In the Court of Appeal of Alberta

Citation: FIC Real Estate Fund Ltd. v Phoenix Land Ventures Ltd., 2016 ABCA 303

Date: 20161012
Docket: 1503-0178-AC
Registry: Edmonton

Between:

FIC Real Estate Fund Ltd.

Respondent

- and -

Phoenix Land Ventures Ltd.

Appellant

The Court: **The Honourable Mr. Justice Ronald Berger**
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Frederica Schutz

Memorandum of Judgment of the Honourable Madam Justice Bielby and the Honourable Madam Justice Schutz

Memorandum of Judgment of the Honourable Mr. Justice Berger Dissenting in Part

Appeal from the Judgment by
The Honourable Mr. Justice S.D. Hillier
Dated the 20th day of May, 2015
Filed on the 20th day of May, 2015
(2015 ABQB 318, Docket: 1003 13366)

Memorandum of Judgment of the Honourable Madam Justice Bielby and the Honourable Madam Justice Schutz

[1] We take no issue with the conclusions reached in the first 10 paragraphs of the minority decision in relation to the trial judge's interpretation of the Trust Agreement.

[2] We respectfully disagree, however, that the trial judge's award of solicitor-client costs should be overturned on this appeal. His reasons for decision, read in their entirety, show that the award was based on his finding of litigation misconduct in the form of significant adverse credibility assessments relating to the trial testimony of the two principal witnesses for Phoenix. Negative credibility findings can be found to amount to litigation misconduct justifying an award of solicitor-client costs in certain cases. Here those findings arose from far more than the trial judge simply preferring the evidence of one set of witnesses over that of another set of witnesses.

[3] The thrust of the appellant's initial argument in relation to the trial judge's award of solicitor-client costs is that he failed to explain that decision. That is not so. It is not necessary for a judge to give detailed reasons for his costs decision if his or her reasoning arc is clear from the judgment in its entirety, as well as from the evidence led at trial: ***R v Gagnon***, 2006 SCC 17 at para 18, [2006] 1SCR 621; ***R v REM***, 2008 SCC 51 at para 35, [2008] 3 SCR 3. That is the situation here. Much of the body of the judgment is comprised of the trial judge's negative assessment of the credibility of Phoenix's principal witnesses, Mr. Tansowny and Mr. O'Dowd; that assessment required and allowed him to consider, and ultimately find, pre-litigation misrepresentations and misconduct.

[4] 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 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), 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] 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] 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] 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] 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), 51 BCLR 217, 1984 CanLII 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] 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] AJ No 902, 83 Alta LR (2d) 152 (QB)).

[5] Overall, the case law in relation to awards of solicitor-client costs "demonstrates that a careful analysis has to be made of the facts in each case and also illustrates the wide discretion to be exercised by the trial judge who had the benefit of seeing and hearing the witnesses and distilling the essence of the lawsuit": ***Sidorsky*** at para 34, citing ***Jackson*** at p 173.

[6] The Supreme Court of Canada provided direction about when it is appropriate for a court to award solicitor-client costs for trial misconduct in ***Young v Young***, [1993] 4 SCR 3 at 134, 108 DLR (4th) 193:

> Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[7] Severe, almost scathing adverse credibility findings made in relation to non-arm's length witnesses called by the unsuccessful party are not excluded from the sorts of things that can constitute "reprehensible, scandalous or outrageous conduct".

[8] It was suggested in the course of oral argument that the judgment of this Court in ***Professional Sign Crafter (1988) Ltd v Seitanidis***, 1998 ABCA 303 concluded that an award of solicitor-client costs can never be justified on the basis of adverse credibility findings at trial. We disagree. The panel that heard that appeal assessed the conduct said to warrant solicitor-client costs and found at para 5: "[t]here is nothing, in our view, in Stanley's conduct in initiating the proceedings and his conduct thereafter that comes within the class of a rare and exceptional case warranting solicitor/client costs."

