Court of Queen's Bench of Alberta

Citation: 864503 Alberta Inc v. Genco Place Properties Ltd, 2018 ABQB 359

Date: 20180502
Docket: 1401 00942
Registry: Calgary

Between:

864503 Alberta Inc., Sukhjinder Boparai, Sukhwant Boparai, Hardial Boparai and Sampuran Chatha

Plaintiffs

- and -

Genco Place Properties Ltd., GDC (GP) Ltd., GDC (Copperfield) Ltd., GDC (Copperfield 2) Ltd., GDC (MG) Ltd., GDC (634) Ltd., GDC (608) Ltd., Genco Development Corporation, Genco Land Holdings Ltd., Pali Bedi, Jasbir Hans and Navpreet Bedi, also known as Navpreet Singh

Defendants

- and -

Genco Holdings Ltd., Genco Place Properties Ltd., GDC (Copperfield) Ltd., , GDC (MG) Ltd., GDC (634) Ltd., GDC (608) Ltd., Genco Development Corporation, and Pali Bedi

Plaintiffs by Counterclaim

- and -

864503 Alberta Inc., Sukhjinder Boparai, and O.K. General Food Stores Ltd.

Defendants by Counterclaim

Memorandum of Decision
of
A.R. Robertson, Q.C., Master in Chambers

[1] This application was presented before me to reconsider the costs that I granted in the special application I decided March 18, 2016 (reported at 2016 ABQB 163). However, my order was reversed on appeal by Justice Dario (reported at 2017 ABQB 809). She has not yet made an award of costs, and she wanted some input on how I had arrived at the costs that I did before she does so. She said this at paragraphs 181 and 182 of her decision:

> To the extent that the cost award of the Master pertains to a finding of an abuse of process based on an attempt to re-litigate a settled issue, given I have found there was no res judicata, this cost award should be reviewed. Although not ideal, 864's approach to the subsequent claim was not a misuse of the judicial system: ***Reece v Edmonton***, 2011 ABCA 238 (CanLII), leave to appeal to SCC refused: [2011] SCCA. No. 447.
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> To the extent, however, that the Master's cost award related to the Plaintiff having first brought new evidence on the second day of the Master's hearing, necessitating a further adjournment (after the matter had already been adjourned once due to insufficient information being provided to the Master), the cost award for this abuse of the court's time may nevertheless be appropriate, notwithstanding granting the appeal. As it is not clear to this court how such costs were apportioned by the Master, the issue of the costs award of the Master is returned to him to consider whether any variation is merited.

[2] I interpret her request to be for my explanation as to how the costs were calculated, and my view as to whether any variation of the costs is merited.

[3] My original award of costs was given orally. It was recorded in the transcript from the hearing on April 27, 2016, starting at page 63, line 39. I broke down how I arrived at my calculations, but I will repeat the calculation here in an attempt to make the approach clearer, as well as explain my views as to how they might be varied by Justice Dario, depending upon how she elects to exercise her discretion.

[4] I took into account that although Mr. Solomon was representing 10 defendants, and they filed separate defences, there were commonalities involved. That is, there were not 10 separate defence counsel. There is only one counsel. I presumed that once one defence was drafted, drafting the next one would have required less work than the first, and so on. Using the single amount of $3,500 for commencement documents was inappropriate, and multiplying it by 10 was also inappropriate. Accordingly, I multiplied the amount times four. That led to a figure of $14,000 for the defences and other pleadings.

[5] I applied the same approach to the amount for disclosure of records. I used the base figure of $1,500 and multiplied it by four, for a figure of $6,000.

[6] The next item was the review of opposite party documents, and using a base figure of $1,500, plus the amount for preparation for questioning, being another $1,500, plus another $1,500 for each half day of questioning, I arrived at $16,500. (In my reasons I referred to backing out one questioning entry, referring to a figure that Mr. Solomon had included in error, but then adding in the questioning of Ms. Lynk, which he had inadvertently omitted.)

[7] I then allowed for uncontested applications before Master Prowse and Justice Park at $800 each, the base amount set out in Schedule "C". That is a total of $1,600 for those applications.

[8] For the purposes of the questioning entries and the uncontested applications, I used no multiplier at this stage of the calculation. Mr. Solomon only attended once on each occasion although he represented multiple parties.

[9] For the contested applications that were heard before the special application before me came up, the figure was $1,500 for each of November 6 and October 21, 2014, for a total of $3,000.

[10] I then totalled all of these numbers, and I arrived at a figure of $44,250. Before proceeding to award costs for the special application before me, I multiplied that figure by three for the following reasons:

(a) the personal and unwarranted allegations that were simply not necessary as against Mr. and Mrs. Bedi, if the objective was to get access to records as the plaintiff alleges;

(b) taking into account the amount that was sued for, which was well in excess of the $1,500,000 figure which is the starting point for column five of schedule C;

(c) the fact that the claim as a whole was an abuse of process;

(d) the fact that some questionable things were done by counsel, including writing Avison Young pretending to represent the opposing lawyer's client and refusing to correct that assertion;

(e) other minor matters previously discussed in the argument about costs; and

(f) to reflect the cost of living increase since Schedule "C" was introduced.

