

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Homegold Resources Ltd. v. Jazz Resources Inc.*,
2023 BCSC 1191

Date: 20230712
Docket: S184875
Registry: Vancouver

Between:

Homegold Resources Ltd., Johan Shearer

Plaintiffs

And

**Jazz Resources Inc., Archie Gordon Beck, Bobette Mae Gegengerg,
Her Majesty the Queen in Right of the Province of British Columbia**

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment on Costs

Counsel for the Plaintiffs:

C.J. Simmonds

Counsel for the Defendant,
Jazz Resources Inc.:

J.B. Rotstein

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
June 29, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 12, 2023

[1] The plaintiffs obtained judgment against the defendant, Jazz Resources Inc. (“Jazz”), in this matter following an 18-day trial. The Reasons for Judgment are reported at 2023 BCSC 423. At issue on this costs application is whether the plaintiffs are entitled to costs for the full trial or something less.

[2] In this case, there were two discrete claims filed under one action. The first aspect of the claim was brought by Mr. Shearer in his personal capacity for monies he claimed were owed to him as a result of his purchase from Glen Developments’ debts owed to it by the defendant Jazz in February 2015.

[3] The second part of the claim was brought by Mr. Shearer's company, Homegold Resources Ltd. (“Homegold”), for professional services provided to Jazz.

[4] Both plaintiffs were successful in obtaining judgment, although each received judgment in an amount less than was claimed.

Legal principles

[5] As a general rule, the successful party at trial is entitled to its costs, unless that party's conduct is such that a departure from the general rule would be appropriate [*Supreme Court Civil Rule* 14-1(9)]. A party need not be successful on every argument or issue to be the successful party in the litigation. The onus is on the party seeking to depart from the normal rule to establish why such a departure would be warranted in the circumstances.

[6] In *Bedwell Harbour Hotel Ltd. v. Poets Cove Owners’ Association*, 2012 BCSC 1524, Justice Bruce held the following at paragraph 4:

[4] The respondents agree that the party who is substantially successful is generally entitled to their costs and that there is no requirement to be successful on all issues: *Robbins v. Pacific Newspaper Group Inc.*, 2006 BCSC 872 at para. 17. However, the respondents maintain a determination of substantial success is not a mathematical calculation. Instead, the court considers four principles: (1) The focus is on the matters in dispute which may or may not be the issues identified in the pleadings; (2) The court must assess the weight or importance of the matters in dispute; (3) The court must conduct a global determination with respect to all the matters in dispute and determine which party substantially succeeded; and (4) Where one party substantially succeeded, consideration is given to whether there are reasons

to otherwise order that the winning party be deprived of their costs: *Chaster (Guardian ad Litem of) v. LeBlanc*, 2008 BCSC 47, which applied *Fotheringham v. Fotheringham*, 2001 BCSC 1321.

[7] If the court considers that the successful party's conduct warrants rebuke, it may deprive that party of costs, whether in whole or in part. In *LeClair v. Mibrella Inc.*, 2011 BCSC 533, Justice Voith, as he then was, said the following at paragraphs 29 and 30:

[29] In most cases where a court has concluded that some aspect of the successful party's litigation conduct warrants rebuke, the court has deprived that party of all the costs to which they would otherwise be entitled. But this need not be so. In some instances an "all or none" approach would provide the court with too blunt a tool and give rise to an inappropriate result.

[30] The discretion conveyed to a judge under Rule 14-1(9) is "extremely broad": Frederick M. Irvine, *McLachlin and Taylor British Columbia Practice*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2006) vol. 2 at 14-173. There have been instances where trial judges have exercised their discretion in a more measured or nuanced way.

[8] It is the party's conduct during the litigation, as opposed to prior to it, that is the focus of the analysis.

