In the Provincial Court of Alberta

Citation: Northmont Resort Properties Ltd v Reid, 2018 ABPC 49

Date: 20180228
Registry: Edmonton
Action Number: P1490304333

Between:

Northmont Resort Properties Ltd.

Plaintiff (Defendant by Counterclaim)

- and -

James Reid and Diane Reid

Defendants (Plaintiffs by Counterclaim)

Supplemental Decision of the Honourable Judge L.D. Young

[1] On October 11, 2017, I issued reasons striking the Amended Dispute Notes and Counterclaims filed by the Defendants and granting Judgment to the Plaintiff (the "Decision").[1] I identified three issues that remained to be decided: interest, costs and expired claims. I urged Counsel to resolve these issues, but they were unable to do so. They returned before me on November 16, 2017 the result of which was an Order directing the filing of written submissions and the filing of certain affidavit evidence respecting the issue of expired claims (the "Order"). What follows is my supplemental decision on the remaining issues and I adopt the same defined terms as are in the Decision.

Interest

[2] There are VIAs that pre-date 2004 which contain a provision that interest is payable on monies owed to the Plaintiff at a monthly rate with no equivalent annual rate or any annual rate at all.[2] Section 4 of the *Interest Act*[3] requires that where an agreement stipulates a rate of

interest that is "payable at a rate . . . for any period less than a year, no interest exceeding the rate or percentage of five percent per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which the other rate or percentage is equivalent."

[3] Although the Defendants did not specifically plead the *Interest Act* in their Dispute Notes, the issue of enforceability of the interest rate provision in the pre-2004 VIAs was raised when I heard the application for judgment. As stated in *Patel v Patel*,[4] "[f]ailure to specifically refer to a commonly-known and obvious statutory provision is not fatal . . ." In *Sticks and Stones Communications Inc. v Hole's Greenhouses & Gardens Ltd.*, [5] despite the fact that the *Interest Act* was not pled by the Defendant, the Plaintiff was unable to recover the stipulated monthly rate in the subject agreement.

[4] The Plaintiff would have me accept that because of the Vesting Order, there can be no finding that the interest provisions in certain of the VIAs offend the *Interest Act*. I reject that argument because so far as I am aware, the Vesting Order did not include any interpretation as to the interest provisions in the VIAs. I am not persuaded that it is an abuse of process for the Defendants to rely upon the *Interest Act*, even if they have done so at a late date. The Plaintiff has not argued that the interest provisions in the pre-2004 VIAs comply with the *Interest Act* nor has the Plaintiff argued that the *Interest Act* is some obscure statute that the Court should ignore even in a circumstance where an interest provision offends the *Interest Act*.

[5] Given all of the foregoing, I am satisfied that for those SLG Defendants with VIAs that pre-date 2004, the annual interest rate to which they are subject is 5%, the maximum allowable under the *Interest Act*.*[6]* Otherwise, for all other VIAs, the SLG Defendants will be subject to the annual rate of interest provided for in those VIAs which is 26.824%.

Costs

[6] The Plaintiff seeks what it calls "extraordinary" costs arguing that such costs are appropriate considering all of the circumstances of the SLG Actions. The Plaintiff makes several arguments. Firstly, it argues that there is blameworthy conduct on the part of the Defendants and that alone entitles the Plaintiff to an enhanced award of costs, even on a solicitor and his own client basis. Secondly, it argues that there is a contingency agreement between the Plaintiff and its counsel that the Court should enforce so as to ensure that the Plaintiff is indemnified for all of the legal costs it has incurred. Thirdly, it argues that an award can be made using the "Costs Guideline" in Provincial Court but significantly increasing the amount that the Court would otherwise award under this guideline in order to take into account the conduct of the Defendants. Lastly, it argues that a formal settlement offer was made by the Plaintiff to the Defendants, which was rejected, and with the Plaintiff's success on its application for judgment, any costs awarded to the Plaintiff should be doubled.

[7] The Defendants argue that the costs claimed by the Plaintiff are "excessive" and say there is support for their position which can be substantiated in a number of ways. Firstly, they argue that costs should only be awarded as if there was one action, with the result that any costs would only be ordered against the Reid Defendants and not as against all of the Defendants in the SLG Actions. Secondly, they argue that any award of costs on a solicitor and client basis is inconsistent with the guiding purpose of civil claims in Provincial Court, namely that disputes be dealt with expeditiously and inexpensively. Thirdly, they argue that there was no blameworthy conduct on the part of the Defendants that would warrant any form of enhanced costs. Fourthly, they argue that the contingency fee arrangement in place between the Plaintiff and its counsel is irrelevant with respect to any award of costs. Lastly, they argue that the formal requirements respecting a settlement offer

were not met by the Plaintiff and consequently, would not warrant any increase in any costs award to the Plaintiff.

