

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*,
2024 BCSC 18

Date: 20240105
Docket: S162484
Registry: Vancouver

Between:

**Greengen Holdings Ltd.,
also known as Greengen Holdings Inc.**

Plaintiff

And:

**His Majesty the King in Right of the Province of British Columbia
Minister of Agriculture and Lands, Regional Water Manager and Minister of
Environment**

Defendants

Before the Honourable Justice K. Loo

Reasons for Judgment on Costs

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Written submissions:

Plaintiff – November 9, 2023
Defendant – November 24, 2023

Place and Date of Judgment:

Vancouver, B.C.
January 5, 2024

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Background

[1] On October 10, 2023, I pronounced reasons for judgment in this matter (the “Reasons”), finding the defendants (collectively, the “Province”) liable to the plaintiff, Greengen Holdings Ltd. (“Greengen”), for the tort of misfeasance in public office, and concluding that damages were payable by the Province to Greengen in the amount of \$10.125 million (the “Damages Award”).

[2] This proceeding arose from attempts by Greengen to develop a hydro-electric project on and around Fries Creek, near the town of Squamish, between 2003 to 2009. In order to proceed with the project, Greengen required a land tenure over Crown land pursuant to the *Land Act*, R.S.B.C. 1996, c. 245 and a water license pursuant to the then *Water Act*, R.S.B.C. 1996, c. 483 (collectively, the “Permits”).

[3] Ultimately, the Permits were denied. I found that Greengen lost an opportunity to achieve a completed and profitable hydro-electric project and that the misfeasance of government representatives was a legal cause of this loss.

[4] In the Reasons, I invited, and received, written submissions from the parties as to costs.

Issues

[5] There are four issues on this application:

- a) What cost orders, if any, ought to be made regarding pre-trial interlocutory applications and the adjournment of an earlier trial date?
- b) Should Greengen receive costs of the entire trial?
- c) At what scale should costs be ordered?
- d) Should uplift costs be ordered?

[6] I will address these issues in order.

Analysis

Interlocutory Applications

[7] Much of the submissions from both parties were comprised of lengthy arguments regarding the other's conduct leading up to the trial. Both sides have invited me to make various findings and cost orders arising from the pre-trial interlocutory battles between the parties and the adjournment of a trial date in 2021.

[8] In my view, the costs of interlocutory matters in this action ought to be addressed in the manner described by the Court of Appeal in *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69, leave to appeal to SCC ref'd, 39145 (1 October 2020), wherein the Court held:

[96] The *Rules* clearly contemplate that a judge or master, other than the trial judge, may make a cost order. While Rule 14-1(15)(a) gives the court the power to award the costs of a proceeding, Rule 14-1(15)(b) gives the court the power to award the costs a particular application, step or matter in the proceeding.

[97] An award of the costs of the proceeding will be made by the trial judge at the conclusion of the matter. The trial judge will determine who should pay the costs, the scale of costs and whether the costs will be payable as party and party costs or special costs.

[98] An order for the costs of a particular application, step or matter will usually be made in chambers. The costs of a chambers application may be disposed of in various ways depending on the circumstances in which the motion was brought and its result. A judge or master may dispose of the motion with costs to one party, with costs in the cause; with costs to one party or another in the cause; with costs to one party or another in any event of the cause; or by specifically ordering that there will be no order as to costs. A presider may or may not fix the scale of costs. In some cases the presider may assess the costs summarily or specifically leave the question of costs to the trial judge.

[99] Unless the presider who hears the application otherwise orders, the costs of a motion are determined by Rule 14-1(12) which holds that if the application is granted, the party who brought the applications is entitled to costs of the application if that party is awarded costs at trial, but the party opposing the application is not entitled to costs even though that party may be awarded costs of the proceedings at trial. Similarly, if the application is refused, the party who brought the application is not entitled to the costs of the application even though awarded costs at trial, while the party opposing the application, is entitled to costs of the application if that party is awarded costs of the trial.