[9] We acknowledge that some judges have declined to find litigation misconduct simply because of credibility findings made against certain witnesses, but as this Court made clear in ***Indutech Canada Limited v Gibbs Pipe Distributors Ltd***, 2013 ABCA 111 at para 104: "no authority precludes the award for that reason. In any event, the nature and depth of the negative credibility findings made against the appellants' witnesses elevates this case from the more typical situation where a trial judge simply accepts the evidence of one witness over that of others."

[10] In this appeal, while he might have done so on the facts as found by the trial judge, FIC's counsel did not attempt to rely on evidence which suggests that solicitor-client costs were justified because Phoenix had been guilty of positive misconduct of a quasi-fraudulent nature or breach of trust pre-litigation, although these factors were recognized in ***Sidorsky*** as separate reasons justifying such an award. He argued instead, that the costs ordered were justified by Phoenix's conduct in defending itself on what amounted to the deeply discreditable evidence of its agent, Mr. Tansowny, and its principal, Mr. O'Dowd.

[11] The evidence of both Mr. O'Dowd and Mr. Tansowny was the subject of considerable judicial criticism, extending well beyond a simple weighing of one witness' evidence against that of another. At AR F0011, para 69 the trial judge stated:

> I start with Tansowny, whose version of events was unburdened by any need to reconcile or distinguish between his vested interest in the outcome and the events as they actually occurred. Overall, I found his testimony to be glib, facile, and dismissive of any real basis for dispute... and I find that his assertions at trial openly in favour of Phoenix simply do not withstand scrutiny.

[12] Tansowny's credibility was further tarnished by the internal inconsistencies in his testimony. His evidence suggesting Phoenix intended to sell only an interest in the hotel business and not in the Golf Dome property, directly conflicted with the evidence that he had earlier sued FIC for real estate commission in relation to its purchase of that property and had filed a caveat on title to support his claim. Additionally, he did not disclose until cross-examination that he had a personal interest in Borealis, another purchaser of an interest in the Golf Dome property. Borealis, purchasing that interest in the same timeframe as FIC, paid a much lower price per percentage interest than FIC was charged.

[13] In relation to Mr. O'Dowd the trial judge stated: "O'Dowd's evidence was almost equally unreliable [to that of Tansowny]". He observed that O'Dowd failed to explain why two other investors were charged considerably less than FIC for a similar interest in the Golf Dome property. While he explained that his failure to remit any share of the property's operating profits to FIC (when he had remitted shares to the other investors) was because he could not find FIC, he had no difficulty in finding FIC when necessary in relation to this litigation.

[14] On the basis of all of this, the trial judge described the evidence of both Mr. Tansowny and Mr. O'Dowd to the effect that the investors, including FIC, only acquired a commitment for shares in the yet to be formed company, "to be unreliable assertions driven by their own interests in the outcome of this litigation." (AR F0014 at para 86)

[15] FIC's argument that the award of solicitor-client costs was justified by the negative credibility findings of the trial judge and litigation misconduct was not contradicted by concessions made by its counsel during oral argument of this appeal. Those concessions amount to no more than agreeing that the nature and depth of the adverse credibility findings made in paragraphs 69, 75 and 86 of the trial decision are a valid basis upon which the award of solicitor-client costs may be upheld; in other words, that those findings are sufficient litigation misconduct to support the award. After agreeing that a trial judge in awarding solicitor-client costs should look simply at conduct in the context of the litigation, FIC's appeal counsel described that conduct in this case as follows:

> Mr. Fitz: Well, I... I think from the trial judge's decision, it is quite evident that he was very unhappy with the demeanor of the... of Mr. Tansowny and Mr. O'Dowd in the giving of their evidence. He was particularly critical of them on a number of occasions. For example, at paragraph 69 where he commented on Mr. Tansowny's being unburdened by any need to reconcile or distinguish between his vested interest in the outcome and the events as they actually occurred, paragraph 86 where he noted that both Mr. O'Dowd and Mr. Tansowny appeared to be motivated by their own personal interests, paragraph 75 of the reasons where he noted the various misstatements in the evidence that they had given. And in particular,