[8] The Provincial Court may award costs in a civil proceeding and the amount to be awarded is within its discretion. Section 9.8 of the *Provincial Court Act* provides that "the Court may . . . on any conditions that the Court considers proper award costs . . ." Further, section 44 provides that, "the amount of the judgment shall include costs . . ." Additionally, the *Provincial Court Fees and Costs Regulation*,[7] sets out certain fees and costs payable in respect of civil proceedings and section 2(l) provides that "payment for additional classes of costs not otherwise specified . . . may be awarded, in the judge's discretion."

[9] There is also a "guideline" to which the parties have referred in their written submissions. That guideline was prepared by certain Judges of this Court many years ago and is titled "Guidelines for Costs in Provincial Court – Civil Division" (the "*Guideline*"). Although it is not legislated, the Guideline has been referred in and appended to decisions of this Court over the years. Counsel who appear in Provincial Court are familiar with the *Guideline*. It confirms that "costs are in the discretion of the court" and that "no minimum or maximum applies." It sets out that costs "are intended to provide a degree of indemnification with respect to the actual expense incurred or which it would be reasonable to incur in conducting litigation having regard to the amount and subject at issue." The amount specified for an award of costs at trial "with counsel [is] 10% of amount at issue." The *Guideline* also sets out certain "additional considerations" that the Court may consider when awarding costs, including "the complexity of the cause of action," the "time engaged in preparation for trial; or preparation of written argument where ordered by the court" and "conduct of a party in making or defending a claim without reasonable meritorious cause."

[10] Section 8 of the *Provincial Court Act* permits the Court to apply and modify the *Rules* as needed, "where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court . . ." As stated in *Posnikoff v Strauss*,[8] "although the Court may look to the *Rules of Court* for guidance with respect to the issue of costs, doing so does not make the application of the *Rules of Court* mandatory, but only permissive." That guidance includes the considerations set out in Rule 10.33 that may be taken into account when making an award of costs.

[11] A useful summary of costs principles was provided recently by Judge Redman in *Semeniuk v Ron's Bobcat Service Ltd.*,[9] at paragraphs 20-24:

> 20 The three categories of party and party costs, solicitor and client costs, and solicitor and own client cost were defined by Sinclair CJQB in *McCarthy v. Calgary Roman Catholic Separate School District No. 1*, 1980 CanLII 1145 (AB QB), [1980] 5 W.W.R. 524, 30 A.R. 208 (Alta. Q.B.), para 3, as follows:
>
> > As a general rule, costs may be said to fall into three categories:
> >
> > 1. Party-and-party costs - to provide partial indemnity for costs the successful party must pay his own solicitor.
> >
> > 2. Solicitor and client - this basis is intended, so far as is consistent with fairness, to provide complete indemnity to the party to whom they are awarded as to costs essential to and arising within the four corners of the litigation.
> >
> > 3. Solicitor and his client - the costs a solicitor can tax against a resisting client; the taxation between a solicitor and

> his client resolves itself into an assessment on the quantum meruit basis, into which all factors essential to fair play and justice enter.

21 As noted by Madam Justice Veit in *Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.*, 1986 CanLII 1771 (AB QB), [1987] 2 W.W.R. 75, 48 Alta. L.R. (2d) 367 (Alta. Q.B.), the definition of the various categories, particularly the third category, is not uniform (para. 12). She suggested that when a judge wishes to indemnify a party in a costs award, the phrase "indemnity basis" should be preferred to "solicitor and his own client" (para.16).

22 The generally accepted rule is that party and party costs are an appropriate level of costs for the party that succeeds in litigation and that it should only be deviated from in rare and exceptional circumstances.

23 As noted by Justice Hutchinson in *Jackson v. Trimac Industries Ltd.*, 1993 CanLII 7031 (AB QB), [1993] 4 W.W.R. 670, 138 A.R. 161 (Alta. Q.B.), at paragraph 12:

> The general rule is that costs follow the event. ...Another undisputed general principle is that "it must be a rare and most exceptional case in which costs will be awarded on a solicitor/client basis rather than on a party-party basis."...

