

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Advantage Tool & Machine Ltd. v. Cross Industries Ltd.*,
2023 BCSC 827

Date: 20230516
Docket: S224555
Registry: New Westminster

Between:

Advantage Tool & Machine Ltd. and Advantage Holdings Ltd.

Plaintiffs/Defendants by Counterclaim

And:

Cross Industries Ltd.

Defendant/Plaintiff by Counterclaim

Before: The Honourable Mr. Justice Riley

Reasons for Judgment on Costs

Counsel for Plaintiffs/Defendants by
Counterclaim:

S. Thomson

Counsel for Defendant/Plaintiff by
Counterclaim:

D. Letkemann

Written Submissions of the Plaintiff:

February 13, 2023

Written Submissions of the Defendant:

February 24, 2023

Place and Date of Judgment:

New Westminster, B.C.
May 16, 2023

Introduction

[1] In reasons for judgment indexed as *Advantage Tool & Machine Ltd. v. Cross Industries Ltd.*, 2023 BCSC 104, I found in favour of the plaintiff and awarded damages for breach of contract in the gross amount of \$252,233.32. I also found in favour of the defendant on the counterclaim and awarded damages for breach of contract in the amount of \$15,000. Applying a set-off between these two amounts, the result was a judgment in favour of the plaintiff in the net amount of \$237,243.32, plus pre-judgment interest calculated based on monthly installments that had been due under the contract. The parties have been unable to agree on costs and now seek a ruling on that issue.

Positions of the Parties

[2] The position of the plaintiffs, Advantage Tool & Machine Ltd. (“Advantage Tool”) and Advantage Holdings Ltd. (“Advantage Holdings”) is fourfold. First, the plaintiffs say they were the substantially successful parties and should be entitled to their full costs. Second, the plaintiffs say that the defendant’s counterclaim was in the nature of an “alternative position” that should not affect the entitlement of the plaintiffs to costs. Third, the plaintiffs seek double costs based on an offer to settle on terms that would have been more favourable to the defendant than the result at trial. Fourth, the plaintiffs seek the return of money paid into court as security for costs.

[3] The defendant, Cross Industries Ltd. (“Cross”)’s position is also multipronged. First, Cross says costs should be apportioned, with Advantage Tool receiving 50% of its costs, or alternatively 50% of its trial costs, and Cross receiving 75% of its costs on the counterclaim. Second, Cross asserts that while one plaintiff (Advantage Tool) was successful in its claim for breach of contract in relation to the asset purchase agreement, the other plaintiff (Advantage Holdings) was unsuccessful in its claim for breach of contract in relation to Cross’s tenancy, such that Cross should have its costs in successfully resisting the latter claim. Third, Cross resists an order for double costs based on the settlement offer, arguing that after making the offer,

the plaintiffs amended their claim to include 5% GST on top of the total claim of \$450,000, giving rise to a “disparity” as between the pleadings and the settlement proposal. In these circumstances, Cross says the Court should exercise its discretion against an award of double costs.

Discussion

[4] The general principle as reflected in Rule 14-1(9) of the *Supreme Court Civil Rules* is that a successful party is entitled to its costs at trial. Where multiple issues or causes of action were dealt with at trial and success was divided or neither party was entirely successful, the Court should determine which party was substantially successful: *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, leave to appeal ref’d, 2002 BCCA 454. Although *Fotheringham* dealt with costs in a family law proceeding, the same principles are commonly applied in civil proceedings: *MacLean v. Mio*, 2011 BCSC 148 at paras. 22–23; *Robinson v. Realm Energy International Corporation*, 2015 BCSC 2425 at paras. 11–14; *Lau v. McDonald*, 2021 BCSC 2013 at para. 12.

[5] In this particular case, viewing the dispute globally, clearly the plaintiffs attained substantial success at trial. Although the defendant was successful in its counterclaim, I agree with the plaintiffs that this was an alternative argument, and in any event only resulted in damages of \$15,000. The plaintiffs were ultimately successful in securing judgment in their favour in the net amount of \$237,243.32, plus pre-judgment interest. I therefore find that the plaintiff Advantage Tool was substantially successful at trial and is entitled to its costs.

