IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Culos Development (1996) Inc. v. Baytalan,* 2024 BCSC 1634

Date: 20240904
Docket: S133186
Registry: Kelowna

Between:

Culos Development (1996) Inc.

Plaintiff

And

Gregory Steven Baytalan

Defendant

Before: The Honourable Justice G.P. Weatherill

Reasons for Judgment on Costs

Counsel for the Plaintiff:	J.A. Hall
Counsel for the Defendant:	W. Thiessen
Place and Date of Trial/Hearing:	Kelowna, B.C. August 28, 2024
Place and Date of Judgment:	Kelowna, B.C. September 4, 2024

Introduction

[1] In written reasons for judgment issued on June 17, 2024 ("Reasons") indexed at 2014 BCSC 1037, I awarded the plaintiff ("Culos") $181,710.69 as damages against the defendant ("Mr. Baytalan") for breach of an option to purchase ("OTP") with costs to be spoken to.

[2] The background facts are canvassed in detail in the Reasons, and I do not propose to repeat them here. Briefly, the dispute concerned a failed property transaction. Culos as purchaser and Mr. Baytalan as seller entered into the OTP with the intention that Culos would develop the subject lands located in the Glenmore area of Kelowna, BC, into a multi-unit residential complex. During the eighteen-month option period, Culos was successful in applying to have the lands rezoned to the appropriate zoning and undertook a series of pre-development, geotechnical, engineering and other work to ensure the lands could be developed as planned. On attempting to notify Mr. Baytalan at the end of the option period that it was exercising the OTP and would be paying the required deposit, Mr. Baytalan took the position that the OTP was void and refused to complete. In support of his position, he cited various shortcomings and other failures by Culos to comply with the OTP's terms. Culos sued seeking an order for specific performance of the OTP but failed to prove the necessary requirements for specific performance. It was awarded damages instead.

[3] On the basis that success was divided, Mr. Baytalan now applies for an order that:

a) Each party should bear their own costs; or

b) In the alternative, each party should bear their own costs from and after February 9, 2024, when the defendant made a formal offer under the *Rules* to settle the case by paying the plaintiff $165,115.69.

[4] For its part, Culos says that, notwithstanding specific performance was not ordered, it nevertheless achieved substantial success at trial and ought to be awarded its Scale B costs.

Summary of Decision

[5] For the reasons that follow, I agree with Culos' position that it achieved substantial success on the main issues in the action. There is no reason to depart from the usual rule and accordingly, Culos is entitled to its costs of the action.

The Rules on Costs

[6] The general rule is that, unless the court orders otherwise, costs of a proceeding *must* be awarded to the successful party: Rule 14-1(9).

[7] Where success is divided, the court will typically order each party to bear their own costs. Where one party is found to be the predominantly successful party, the court maintains discretion to depart from the general rule, such discretion is to be exercised judicially and in a principled and cautious manner: *Meade v. Armstrong (City)*, 2018 BCSC 528 at para. 20; *Staley v. Squirrel Systems of Canada Ltd*., 2012 BCSC 954, at para. 17.

[8] Factors to consider in departing from the general rule include:

a) Misconduct in the course of the litigation;

b) A failure to accept a formal offer to settle; and

c) Where the court rules against the successful party on one or more issues that took a discrete amount of time at trial,

Loft v. Nat, 2014 BCCA 108 at para. 49 [*Loft*].

[9] For the purposes of Rule 14-1, the term "substantial success" is to be measured objectively by looking at the matters in dispute. It involves a four-step approach:

a) A focus on the "matters in dispute" at trial;

b) An assessment of the weight or importance of these matters in dispute to the parties;

c) Conducting a global determination of the mattes in dispute and determining which party "substantially succeeded" overall and won the event; and

d) Where a party "substantially succeeded", considering whether there are valid reasons to "otherwise order" that such party be deprived of costs and each side then bear their own costs,

Aulakh v. Nahal, 2018, BCSC 719 at para. 19 [*Nahal*].

[10] Absent special considerations, a successful litigant can reasonably expect an order for the payment of its costs: *Sutherland v. Attorney General of Canada*, 2008 BCCA 27.

[11] Obtaining a judgment in an amount less than what was sought is not in itself a proper reason to deprive a party of its costs: *Loft* at paras. 47- 49.

[12] Offers to settle are governed by Rule 9-1, which sets out options available to the court where an offer to settle has been made. Rule 9-1(6) identifies several factors that the court may consider when making a costs award in the face of an offer to settle.

Mr. Baytalan's Position

[13] Mr. Baytalan asserts that success at trial was divided and each party should bear their own costs.

[14] He argues that the real matters in dispute were matters of remedy, namely, entitlement to specific performance of the OTP and damages for loss of bargain or profit. He argues that the whole reason Culos brought the action was to obtain specific performance of the contract of purchase and sale. He points out that damages were not even sought in the alternative.

[15] He relies on the outcome in *Nahal*, *Imraj Holdings Enterprises Ltd. v. 650273 Alberta Ltd*., 2023 BCSC 256 [*Imraj*]; and *Akelius Canada Inc. v. 2436196 Ontario Ltd.,* 2020 ONSC 6182. He asserts the costs in this case should be addressed in the same manner, namely that each party should bear their own costs due to divided success.

[16] For example, in *Nahal*, a property purchaser proved that the seller had breached the contract of purchase and sale but did not prove entitlement to either specific performance or damages. The only remedy received was the return of the deposit on the purchase. The defendant counter-claimed against the plaintiff and there were third-party pleadings against realtors. The counterclaim and third-party proceedings were dismissed. The Court concluded that success was divided and ordered that each party bear their own costs.