[9] In my view, on an application for costs following the trial of an action, this Court's function is not to go back to determine what costs ought to be assessed on long-past interlocutory applications. If a party on any particular application was of the view that the circumstances warranted a specific costs order, it was incumbent upon that party to apply for such an order at that time. If the presider made an order, that order ought to prevail. If the presider did not make an order, R. 14-1(12) of the *Supreme Court Civil Rules [Rules]* will apply:

- (12) Unless the court hearing an application otherwise orders,
 - (a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and
 - (b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

[10] Similarly, in respect of the adjournment of a trial date in late 2021, it appears that both parties sought costs of the adjournment but no application was ever set down. Again, it was incumbent upon the party seeking costs of the adjournment to apply at the time. As it is not clear from the record which party was at fault for the adjournment, there will be no costs order in this regard.

[11] The only instance in which this Court must determine what costs ought to be paid on an interlocutory application is where the presider specifically left the costs of that application to be determined by the trial judge. As I understand it, there was only one instance in this case in which a presider did so.

[12] In an application filed on July 7, 2022 and heard on December 6, 2022, the Province applied for an order compelling Greengen to respond to discovery undertaking requests. Master Nielsen ordered responses to be provided. According to Greengen, its response was that there were no further responsive records.

[13] In my view, this application was not particularly remarkable or extraordinary. Both the application and the outcome were fairly typical of complex and hard-fought proceedings. I am therefore of the view that the appropriate costs order is costs in the cause. In the circumstances of this case, this means that no costs of the application are payable by either party.

Costs of the Trial

[14] Greengem's expert at trial opined that the appropriate range of damages in this case was between \$53.8 million and \$75.1 million: Reasons at paras. 373, 471. As indicated above, I concluded that the Damages Award was \$10.125 million. The Province now argues that the trial costs should reflect divided success, given that Greengem recovered far less than the maximum amount of damages it sought. However, I do not agree with this submission.

[15] This is not a case in which the Court adopted the Province's theory or evidence regarding damages. The Province's experts, Mr. Dalton and Mr. Killeavy, opined that the value of the project to Greengem was \$1.995 million as of March 2008, \$2.025 million as of November 2008 and \$2.045 million in August 2009: Reasons at para. 377. Therefore, although Greengem recovered an amount that was approximately one-fifth of the lower end of its expert's damages range, the Damages Award was approximately five times the amount supported by the Province's experts.

[16] It is instructive to consider why the Court awarded an amount less than Greengem's claim. At paras. 471 and 472 of the Reasons, I held:

[471] I observe that the plaintiff's claims for damages are substantially higher than this figure. For example, Mr. Teitge opined that damages in this case are in the range of \$53.8 million to \$75.1 million.

[472] The primary reason for the difference between the Damages Award and the damages calculated by Mr. Teitge is that, in order to calculate damages as at 2023, Mr. Teitge applied a 19.4% compound interest rate to the value of the project as at COD [Commercial Operation Date]. The addition of more than 12 years of compounded interest at a rate of 19.4% increased Mr. Teitge's damages calculation dramatically.

[17] For the most part, I accepted Mr. Teitge’s evidence in my assessment of damages. The primary factor accounting for the difference between the figure advanced by Mr. Teitge and the Damages Award was that I applied pre-judgment interest and not a 19.4% compound interest rate to the value of the project at the Commercial Operation Date. Although this turned out to be a significant factor, the fact that I did not accept Greengen’s evidence on this particular point does not warrant a finding of divided success in the underlying action.

[18] As I have concluded that success on the trial was not divided, costs of the action shall follow the event and shall be awarded to Greengen.

Scale of Costs

[19] Under s. 2(2) of Appendix B to the *Rules*, Scale B costs are for “matters of ordinary difficulty” and Scale C costs are for “matters of more than ordinary difficulty”. In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 6 [*Slocan*], this Court listed the following factors to be considered in determining the appropriate scale of costs:

- (a) Length of trial;
- (b) Complexity of issues;
- (c) Number and complexity of pre-trial applications;
- (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
- (e) The number and length of examinations for discovery;
- (f) The number and complexity of expert reports;
- (g) The extent of the effort required in the collection of and proof of the facts.