> I think in the case of Mr. Tansowny, the fact he gave evidence at trial concerning what he said happened, yet his own conduct in commencing an action and filing affidavit evidence to the contrary was obviously something significant. That only came out in cross-examination, of course, but obviously it was... it was quite significant when he had told one story to Justice Hillier and then being shown in cross-examination affidavit evidence that he had sworn in other proceedings.
>
> So, in my submission, you simply have a situation where you have a trial judge who takes a very harsh view of the credibility of both of the key defence experts and in my submission there is clear authority for you, it's in our materials that would permit the award of solicitor-client costs in that case, the *Indutech* case...
>
> So, in my submission, this is a situation where the trial judge had the benefit of hearing five days of trial, of assessing the credibility of the various witnesses, obviously formed a very negative view of Mr. Tansowny and Mr. O'Dowd and it's not hard to... read through the decision and see that the basis upon which the solicitor-client costs award was that negative view as to the credibility of those two witnesses.

[16] FIC's counsel went on to support this argument by referencing the decision of this Court in ***Lavoie v Wills***, [2002] ABCA 240 at para 3, 312 AR 373: "The trial judge censored the appellant's conduct and credibility at trial, and awarded solicitor-client costs to the respondent. The appeal of that award was dismissed by this Court". He also referred to the Alberta Court of Queen's Bench decision in ***Jackson v Trimac*** at para 35, where the trial judge relied on the unreliability of one of the witnesses to the extent that it affected the conduct of the action, as being one of several reasons for his award of, what was essentially, solicitor-client costs to the plaintiff.

[17] While counsel did not attempt to rely on pre-litigation misconduct as justification for the award of solicitor-client costs, it is not improper to now consider that conduct as supportive of the overall reasoning arc of the trial judge in setting costs. The evidence demonstrated that Mr. Tansowny was operating under a considerable conflict of interest when he testified at trial on behalf of Phoenix. He had been hired by FIC to provide advice and services leading up to the creation and execution of the Trust Agreement, but did not reveal to FIC that he had an interest in Borealis or that Borealis paid a much lower price for its interest in the Golf Dome property than that paid by FIC. Further, when it became clear that the hotel redevelopment could not proceed because of municipal zoning requirements, he was hired by Phoenix to act in the further execution of the Trust Agreement with FIC; going to work, as it were, for the "other side". Additionally, he

received profit share payments from the Golf Dome property through Borealis at a time when no such profit share payments were made to FIC.

[18] Further, as expressly found by the trial judge:

- Phoenix failed to advise FIC that it actually did not acquire title to the Golf Dome property until July 31, 2009 when Mr. O'Dowd's daughter's company transferred title into Phoenix's name for one dollar (paras 28-30, 39, 91(a));
- Phoenix then arranged to place a $1.5 million mortgage on title, without advising FIC or accounting to it for any of the resulting $1.5 million (para 39);
- FIC was not advised of O'Dowd's conversion of the facilities on the Golf Dome land for use by a ball hockey group resulting in cost overruns of $544,000, nor that the builder subsequently put a lien on the property for that amount (para 40); and
- FIC was not advised that the ball hockey group defaulted on its obligations and was evicted or that two subsequent arrangements with different ball hockey groups failed, with rentals paid by them credited to the parties who had purchased interests in the development in 2007, although FIC never received any share of these rental payments (paras 41-42).

[19] The trial judge expressly stated at para 95 of the decision under appeal that he had considered "all of the evidence" in finding Phoenix to have acted as a trustee. While not expressly referenced, this would undoubtedly have included the reasonable inference that any equity in the Golf Dome property that FIC could hope to recover as a result of a trial judgment in its favour may have been seriously diluted by the $1.5 million mortgage and subsequent $544,000 builder's lien, placed on the property without its knowledge or consent. We have concluded however, that it is not appropriate for us to consider, or take into account in any way, the actions of Phoenix that led to this development. Those facts might have supported an argument that an award of solicitor-client costs should also be made against Phoenix in order for justice to be done, as otherwise FIC's success at trial and on this appeal could well amount to a strictly pyrrhic victory (see ***Sidorsky*** at para 28(2); ***Meleshko v Alberta***, 2013 ABQB 468). We completely set aside that consideration here, however, as counsel did not raise these facts or that argument at trial or on appeal.