[17] A similar conclusion was reached in *Imraj* where a breach of a purchase contract by the defendant was established, the Court refused to order specific performance and no damages were proven. Nominal damages of $1,000 were ordered. The defendant filed a counterclaim that was dismissed. The Court concluded that success was divided, and each party was ordered to bear their own costs.

[18] By letter dated February 9, 2024, Mr. Baytalan made a formal offer to settle the action by the payment of $165,115.69 (representing what he determined was the plaintiff's "pre-development" expenses of $90,115.69 and $75,000 "for costs") and the plaintiff removing the option to purchase and certificate of pending litigation from the property's title. The offer contemplated a "without costs" consent dismissal order to be signed by the parties and mutual releases ("Formal Offer").

[19] The Formal Offer was open for acceptance until 4:00 pm February 16, 2024, seven days hence.

[20] Mr. Baytalan argues that he offered to compensate Culos for its pre-development costs and conceded during trial that, even though he was of the view that these costs would have been incurred in any event of the exercise of the Option to Purchase, such costs could be awarded as reliance damages.

Culos' Position

[21] Culos points to seven hotly contested trial issues and asserts it was entirely successful on six of them. Those issues were:

a) Whether the OTP was validly entered;

b) Whether Culos' initial appraisal prepared by Mr. Hoffman complied with the OTP's terms;

c) Whether Culos properly instructed Mr. Hoffman on the basis for his appraisal;

d) Whether Mr. Baytalan's appraisal prepared by Mr. Rizzo, complied with the OTP;

e) Whether Culos waived a requirement that Mr. Rizzo's appraisal was to be tendered in a timely manner;

f) Whether Culos' notice of intent to exercise the OTP was validly delivered; and

g) Whether Culos was entitled to specific performance of the OTP.

[22] Given this success, including beating the Formal Offer by a substantial amount, it should be awarded its costs throughout.

Discussion

[23] The overarching objective of a costs award is to ensure a just result and is very much a matter of a trial judge's discretion. A trial judge is in the best position to determine the proper costs order and to what extent, if any, an offer to settle should impact costs: *Loft* at para. 50.

[24] As I mentioned in the Reasons, this was a case of seller's remorse. Mr. Baytalan was initially happy with the sale price he negotiated but a year or so later, after becoming aware that property values in the Kelowna area had risen sharply since the OTP was entered into, decided he either wanted to renegotiate the purchase price or find a way out by raising a series of issues related to the OTP's terms and whether Culos complied with them.

[25] The trial issues identified by Culos were all vigorously contested throughout. Culos clearly succeeded on all issues save whether it was entitled to an order for

specific performance. In the Reasons, and although tempted to order otherwise, I concluded that on the facts before me, the law did not permit an order for specific performance to be made. Nevertheless, I ordered that Culos was entitled to recover significant damages instead.

[26] I recognize that, in determining success, the court is to be cautious in parsing out the case on an issue-by-issue basis but rather should look at the case globally and determine which party succeeded in the litigation. I also recognize that applications to apportion costs between issues are to be confined to relatively rare cases: *Lewis v. Lehigh Northwest Cement Limited*, 2009 BCCA 424.

[27] From a global perspective, I consider that Culos was easily the winning party. Even if I did look at the case on an issue-by-issue basis, I still would consider Culos to be the substantially successful party. Before getting to the remedy stage, Culos was forced to deal with and win the other issues Mr. Baytalan raised, which it did so successfully.

[28] There was, in my view, only one real matter in dispute between Culos and Mr. Baytalan, namely whether Mr. Baytalan breached the OTP. It cannot be seriously said that Culos was not successful in proving that he did so. While Culos was unable to prove that it was entitled to specific performance (which was clearly its goal), it was successful in proving significant damages.

[29] In these circumstances, the appropriate costs order is that Culos be entitled to its Scale B costs throughout.

[30] Respecting the Formal Offer ($90,115.69 plus $75,000 for “costs”), Mr. Baytalan argues that, because Rule 9-1’s purpose is to promote settlement of disputes, Culos should reasonably have accepted it based on what was known at the time it was received: *Meade v. Armstrong (City),* 2018 BCSC 528 at para. 33.

[31] He contends that if Culos had accepted the offer it would have been fully compensated for the entirety of its then-quantified reliance damages, and the trial would not have been required. The offer was made two months after the deadline for expert

reports and by then Culos would have appreciated that without experts, it could not establish damages for loss of bargain or loss of profit. That is, Culos should have then known that it would not do better that the Formal Offer at trial.

[32] While it was certainly appropriate for Mr. Baytalan to attempt to settle the case before trial by making a formal offer under the *Rules,* the amount offered was, firstly ambiguous in that it did not set out what the term “costs” was to entail and, secondly, was far less than amount awarded to Culos. Culos cannot suffer costs consequences because it rejected a formal offer less that the amount recovered at trial: *Gichuru v. Purewal*, 2021 BCCA 91.

[33] In my view, the Formal Offer was, in effect, an offer to settle for $91,115.69 plus pre-assessed costs of $75,000. It was less than one-half of what Culos was awarded and in the circumstances of this case, has no impact on the consideration of costs to be awarded.

Summary

[34] Mr. Baytalan’s application is dismissed.

[35] Culos is entitled to its Scale B costs of the action, including costs of this application.

“G.P. Weatherill J.”