[20] Greengen cites the following factors in support of an award of costs at Scale C in this case: the trial lasted more than 50 days; the claim of misfeasance is one rarely litigated to trial; the trial also required consideration of administrative law, commercial law, and Aboriginal law; the matter was hard-fought, with approximately 13 pre-trial applications, including two appeals to the Court of Appeal; a *voir dire* regarding admissibility of expert evidence took one week of trial time; and the written

closing submissions of Greengen and the Province were 212 and 161 pages, respectively.

[21] In addition to those factors, there were applications within the trial regarding Greengen's standing to advance this action, a limitations defence advanced by the Province and the Squamish Nation's potential intervention on issues regarding the duty to consult owed by the governments of Canada to First Nations.

[22] Further, the evidentiary issues at trial were complex, particularly in respect of documents. There was no document agreement, and evidentiary objections arose repeatedly throughout the course of testimony. Oral reasons from the Court regarding document issues were necessitated on two separate occasions. Evidentiary issues were exacerbated by the fact that two of the potentially key witnesses were deceased by the date of the trial.

[23] The Province argues that the trial was longer than it should have been, but it was not a matter of more than ordinary difficulty. It cites para. 31 of the Reasons wherein I stated that the case turned on "a relatively small subset of the evidence". The Province submits that this Court ought to refuse an order for costs at Scale C or, in the alternative, to assess only some aspects of the case at Scale C.

[24] In my view, the factors listed above support a finding that this case was of more than ordinary difficulty. I conclude that the circumstances of this case warrant costs at Scale C.

[25] I have considered whether the scale of the pre-trial costs should be different than the scale of the costs of trial and I have concluded that they should not. The pre-trial steps in the litigation were numerous, complex and, hard-fought. As stated above, there were approximately 13 pre-trial applications, including two appeals to the Court of Appeal. Even in cases where the pre-trial steps are straightforward, the general rule is to not fix different scales for different aspects of the case: *Slocan* at para. 23.

Uplift Costs

[26] Sections 2(5) and (6) of Appendix B to the *Rules* provide:

(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).

[27] In *Shen v. West Continent Development Inc. (BC0844848)*, 2022 BCSC 462, Justice Maisonville set out the following principles relating to uplift costs:

[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.

[30] Uplift costs are meant to indemnify the successful party where there are unusual circumstances, not punish the unsuccessful party: *Sheppard v. Vancouver Coastal Health Authority*, 2021 BCSC 539 at para. 56.

[31] Section 2(5) does not prescribe what constitutes “unusual circumstances” or an award that is “unjust or grossly inadequate”. This inquiry is highly fact-specific: *Herbison v. Canada (Attorney General)*, 2014 BCCA 461 at para. 42.

[32] Misconduct may amount to an “unusual circumstance” justifying an award of uplift costs. However, the party asserting misconduct must show there was misconduct deserving of some form of rebuke, including disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence: *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 57.

[33] The Court of Appeal in *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 41 set out this statement from *ICBC v. Patko*, 2009 BCSC 578 regarding the requirement for misconduct in awarding uplift costs:

[18] It is also clear that before a party’s conduct in the litigation process can constitute “unusual circumstances” within the meaning of s. 2(4.1), it must be conduct that is deserving of some form of rebuke: *Gurney v. Gurney*, 2007 BCSC 1745 (uplift not ordered); *Bajwa v. Veterinary Medical Association*, 2008 BCSC 905 (multiplicity of proceedings, failure to provide particulars, failure to abide by document disclosure obligations, general non-compliance

with the Rules), *D. v. D.*, 2008 BCSC 1260 (wife's evidence unnecessarily lengthy, uninformative and irrelevant, needlessly and significantly prolonging the trial).