[20] The trial judge's conclusion on costs is not contradicted by his determination that there was no evidence that Phoenix, as trustee of FIC's interest in the Golf Dome property, mismanaged the property contrary to the best interests of the beneficial owners. That statement, found at para 104 of the trial decision, must be read as referring only to the day-to-day management of the property, including the effort to mitigate losses by reconfiguring it for use as a ball hockey venue. To hold otherwise would mean this determination makes no sense in the context of his other findings of misconduct by Phoenix. These findings included: that the Golf Dome property was not owned by

Phoenix at the time it sold a 20% interest in it to FIC (para 91(a)); that Phoenix valued the Golf Dome property at $3.5 million to two other investors in the same time frame as Phoenix told FIC it was valued at $5 million (para 77); and, that FIC received no report from Phoenix that the City of Edmonton had refused to rezone the property for a hotel redevelopment (para 91(c)).

[21] While neither Mr. Tansowny nor Mr. O'Dowd was a party to this litigation, Phoenix Land Ventures Ltd is a corporation, which could only provide evidence through its principals or other knowledgeable representatives: see ***Motkoski Holdings Ltd v Yellowhead (County)***, 2010 ABCA 72 at para 88. Mr. Tansowny and Mr. O'Dowd were its voice. Mr. Tansowny was a contractual consultant to FIC when the Trust Agreement was executed; he subsequently became a consultant of Phoenix, an arrangement that remained extant at trial. Mr. O'Dowd was a principal of Phoenix throughout. There is no reason to conclude that an award of solicitor-client costs based on credibility findings can only be made in relation to the testimony of individual party litigants, as that would result in such an award never being available in relation to corporate litigants no matter how egregious the testimony of their representatives at trial.

[22] FIC cannot be faulted for failing to make an express claim for solicitor-client costs in its Statement of Claim. The litigation misconduct supporting such an award - the lack of credibility of Phoenix's primary witnesses, did not arise until after the commencement of trial, at the earliest, and perhaps not until after the trial judge made the negative credibility findings in his decision. There is no way that FIC could have known this would occur in advance of trial.

[23] While the trial judge did not expressly afford Phoenix the opportunity to speak to the issue of solicitor-client costs before making the award, it has been given full opportunity on this appeal to make its best case and has failed to convince the majority, in the unusual circumstances of this case, to interfere with the discretion of the trial judge. We agree with the wisdom behind requiring that any party vulnerable to a potential award of solicitor-client costs be given advance notice of the claim so that it has an opportunity to make full argument on that issue. Judges, as a general practice, should always give parties notice and an opportunity to argue their position before making any order that has not otherwise been expressly sought. However, the failure to have done so here does not persuade us to interfere with the discretionary decision of the trial judge. This situation differs from that in ***Blanchard v Canadian Paperworkes Union (CPU), Local 263***, [1991] NBJ No 132, 49 CPC (2d) 151 (CA), where the self-represented appellant was ordered to pay solicitor-client costs after requesting an adjournment on the basis of what the trial judge considered scandalous accusations, and where the respondent had not asked for any costs in relation to that adjournment or the mistrial which was ultimately declared by the trial judge.

[24] While this Court commented in ***Sidorsky*** at paras 29-32, that the rationale for providing enhanced costs only exceptionally is to prevent a chill on bringing valid claims and defences for fear of losing and facing unduly high costs, given that the impugned testimony emanated from sophisticated businessmen, we do not anticipate that upholding the trial judge's costs award will have a chilling effect on litigation driven by honest differences of opinion.

[25] In summary, we diverge from the minority decision and conclude that the trial decision readily discloses that the award of solicitor-client costs was rooted in findings of litigation misconduct arising from the severe negative credibility assessments made in relation to Phoenix's most significant witnesses. We defer to the discretion of the trial judge in relation to his award of solicitor-client costs.