[11] At that point the award of costs totalled $132,750.

[12] Then I proceeded to the special application before me. For that application, I used a lump sum figure of $25,000.

[13] There were disbursements and other charges that were claimed that totalled $26,600.66.

[14] Adding the $132,750, plus $25,000, plus disbursements of $26,600.66, I arrived at a total of $184,350.66. I then rounded that to $185,000.

[15] I did not allow GST because it is not appropriate. Corporate litigants normally obtain an input tax credit. Claiming GST on bills of costs would be a recovery of a costs that has already been reimbursed. That is specifically addressed in rule 10.48(2).

[16] In light of the reversal of my decision, factor (c), being my conclusion that the claim as a whole was an abuse of process, is no longer an appropriate factor to consider. The claim has now been found not to have been an abuse of process.

[17] That was the single most important factor leading to the multiple of three. Removing that factor, I would have used a multiple of 1.5, although the amount for the contested application would have remained at $25,000 with no multiplier.

[18] In my view what happened on the appeal here was that after the application was argued before me, counsel for the plaintiff provided new evidence, which should have been available to him before appearing in Master's Chambers but was not used. He then re-argued the case before Justice Dario. Unfortunately, this is a common occurrence in appeals from Masters' chambers. Apparently that new evidence was important in persuading Justice Dario that summary dismissal should not be granted.

[19] However, that does not change these facts:

(a) all of the pre-application steps had to be done;

(b) the case was still one where unnecessarily hostile things were said in the pleadings, in circumstances where the plaintiff explains that the claim was advanced substantially to get accounting records;

(c) the case was discontinued as against many of the parties before it came before me (although that discontinuance was part of the application before me in light of the Clerk's filing of a flawed "amended discontinuance"), with the result that the defendants were substantially successful for a significant part of their application before it was even brought to the hearing for resolution;

(d) there were still questionable things done, now partly explained by counsel for the plaintiff, but one not explained is the letter to Avison Young, which I am advised has still not been corrected. However, I accept that the critical email that was not included in the compendium affidavit that was presented mid-hearing, initially without being under oath, was left out innocently.

[20] In light of the reversal, and in light of Justice Dario's comments at paragraph 180 of her decision, in which she said that the plaintiff's approach "created a labyrinth of claims and associated evidence, making this review unnecessarily complex, convoluted and time-consuming", it appears to me that she might be considering awarding costs in favour of the unsuccessful defendants. She has not yet made her award as to costs. I do not mean to pre-judge or influence her approach on this issue, but the request for my consideration of whether the costs award should be varied requires me to consider various options.

[21] It is my suggestion that if costs are to be awarded in favour of the defendants, those pre-application costs would remain, with the exception of the costs for pleadings ("commencement documents"), but with a multiplier of only 1.5 to reflect the plaintiff's success on the application. I would still include the costs for document production because, we are told, the claim was advanced mostly to get access to the accounting records. Although the appearance in Master's Chambers was essentially a "dress rehearsal" for the appeal to a Justice, those pre-application costs were still incurred and not wasted, and most of my concerns about how this matter proceeded remain.

[22] In light of the reversal of my decision, the cost of $25,000 for the contested application before me would not be awarded, unless Justice Dario thinks it appropriate to do so specifically on the basis that the appearance in Master's Chambers was simply a waste of time for the defendants as well as the court. That figure does not reflect the defendants' actual legal fees arguing this difficult case before me, but it is a significant increase from the amount set out in Schedule "C". Whether anything should be awarded for this wasted exercise, and if so, how much, is within her discretion, not mine.

[23] As to the disbursements and other charges, I am not now in a position to provide a final figure for a suggestion or recommendation, because I do not have access to the specific items that led to the figure I used. Conceptually, my recommendation would be to apply the disbursements that applied to each of the steps that were properly taken for which I would award costs, as set out above.

[24] If some of the disbursements related directly to the hearing before for me, such as the photocopying of briefs, delivery charges and the like, they would be taken into account on the same basis as the $25,000 lump sum costs award for fees for the hearing.

[25] Of course, there would be no multiplier applied to the disbursements.

[26] If there is to be an award as to costs for the recent appearance before me to address these points, that is for Justice Dario.

Heard on the 13th day of March , 2018 and 26th day of April, 2018.
Dated at the City of Calgary, Alberta this 2nd day of May, 2018.

A. R. Robertson, Q.C.
M.C.C.Q.B.A.

Appearances:

Glenn Solomon, Q.C.
Jensen Shawa Solomon Duguid LLP
for the Applicants/Respondents

Kevin McGuigan
McGuigan Nelson LLP
for the Respondents/Applicants