[34] Similarly, in *380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37, Justice Allan noted that the following have been cited as factors that may attract an award of uplift costs:

- 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.

See also *J.P.* at para. 58.

[35] Other factors that could constitute "unusual circumstances" include misbehaviour by a party that added to the expense incurred by the party claiming costs, and the degree of disparity between costs calculated at Scale B and actual legal fees incurred: *Neil v. Martin*, 2022 BCSC 134 at para. 36.

[28] Greengen advances four arguments in support of an award of uplift costs in this case.

[29] First, it alleges that "there is a pattern of behavior on the part of the Province which deserves rebuke". However, the Province vigorously disputes this broad allegation. In my view, the following comments of Justice Blok from *Globalnet Management Solutions Inc. v. Aviva Insurance Company*, 2020 BCSC 1361, are apposite here:

[36] While it is obvious that this matter has had a very extended history, it is much less obvious that one side or the other is to blame for that delay. Each side has provided examples that appear to show intransigence (or worse) on the part of the other, but for the most part neither side *answered* the opposing complaints. Instead, each side simply made complaints about the other.

[37] Without a comprehensive analysis of these allegations, something that is not possible on the limited record before me, with one exception I cannot come to any conclusions on the allegations of delay, intransigence and obstructiveness ...

[*Italic emphasis in original.*]

[30] On some of the interlocutory applications in this case, costs in the cause were awarded in any event of the cause. On others, no cost orders were made. Although

Greengem appears to have succeeded on interlocutory applications more often than the Province, and Greengem has been able to point to a few instances in which a presider was critical of the Province's conduct, I am unable to find on the record before me that there was "misconduct deserving of some form of rebuke, including disobedience of court processes, incivility, frivolity, actions taken in bad faith, and impertinence": *Shen* at para. 32, citing *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 57. As stated above with regard to the interlocutory applications, Greengem had an opportunity at every application to apply for costs which would have reflected the rebuke which it now says was warranted.

[31] Second, Greengem raises the issue of complexity. In these reasons, I have set out aspects of this case that were complex and which led me to conclude that Scale C costs are justified. In my view, however, while the case was of more than ordinary difficulty, it was not so difficult or complex so as to make Scale C costs grossly inadequate or unjust.

[32] Third, Greengem submits that the importance of the litigation to the parties or to the development of the law generally, coupled with the seriousness of the allegations, warrant an order for uplift costs. There is no doubt that the allegations were serious and the litigation was important to the parties. However, in my view, the importance of the litigation to the parties and the seriousness of the allegations do not constitute "unusual circumstances" within the meaning of s. 2(5) of the *Rules*. Uplift costs are not justified simply because Greengem advanced an intentional tort claim for millions of dollars in damages. Further, it is my view that the case turned on fairly unique facts regarding the November 2018 telephone call between assistant deputy ministers and Greengem. It is more accurate to say that the law on the tort of misfeasance in public office was applied, rather than developed, by the Reasons.

[33] Finally, Greengem submits that the disparity between ordinary costs and uplift costs justifies uplift costs. It has advanced evidence that Scale C costs would be in the order of 27% of actual costs. However, s. 2(6) specifically provides that a costs award 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 by the Court.

[34] For all these reasons, I have concluded that there should not be an award of uplift costs.

Conclusion and Orders

[35] Costs of the action are payable by the Province to Greengen at Scale C.

[36] If specific awards were made by any presiders in respect of interlocutory applications, those awards shall not be disturbed.

[37] If no specific awards were made by any presiders in respect of interlocutory applications, the costs of those applications shall be governed by R. 14-1(12).

[38] The costs of the Province's July 7, 2022 application for responses to undertaking requests that was heard by Master Nielsen on December 6, 2022 shall be in the cause.

[39] No uplift costs shall be payable under s. 2(5) of Appendix B to the *Rules*.

“The Honourable Justice Loo”