[9] At paragraph 31 of *LeClair*, Justice Voith went on to cite *Samuda v. Recipco Corporation*, 2009 BCCA 33, and said the following at paragraphs 31-32:

[31] In *Samuda*, the obdurate conduct of the successful party lengthened the trial. Allan J. reduced the costs to which that party would otherwise have been entitled based on her estimate of how much the plaintiff's conduct had unnecessarily lengthened the trial (at paras. 34-35 and 39). Allan J.'s decision was upheld by Newbury J.A., for the Court of Appeal in *Samuda v. Recipco Corporation*, 2009 BCCA 33 at para 18:

However, the Court did agree that since Mr. Fierro's conduct had protracted the trial unnecessarily, the defendants should have costs of a ten-day trial rather than 14 days. This was a matter uniquely within the trial judge's discretion and in my opinion, she has not been shown to have exercised her discretion on a wrong principle or to have otherwise erred.

[32] In *Noyes*, Brenner J., as he then was, said:

[80] However, where a plaintiff's exaggeration is excessive to the point that it represents an attempt to materially mislead the court litigants must understand that the court will not hesitate to impose an appropriate sanction. At the lower end of the scale this sanction can comprise an award of reduced or no costs to a plaintiff, while at the

higher end it can result in an order that the plaintiff pay the defendant's costs. In the most extreme of cases where the court is satisfied that the plaintiff has attempted to perpetrate a fraud on the court, the appropriate sanction could require the court to dismiss the plaintiff's claim.

[Emphasis added.]

[10] It is with these principles in mind that I will consider the conduct of the plaintiffs in this matter.

Defendant's position

[11] The defendant's arguments as to why the plaintiffs should be deprived of their costs, whether in whole or in part, may be summarized as follows.

Shearer claim

[12] Mr. Shearer sought judgment against Jazz in the amount of \$725,429, but only obtained judgment in the amount of \$406,558. The primary difference between the amount awarded and the amount sought was Mr. Shearer's claim for contractual interest which was pursued during the trial but abandoned in final argument.

[13] The defendant argues that trial time was unduly extended because Mr. Shearer failed to grapple with the evidence prior to trial. Had he done so, it should have been obvious that the claim for contractual interest was doomed to fail.

Homegold claim

[14] The defendant makes similar arguments, to the extent that it argues that Homegold never truly grappled with its case prior to trial. In this regard, the defendant says that:

- a) The amount of the judgment for unjust enrichment was \$100,000, much less than the professional fees claimed of approximately \$250,000;
- b) Homegold asserted a claim of builders lien during the litigation but only abandoned it on day one of trial;

- c) Homegold pursued at least one invoice that was not part of the relief sought;
- d) It ought to have been apparent from the outset that there was no contract for services between Homegold and Jazz;
- e) Although Homegold obtained judgment, the decision granted relief based on unjust enrichment and the invoices themselves were not allowed based on there having been no contract between the parties; and
- f) Mr. Shearer's failure to acknowledge there was no contract resulted in the defendant calling two other witnesses, both former directors, which witnesses were unnecessary.

Discussion

[15] I start by addressing whether the plaintiffs were substantially successful.

[16] In *G.M. Pace Enterprises Inc. v. Tsai*, 2004 BCSC 156, Justice Taylor said the following about the meaning of 'substantial success' at paras. 15-18:

[15] Bouck, J. in *Fotheringham v. Fotheringham*, [2001] B.C.J. 2083 (S.C.) at paragraph 60(2) and (3) provide a brief summary of what the term "substantial success" means.

(2) Substantial success is measured objectively taking into account all the matters in dispute, their weight or importance to the parties and the parties' relative success or failure with respect to those matters.

(3) As a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute looked at globally.

[16] The second approach is that premised on divided success. Such an approach involves a consideration of what each party obtained (or retained from what was otherwise at risk) from the decision and a weighing of relative success of each as opposed to the identification of a particular issue or part of the proceeding in a quantitative sense under Rule 57(15).

[17] As noted by Smith, J. in *Gutoski v. Hammett*, [1998] B.C.J. 748 paragraph 3:

Pursuant to Rule 57(9) costs of a proceeding shall follow the event as otherwise ordered. In cases of divided success the word "event" has been interpreted distributively by apportioning costs between parties: *McLeod Engines Ltd. v. Canadian Atlas Diesel Engines Company Ltd.* (1951), 1 W.W.R. 803 (B.C.C.A.).