[26] In the result, the appeal is dismissed. Given the trial judge's failure to give Phoenix an opportunity to speak to an award of solicitor-client costs in the Court below, which, had he done so might have avoided the need for this appeal, each party shall bear its own costs of this appeal notwithstanding FIC's success otherwise.

Appeal heard on June 06, 2016

Memorandum filed at Edmonton, Alberta
this 12th day of October, 2016

Bielby J.A.

Schutz J.A.

Memorandum of Judgment of
The Honourable Mr. Justice Ronald Berger
Dissenting in Part

[27] The narrow issue on appeal engages the interpretation of a contract. The respondent FIC Real Estate Fund Ltd. ("FIC") is a group of member investors based in British Columbia who finance and invest in various global projects. FIC entered into a Trust Agreement on August 2, 2007 signed by its agent John Tansowny. At all material times, Denis O'Dowd was the principal of Phoenix Land Ventures Ltd. ("Phoenix").

[28] In issue is whether pursuant to the Trust Agreement the interest which the respondent was to acquire was a 20% interest in the hotel redevelopment of that which is referred to as the Golf Dome property in exchange for the contribution of one million dollars ($1,000,000.00) or whether, as the respondent maintains, and as the trial judge found, the Trust Agreement gave the respondent a 20% interest in the land and buildings.

[29] The Trust Agreement makes reference to both the development project and the land and buildings:

> 1. The purpose of this agreement is to confirm FIC's participation in PLV's development project as the Golf Dome Redevelopment...
>
> 2. FIC has provided a total of One Million Dollars ($1,000,000), Canadian funds, the receipt of which PLV hereby acknowledges, for which FIC acquired a combined 20% ownership interest in the existing Golf Dome land and building valued at Five Million Ninety-Two Thousand Dollars ($5,092,000.00).
>
> 3. PLV irrevocably agrees:
>
> a) to irrevocably hold title to the specific FIC shares "In Trust" for FIC as joint title holders.
>
> b) to assure FIC's participation in the Golf Dome's redevelopment in proportion to FIC's Golf Dome ownership share.
>
> c) to issue or hold in trust, FIC's shares in any development joint ventures created to undertake the project in direct proportion to FIC's Golf Dome ownership...

[...]

> 5. It is understood by all parties this agreement will be superseded by a Joint Venture Agreement and a new corporation will be structured to manage the development... PLV acknowledges that FIC will be a party to the Joint Venture Agreement as well as an equity participant in the new corporation in proportion to FIC's ownership share of the Golf Dome property

[30] By May of 2008, FIC and John Tansowny had parted company. When the matter came to trial, Mr. Tansowny was now working for Phoenix and both he and Mr. O'Dowd were called by Phoenix to testify on behalf of the appellant.

[31] The trial judge concluded that FIC was the owner of the 20% interest in the Golf Dome property. The intent of the parties, he held, was first to acquire ownership in the Golf Dome and then to develop the property into a hotel. He ordered an accounting of the profits of the Golf Dome property between September 2007 and May 2015 and, *inter alia*, ordered costs on a solicitor-client basis.

[32] Phoenix argues that the original and only written offer made by Mr. O'Dowd to FIC was not to acquire ownership in the Golf Dome property, but merely an interest in the hotel redevelopment on that property. Phoenix points to the original email offer ("40% interest in the project for $3.3M") stating: "I am offering FIC an opportunity to joint venture this project as the profit potential is significant." Phoenix submits that there was no other objective evidence at trial that it was FIC's "intent" to acquire a 20% interest in the Golf Dome property outside of the hotel redevelopment.

[33] As to the first ground of appeal, ***Sattva Capital Corportation v. Moly Corporation***, 2014 2 SCR 633 makes clear that a Court must read the contract as a whole, consistent with surrounding circumstances known to the parties at the time of the formation of the contract. The overriding concern is to determine the intent of the parties and the scope of their understanding.