[6] Cross argues that this is an appropriate case for apportionment of costs under Rule 14-1(15), on the basis that the opposing parties each attained success on discrete “matters” in relation to the proceeding. While Advantage Tool was successful in its claim for breach of contract in relation to the asset purchase agreement, Cross was successful in resisting the Advantage Holdings claim for breach of contract in relation to Cross’s tenancy at the Advantage Holdings premises. Further, Cross was successful in its counterclaim for breach of contract

based on Advantage Tool's failure to provide clear title to the equipment that was the subject of the asset purchase agreement.

[7] It would appear that a separate cause of action, or a counterclaim tried together with a main claim may qualify as a discrete "matter in or in relation to a proceeding" for the purposes of apportionment of costs under Rule 14-1(15): *Consbec Inc. v. Walker*, 2015 BCSC 410 at paras. 28–31; see also *Lee v. Jarvie*, 2013 BCCA 515 at paras. 17–39, explaining that costs can be apportioned on the basis of divided success on various "issues" at trial. However, the use of apportionment to award costs to a party that did not attain substantial success against a party that did is relatively rare: *Loft v. Nat*, 2014 BCCA 108 at para. 49, leave to appeal to SCC ref'd, 35893 (4 September 2014); *Lewis v. Lehigh Northwest Cement Ltd.*, 2009 BCCA 424 at paras. 35–36. Apportionment should only be considered where: (i) there were one or more separate and discrete issues on which the party seeking apportionment was successful at trial, (ii) there is a basis on which the trial judge can identify the trial time attributable to those discrete issues, and (iii) apportionment would be a just result: *Lee* at para. 40, applying *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31.

[8] In considering the argument for apportionment, I will first address Cross's success on the counterclaim, and then consider Cross's success in resisting the Advantage Holdings claim.

[9] With regard to the counterclaim, I am not satisfied that the first two elements of the test for apportionment of costs have been met. I find that the underlying issue of whether Advantage Tool failed to provide clear title to its equipment per the terms of the asset purchase agreement is not a sufficiently "discrete" matter to warrant apportionment. To explain, Cross put forward a number of arguments premised on Advantage Tool's failure to provide clear title to the equipment. Some of those arguments went to the defence of Advantage Tool's breach of contract claim, while others went to Cross's counterclaim. In particular, Cross argued that Advantage Tool's failure to provide clear title to the equipment was (a) a fundamental breach of

the contract by Advantage Tool, (b) the basis of an alleged misrepresentation on the part of Advantage Tool, or (c) a breach of contract entitling Cross to damages. The first two of these arguments went to Advantage Tool's claim for breach of contract, on which Cross was ultimately unsuccessful. The third argument went to the counterclaim, on which Cross attained success. In these circumstances, I would not consider the issue of Advantage Tool's failure to provide clear title to the equipment to be a sufficiently discrete "matter" to warrant apportionment under Rule 14-1(15). It was a "matter" that pertained to both the plaintiff's claim and the defendant's counterclaim. Furthermore, since the issue of failure to provide clear title to the equipment permeated the evidence, argument, and legal analysis, it is not possible to ascertain the amount of trial time attributable to this point. I thus reject Cross's argument for apportionment of costs based on its success in the counterclaim, because the underlying issue or "matter" – Advantage's failure to deliver clear title to the equipment – was woven into both the claim and the counterclaim.

[10] With regard to Cross's success in resisting the breach of contract claim advanced by Advantage Holdings, I find that this is also not an appropriate "matter" for apportionment, based on the second and third prongs of the test. The Advantage Holdings claim was addressed only briefly in the evidence and in argument, and in my view it is not possible to ascertain the amount of time devoted to it. Furthermore and in any event, the amount of the Advantage Holdings claim was \$4,435.12, which would represent less than 2% of the judgment ultimately awarded to the successful plaintiff. Thus, I conclude that it would not be just and appropriate to make any apportionment of costs in favour of Cross based on this aspect of the case.

[11] Cross also argues that this is a case of "multi-party litigation", where opposing parties attained mixed success at trial, such that discrete costs orders should be made. While accepting that Advantage Tool has an entitlement to some costs in relation its successful claim, Cross maintains that it is also entitled to costs in successfully resisting the claim made by Advantage Holdings.

[12] In cases of “multi-party” litigation, the Court retains a broad discretion to determine the appropriate costs award. The starting point in the exercise of that discretion is the general proposition that costs are usually awarded to successful parties. Beyond this, there is no overarching formula for costs in relation to “multi-party” litigation: *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; *Lettuce Serview Limited Partnership v. Western Delta Lands Partnership*, 2008 BCSC 859 at paras. 15–16.