[18] As Smith, J. further noted apportionment under Rule 57(15) is exceptional in its occurrence.

[17] I conclude that the plaintiffs were substantially successful. The defendant opposed both claims in their entirety. Although the plaintiffs did not succeed on every argument, judgment was obtained on both claims, even if the amount awarded was less than the amount sought. This was not a case of divided success, an example of which would have been if one plaintiff had obtained judgment but the other claim had been dismissed. The threshold of 75 percent mentioned in the case law refers to the matters in dispute, not an arithmetic calculation of the judgment amount as a percentage of the quantum sought.

[18] I will turn to the question of whether Mr. Shearer should be deprived of some of his costs based on his conduct during the litigation, including whether his conduct unduly lengthened the trial.

[19] With the benefit of some more detailed consideration of the evidence in advance, Mr. Shearer would have appreciated that there was little chance that he would succeed on the issue of contractual interest because the only source of his contractual interest claim was an agreement that was never adopted by the directors of Jazz.

[20] However, I am not satisfied that the trial was lengthened on account of Mr. Shearer's refusal to concede the point. The defendant maintained throughout that no amounts were payable. It argued a limitation defence, amongst other defences, and suggested that no amount was due. There was evidence regarding various acknowledgements of various debts in the financial statements from numerous witnesses, assignments, an argument about whether a condition precedent had been satisfied involving the TSX, and various communications between various parties over the years.

[21] There would have been little to no time saving had the contractual interest argument been conceded, because of the matters that would otherwise still have

been in dispute. I do not consider there to have been any conduct warranting rebuke so as to deprive the plaintiff Shearer of his costs.

[22] I turn now to the Homegold claims.

[23] It was the Homegold claims that took the vast majority of the time at trial. Homegold rendered some 23 or 24 monthly invoices to Jazz, which were at issue in the trial. The plaintiff's direct examination was cursory, simply referring to the invoices, confirming delivery and nonpayment and that all of the activities, which were listed on the invoices by day, had been completed.

[24] Cross-examination, which Mr. Rotstein conceded was "painful", went through each invoice line by line. The primary reason the trial took eight days longer than was originally anticipated was due in large part to the evidence relating to the invoices. Despite the Court's efforts to encourage the parties to come to some arrangement whereby invoices or portions of them could be categorized with a view to shortening the cross-examination, it cannot be said that it was unreasonable for the plaintiff to put the invoices into evidence, nor for the defendant to undertake such a detailed cross-examination.

[25] As for the abandonment of the claim of builder's lien, I agree with Mr. Simmonds that it is not apparent that this complicated the trial and indeed could have simplified it, albeit that did not occur.

[26] Although the cross-examination on the invoices is what led to the Court's conclusion that Mr. Shearer had deliberately withheld information from his fellow directors regarding the permit issue (paras. 185 to 194 of the Reasons for Judgment), this was not litigation conduct but rather was an adverse finding in the overall context of the case.

[27] As for the lack of a contract between Homegold and Jazz, while that impacted on the relief available to the plaintiff, it did not materially impact the duration of the trial. The award of damages for unjust enrichment related to the same services provided by Homegold that were set out in its invoices to Jazz, and the two directors

who were called as witnesses on the question of the contract by Jazz, Mr. Hannan and Mr. May, were both relatively brief and also testified about other matters.

[28] The only instance of wasted time was the plaintiff in its case sought to rely on Homegold's first invoice, which was entitled to repayment. However, the defendant objected based on it having not been properly included in the pleading, and I directed that I was not in a position to rule on the matter and that the defendant therefore ought to proceed to cross-examine if the invoice were disputed. Mr. Rotstein did so, but during its closing the plaintiff withdrew its claim for that first invoice. However, the time spent on cross-examination on this invoice was not significant – based upon my review of my notes, cross-examination on this invoice took less than half a day.

Conclusion

[29] In the circumstances, I conclude that the plaintiffs' conduct during the litigation does not warrant rebuke, nor was the trial unnecessarily lengthened as a result of the plaintiffs' actions.

[30] There being no reason to depart from the usual rule, the plaintiffs are entitled to their costs of the trial at Scale B.

“Wilson J.”