended up taking a further 16 days. Written arguments were voluminous.

[23] In my view, this case was one of more than ordinary difficulty.

II. DOUBLE COSTS

[24] Mr. Reid relies on three offers to settle made by him and claims double costs under Rule 11-1(5)(b):

Offer Date	Amount Offered	Open For
October 15, 2013	$270,500.00	3 days
October 26, 2013	$410,000.00	2 days
May 30, 2014	$400,000.00	7 days

To put the dates of the offers in context, the trial commenced on October 28, 2014. It had been set for two weeks and the trial had not completed. It was therefore adjourned and continued on June 23, 2014.

[25] All of the offers dealt with either child or spousal support or both. They did not offer anything regarding division of assets.

[26] The following factors may be considered under Rule 11-1(6):

> (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 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.

[27] The first factor is to be considered without reference to the Court's decision in the matter.

[28] When the first two offers were delivered, the vast majority of the parties' documents had been exchanged, the parties had both been examined for discovery, and had exchanged sworn financial statements. The parties had attended a two-day mediation.

[29] By the second offer, Ms. Reid had all of the Cityfone minutes. Messrs. Simmers, Jennings and Lacavera had all been examined under oath. The evidence of Mr. Jennings and Mr. Simmers was to the effect that the board did not delay or obfuscate transactions because of Mr. Reid's matrimonial status.

[30] Therefore, by the time of the second offer, it ought to have been apparent that there was no evidence of fraud or that Cityfone was undervalued.

[31] With respect to the issue of duress, Ms. Reid's own evidence was scanty at best and contradicted by her own lawyer in the collaborative process. Ms. Reid obviously had access to her lawyer before the trial so her evidence should not have come as a surprise.

[32] With respect to the value of Cityfone, Ms. Reid had no expert opinion. She used the sale price to Rogers as a proxy for the value of the company some years earlier. In part (she did have other arguments) her case was based on a contradiction: she says the PwC opinion was stale-dated at the time of the separation agreement and could not have represented the value of the company.

Yet she relied on a sale a year and half after the separation agreement to establish the value at the time of the agreement. All of this ought to have been apparent at least by the time of the delivery of the second offer.

[33] Ms. Reid relies on the fact that she provided offers on October 24 and October 27, 2013 in which she indicated she was prepared to accept Mr. Reid's offer regarding the support issues apart from extraordinary expenses, but that the property issues were still in dispute. Her offers were not time limited. I fail to see how this assists her given the elephant in the courtroom was the value of Cityfone and Mr. Reid's alleged knowledge of that.

[34] I recognise that the offers were short-fused. Nevertheless, Ms. Reid responded to the first offer. Any changes in the lay of the land after the first offer would have been incremental and therefore the two-day acceptance period for the second offer was not unreasonable.

[35] I have already dealt with the financial circumstances of the parties.

[36] In my view, this is a case where double costs ought to be awarded. Given the timing of the offers I award double costs for the trial and subsequent proceedings.

III. SPECIAL COSTS

[37] Mr. Reid applies for special costs. Special costs are meant to penalise a losing party for reprehensible conduct. In *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.). at p. 315, Chief Justice Esson stated:

> There is nothing in the conduct of Mr. Leung in relation to this matter which I would call "scandalous" or "outrageous". But "reprehensible" is a word of wide meaning. It can include conduct which is scandalous, outrageous or constitutes misbehaviour; but it also includes milder forms of misconduct. It means simply "deserving of reproof or rebuke".

This was quoted by the Court of Appeal in *Garcia v. Crestbrook Forest Industries*, [1994] B.C.J. No. 2486. However, the Court went on to say:

> 23 However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in Young v. Young at p. 28. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

[38] Mr. Reid relies on the factors listed in para. 11 of *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, and argues that almost all apply to this case. However, his argument can be collapsed into these overriding points:

- Ms. Reid pursued a claim that was bound to fail. She did not have her own expert opinion as to the value of Cityfone and sought to have it valued on supposed industry metrics that were not pursued at trial. I have referred to several of these points in the context of ordinary costs.