24 In the recent decision of *FIC Real Estate Fund Ltd. v. Phoenix Land Ventures Ltd.*, 2016 ABCA 303 (CanLII), 2016 ABCA 303 (Alta. C.A.), both justices in the majority and the justice in partial dissent endorsed this principle and the list of examples where a greater costs award would be appropriate as set forth in *Jackson v. Trimac Industries Ltd*. At paragraph 4 the ABCA majority noted as follows:

> Generally, an award of solicitor-client costs is based on misconduct that occurs during the course of litigation. However, that is not an invariable rule. In *Sidorsky v CFCN Communications Ltd.*, 1997 ABCA 280 (CanLII) at para 28, [1998] 2 WWR 89, this Court further clarified that "a departure from party and party costs should only occur in rare and exceptional circumstances" and endorsed a list of examples from *Jackson v Trimac Industries Ltd.*, (1993), 1993 CanLII 7031 (AB QB), 138 AR 161 at 172 (QB), where a greater costs award would be appropriate:
>
> > 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (*Reese et al v Alberta (Minister of Forestry, Lands and Wildlife) et al*, 1992 CanLII 2825 (AB QB), [1992] AJ No 745, 5 Alta LR (3d) 40 (QB);
> >
> > 2. cases in which justice can only be done by a complete indemnification for costs (*Foulis et al v Robinson; Gore Mutual Inc Co, Third Party*, 1978 CanLII 1307 (ON CA), [1978] OJ No 3596, 21 OR (2d) 769 (CA));
> >
> > 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (*Max Sonnenberg Inc v*

Stewart, Smith (Canada) Ltd, 1986 CanLII 1771 (AB QB), [1986] AJ No 1036, 48 Alta LR (2d) 367 (QB);

4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (*Olson v New Home Certification Program of Alberta*, 1986 CanLII 1640 (AB QB), [1986] AJ No 347, 44 Alta LR (2d) 207 (QB));

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (*Dusik v Newton* (1984), 1984 CanLII 690 (BC SC), 51 BCLR 217, 1984 Can LII 690 (SC));

6. defendants found to be acting fraudulently and in breach of trust (*Davis v Davis*, [1981] MJ No 320, 9 Man R (2d) 236 (QB));

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (*Kepic v Tecumseh Road Builder et al*, [1987] OJ No 890, 23 OAC 72);

8. fraudulent conduct (*Sturrock v Ancona Petroleums Ltd*, 1990 CanLII 5563 (AB QB), [1990] AJ No 738, 111 AR 86 (QB)); and

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (*Pharand Ski Corp v Alberta*, 1991 CanLII 5931 (AB QB), [1991] AJ No 902, 83 Alta LR (2d) 152 (QB).

[12] It is well established that a finding of *res judicata*, abuse of process, and vexatious proceedings, as set out in the Decision, may result in an order for enhanced, as opposed to full indemnity, costs. Most recently, in *Loughlin v. Her Majesty the Queen*,[10] Justice Shelley wrote at paragraph 15:

> . . . While full indemnity cost awards are rare, enhanced costs are a common response to " . . . circumstances where the conduct of one of the participants falls far short of what is expected from a responsible litigant": *Kent v. Law Society of Alberta*, 2015 ABQB 432 (CanLII), 2015 ABQB 432 (Alta. Q.B.) at para 18, (2015), 76 C.P.C. (7th) 110 (Alta. Q.B.); *Decore v. Decore*, 2016 ABQB 572 (CanLII), 2016 ABQB 572 (Alta. Q.B.) at para 16, (2016), 44 Alta. L.R. (6th) 410 (Alta. Q.B.).

[13] I have had the benefit of reviewing the supplementary reasons for judgment issued by Justice Branch in *Northmont Resort Properties Ltd. v. Golberg,*[11] respecting quantum, including interest, and costs. Justice Branch found that enhanced costs were warranted.

[14] I am not persuaded by the argument of the Plaintiff that it should be fully indemnified. Firstly, the Plaintiff has not brought to my attention any specific contractual provisions in the VIAs which would entitle it to full indemnification. The amended civil claims in the SLG Actions simply plead "full costs of this action as per the agreement," without pleading a particular clause or its wording. Secondly, Justice Moreau (as she then was) in *Edwards* previously decided the costs with respect to a VIA entered into between the parties in 2010. Many of the same arguments here were raised in *Edwards*. Justice Moreau decided that the indemnification provision in the VIA was not sufficiently clear to award costs on a full indemnity basis.[12] Secondly, the contingency agreement relied upon by the Plaintiff is not in evidence before me, nor is the formal offer of settlement. There is nothing in the *Provincial Court Act* which deals with a contingency agreement or a formal offer of settlement. As a result, in looking to the *Rules* for guidance, in order for there to be any enforcement of a contingency agreement or formal offer of settlement, they must meet certain formalities in order to be recognized and enforced.[13] Those formalities have not been met.

[15] That being said, I am satisfied that as a result of my findings of *res judicata*, abuse of process and vexatious proceedings in the Decision, the Plaintiff is entitled to costs on an enhanced basis. The difficulty lies in determining what amount is reasonable having regard to the unique circumstances of the SLG Actions proceeding together, even though there was no formal order of consolidation, nor was this is a "class proceeding."