[13] In considering how to exercise its discretion in a case involving an unsuccessful co-plaintiff in an otherwise successful claim, the Court may take into account a variety of factors, including whether the plaintiffs were jointly represented, whether the plaintiffs shared a common interest, and how much time and complexity the unsuccessful co-plaintiff’s case added to the trial: *Mainland Sawmills Ltd. v. IWA-Canada Local 1-3567*, 2008 BCSC 454 at paras. 6–12.

[14] In the case at bar, all of these considerations favour the position of the plaintiffs. The principal of both plaintiff companies was Mr. Howlett, who was the main witness for the plaintiffs at trial. Both plaintiff companies were represented by the same counsel, and their legal positions were more or less completely aligned. Finally, the position advanced by the unsuccessful plaintiff, Advantage Holdings, added little to the case in the way of complexity or court time. I agree with the submission of the plaintiffs that the failure of the Advantage Holdings claim was akin to a loss on a minor head of damages, with little bearing on the question of which of the opposing litigants attained overall success.

[15] I turn next to the settlement offer and its implications. Cross points out that after the settlement offer was made, the plaintiffs (on the first day of trial) amended their claim to include GST. In these circumstances, Cross submits that the settlement offer was made on “different pleadings” than those that the defendant had to face at trial, and that the difference was “material to the result”.

[16] While I agree that the amendment to the pleadings was material to the result in that it added a further \$22,500 to the amount of the judgment obtained by the plaintiffs, I find that the amendment did not have any material bearing on the offer, or the defendant's ability to properly assess it, for the following reasons.

[17] The offer proposed settlement for a specified amount of \$198,674.58, and was open for acceptance until the commencement of trial. The pleadings were in fact amended on the first day of the trial, after the offer lapsed. In any event, the filing of an amended claim adding GST to the plaintiff's claim did not alter the terms of the offer, which was for a specified dollar amount. Indeed, the amendment to the claim only served to increase the defendant's jeopardy, which should have made the offer to settle even more palatable to the defendant.

[18] I acknowledge that the amount of the amended claim ultimately increased the damages awarded to the plaintiffs by some \$22,500, representing some 9.4% of the net amount of the judgment. While as a percentage this is greater than the increase in damages considered in a comparable situation in *Best v. Thomas*, 2014 BCSC 2487 at para. 36, in my view the overall situation is very much the same as it was in *Best*. As in *Best*, the defendant remained well aware of "the case it had to meet", despite the amendment to the pleadings. Further, the change in pleadings did not in undermine or materially reduce the value of the offer to settle.

[19] I turn to a consideration of the factors set out in Rule 9-1(6). I find that the settlement offer is one that ought reasonably to have been accepted as contemplated in Rule 9-1(6)(a). It was presented 30 days before trial, and was open for acceptance until the trial commenced. It was a rational offer that, viewed objectively, would not have been difficult to evaluate in light of the issues and the litigation risks at play. Turning to Rule 9-1(b), the terms of the offer were more favourable to the defendant than the result at trial. With regard to Rule 9-1(c), the evidence at trial suggests that the financial position of the plaintiff Advantage Tool was tenuous, while there is no suggestion the defendant was or is in any particular financial difficulty. In these circumstances, I see no reason to depart from the

general proposition that there should be a cost consequence associated with the defendant's failure to accept a reasonable offer: see *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. In this particular case, the appropriate consequence is to order double costs from the operative date, per Rule 9-1(5)(b). I take into account that the defendant ought to have had some reasonable time within which to consider and accept the offer. In this case, the offer was made some 30 days before trial, but was open to acceptance until the trial commenced. In the absence of some earlier deadline, I find that the operative date ought to be the final business day before the trial commenced, which was 23 September 2022. I conclude that the plaintiff is entitled to double costs from 24 September 2022 onward.

[20] Finally, there is the issue of the return of the amount paid into Court as security for costs. In particular, in a pre-trial ruling indexed as *Advantage Tool & Machine Ltd. v. Cross Industries Ltd.*, 2021 BCSC 1172, Advantage Tool was required to pay \$45,568.05 into Court as security for costs. I agree that this amount ought to be returned.

Summary and Conclusion

[21] The plaintiff Advantage Tool is entitled to its costs at Scale B, double costs from 24 September 2022, and the return of the amount paid into Court as security for costs.

“Riley J.”