- She pursued an unfounded allegation of fraud.

[39] In my view, the items in the first bullet point do not amount to reprehensible conduct. Rather, they fall within what *Garcia* recognised as claims having little merit. This case does not rise to the level of *Mayer*, where the plaintiff continued to advance claims that had been ruled on in prior motions.

[40] The fraud allegation is more troubling. The allegation of fraud at the start of the trial can perhaps best be captured by the following passage from Ms. Reid's opening:

> The Claimant's theory of this case is that from at least December 2007 the Respondent was aware of potential purchasers and increased his pressure on the Claimant to sign the Separation Agreement. The Respondent had known since at least 2001 that cellular phone companies brought a premium in their sale perhaps because of the monopolization of cellular phone services in Canada by a limited number of companies.

[41] Ms. Reid was also aware of the potential cost penalty of unproven allegations of fraud. Once again, the following is from her opening:

> These proceedings were commenced by the Claimant on July 7, 2011 claiming that the Separation Agreement was unfair; she was not in the right frame of mind to make an agreement, and fraud on the part of the Respondent. With an allegation of fraud it is necessary to prove that on a standard higher than a balance of probabilities but less than a standard beyond a reasonable doubt. If not, the Claimant may be mulcted on special costs.

[42] In my initial trial judgment I grouped Ms. Reid's allegations into three broad points:

> [67] These allegations amount to three broader arguments. The first is that the PwC report undervalued the company as at the valuation date because of flawed methodology or failure to take into account relevant information. The second is that at the time of the separation agreement the valuation was stale-dated and undervalued Cityfone because things had improved for the company between the valuation date and the separation agreement. Both of these go to the value per share of Cityfone. The third broader argument deals with Mr. Reid's interest in the company, whether through shares or warrants and his salary and benefits package.

[43] I added:

> [68] An overriding allegation is that Mr. Reid knew of these issues and failed to disclose them, along with other relevant information regarding the company.

It is this point that is tantamount to fraud.

[44] Nevertheless, I am not prepared to order special costs. Many cases have said that all unproven allegations of fraud do not merit special costs. There were a number of issues that did not allege fraud. It would therefore be unfair to award special costs for the whole trial, and to determine the fees attributable to the fraud allegations alone would be near impossible. Further, although family cases are subject to the same cost regime as other cases, the decision to award special costs is highly contextual and fact-dependant and the context of this case is that it was a family one. In *Rick v. Brandsema*, 2009 SCC 10, the Supreme Court established that in cases seeking to set aside a separation agreement contractual principles are not to be applied in the same manner as in commercial cases. I think care must be taken not to narrow a door (through the chill factor of special costs) that the

Supreme Court widened. In the case at bar, I have awarded double costs and that is a sufficient cost penalty.

IV. FIXING COSTS

[45] Mr. Reid argues that I should fix the costs. His bill of costs for the greater level of difficulty scale including double costs for the trial amounts to $222,000.

[46] The Court of Appeal recently addressed the court fixing special costs in *Gichuru v. Smith*, 2014 BCCA 414, and said this should only be done in exceptional circumstances. Many of the Court's comments and concerns are applicable to the court fixing party-party costs and were based on *Civil Rule* 14-1(15)(c), which applies to both types of costs. These comments are also applicable to a proceeding under the *Family Rules*.

[47] Requests for the court to fix party-party costs seem to have become commonplace. That ought to be discouraged. Judges are not meant to perform the role of a registrar. The mere fact that the courts' fixing of special costs will save the parties a further step in the litigation is not sufficient in and of itself. There must be more.

[48] There is nothing here that merits fixing special costs. This was a complex case and there were many interlocutory applications. The amount in issue was significant. The amount claimed as special costs is significant. Both parties are of means.

V. CONCLUSION

[49] Mr. Reid is entitled to costs on the basis that this case was one of more than ordinary difficulty. He is entitled to double costs from the start of the trial. Those costs are to be assessed.

"E.M. MYERS, J."