[16] I am satisfied that the same costs award should be made in each action, without reference to the amount of the claim, because the SLG Defendants proceeded together, filed the same dispute note and counterclaim and were represented by the same counsel.

[17] Ordinarily, in awarding costs, I would first look to the *Guideline*, but it is not really of assistance in these circumstances. The difficulty is that there was no trial in the SLG Actions, and there are approximately 750 SLG Actions, each with differing principal amounts. Further, the *Guideline* does not break down steps in litigation. "Schedule C, the Tariff of Recoverable Fees" in the *Rules*, may also be of assistance as it does provide a breakdown of steps in litigation. However, I do not have the benefit of a draft bill of costs detailing the steps that the Plaintiff took in this litigation. Certain steps, such as the filing and service of a civil claim, were required in each of the SLG Actions, but most other steps were done "globally." For example, when counsel for the Plaintiff appeared on an application, that application and the required preparation was done once – not seven hundred and fifty times. In other words, the steps taken by the Plaintiff have essentially been the same in all of the SLG Actions. Those steps have been the filing of a civil claim and the participation by the Plaintiff in a number of case management conferences and applications, culminating in its successful application for judgment.

[18] As costs are within my discretion, I find that a costs award in each SLG Action of $750.00 is reasonable having regard to all the circumstances of this litigation. I have found an award of enhanced costs is warranted and I am going to increase that sum by 25% to $937.50.

[19] As to disbursements, the amount claimed in each SLG Action is $225.00 as set out in the Affidavits of Lauren Crandall and Kristina Ples, filed by the Plaintiff. That amount is certainly reasonable, as in many of the SLG Actions the filing fee alone would have been $200.00.

[20] The end result is that I award costs inclusive of disbursements in the amount of $1,162.50 in each SLG Action.

Expired Claims

[21] The Defendants allege that some of the civil claims have expired, presumably because they have not been served within one year from the date they were issued or have not been served at all.

There was no reference to any expired claims in the Defendant's written submission nor was any affidavit evidence filed as required by the Order. Consequently, there is no basis on which to find in favor of the Defendants on this issue and any argument as to expired claims fails.

Conclusion

[22] In the Decision, I awarded judgment for the amount claimed in the Amended Civil Claims. However, those amounts included interest and given that the issue of interest was reserved, I am clarifying by this supplemental decision that the amount of the judgment awarded to the Plaintiff in each SLG Action is the principal amount as set out in the Simovonian Affidavit. Interest is to be calculated on those principal amounts at the rate of 5% per annum for those VIAs that pre-date 2004 and at the rate of 26.824% per annum for all other VIAs.

[23] Counsel for the Plaintiff is directed to prepare a "judgment roll" for each of the SLG Actions, specifying on one page for each action: action number, style of cause, VIA date, principal sum, rate of interest, calculation of interest including dates from which interest begins to the date of this decision and a *per diem* thereafter, applicable Federal Goods and Services Tax and costs of $1,162.50 (the "Judgment Rolls"). The Judgment Rolls are to be provided to Counsel for the Defendants within 30 days of the date of this decision. Counsel for the Defendant will then have 21 days from receipt of the Judgment Rolls to review them and advise Counsel for the Plaintiff, in writing, whether there are any concerns with the Judgment Rolls.

[24] Where there is no objection, the Plaintiff is to file those Judgment Rolls as soon as practicable with the Clerk and a Certificate of Judgment will be issued. I urge counsel, yet again, to make every effort to resolve any differences, failing which they can contact the trial coordinator to schedule a date to appear before me to settle any disputed Judgment Rolls.

Dated at the City of Edmonton, Alberta, this 28th day of February, 2018

L.D. Young
A Judge of the Provincial Court of Albert
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Appearances:

F. Sauvageau, Sauvageau & Associates: Solicitors for the Plaintiff (Defendant by Counterclaim)

B. King, Strathcona Law Group: Solicitors for the Defendants (Plaintiffs by Counterclaim)

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[1] 2017 ABPC 249 (CanLII)
[2] Affidavit of Carla Avery filed August 24, 2016
[3] RSC 1985 c I-15
[4] 2011 ABQB 662 (CanLII) para 32
[5] 2015 ABQB 774 (CanLII)
[6] *Toerper v Hoard* 2011 ABQB 85 (CanLII)
[7] AR 18/1991
[8] 2009 ABPC 293 (CanLII) at para 12

[9] 2017 ABPC 50 (CanLII), see also, *Stagg v Condominium Plan No. 822-2999*, 2013 ABQB 684 (CanLII), at paras 25-30
[10] 2018 ABQB 45 (CanLII)
[11] 2018 BCSC 151 (CanLII)
[12] At paragraph 104
[13] See *Rules* 10.7-10.8 and 4.24 and 4.29