[34] The trial judge found that the clear reading of the Trust Agreement was that all parties "intended that FIC would acquire a 20% interest in the Golf Dome property as it existed at the time" and the wording, though brief, was "reasonably understood to mean" that the FIC acquired an interest in the property, not restricted to shares or a joint venture in a future development.

[35] The trial judge was of the view that while the agreement reflects the general intent to develop the property, that intent is not inconsistent with the initial purchase of the existing property by FIC and that FIC's share in the joint future venture was based on its original interest as a "joint title holder." That conclusion, in the view of the trial judge was not disturbed by subsequent actions taken to set up a company to develop the land. The Trust Agreement was sufficient to conclude that FIC was a 20% property owner of the Golf Dome, notwithstanding that no joint venture agreement was ever signed.

[36] As I see it, palpable and overriding error is not made out. Nor does the record reveal a misapprehension of fact by the trial judge. He correctly identified and applied the applicable principles of contractual interpretation. He was mindful of the surrounding circumstances which he found to be consistent with a plain reading of the FIC Trust Agreement. His credibility assessments, given the standard of review, are unassailable.

[37] I turn to a consideration of the award of solicitor-client costs, the second issue on appeal.

[38] Trial judges enjoy a wide discretion when awarding costs; that discretion must be exercised judicially. The trial judge in a conclusory, unexplained disposition, awarded costs on a solicitor-client basis (AR F0019, para 110). He did so without notice and without offering counsel an opportunity to speak to the issue.

[39] The general rule is that solicitor-client costs will be awarded only in "a rare and most exceptional case." As this Court observed in ***Sidorsky v. CFCN Communications Ltd.***, 1997 ABCA 280, the rationale for providing enhanced costs only exceptionally is to prevent a chill on bringing valid claims and defences for fear of losing and facing unduly high costs (paras 29-32).

[40] The "exceptional case" warranting costs on an indemnity basis is one in which the conduct of the litigation is adjudged to be "reprehensible, scandalous or outrageous" or where the court is satisfied that the conduct of a party hindered, delayed or confused the litigation or amounted to deception or fraud. That said, as Hutchinson J made clear so many years ago in ***Jackson v. Trimac Industries Ltd.***, [1993] 4 WWR 670; 138 AR 161, at para 30:

> "Two major propositions appear to mitigate against an award of solicitor-client costs. The first is that it is the conduct of the action and not the conduct of the party that gives rise to the action that determines an award of solicitor-client costs. Secondly, punitive damages or damages should not be confused with a costs award."

[41] In ***Sidorsky v CFCN Communications Ltd.***, 1997 ABCA 280 at para 28, [1998] 2 WWR 89, this Court endorsed a list of examples from ***Jackson v Trimac***, where a greater costs award would be appropriate:

> 10) 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));
>
> 11) cases in which justice can only be done by a complete indemnification for costs (***Foulis et al. v. Robinson; Gore Mutual Ins. Co.***, Third Party, 1978 CanLII 1307 (ON CA))
>
> 12) 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));

13) 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));

14) 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 CanLII 690 (BC SC));

15) defendants found to be acting fraudulently and in breach of trust (David v David);

16) 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] O.J. No. 890, 23 O.A.C. 72);

17) fraudulent conduct (***Sturrock v. Ancona Petroleums Ltd.,*** 1990 CanLII 5563 (AB QB));

18) 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 5883 (AB QB)).

[42] My colleagues rely, in part, on pre-litigation conduct to justify the disposition in the Court below. Because the judge provided no reasons, my colleagues explore the factual underpinnings that gave rise to the litigation to establish "reprehensible, scandalous or outrageous" conduct to sustain the costs disposition.

[43] In so doing, with respect, they ignore a number of salient considerations:

1) The Statement of Claim issued on August 9, 2010 references the Agreement of August 2, 2007 and the payment of $1,000,000.00 "towards Phoenix's intended redevelopment of the Golf Dome property" in exchange for which "it was provided with a 20% ownership interest in the existing Golf Dome property which was, as at August 2, 2007, valued at $5,092,000.00."

2) Importantly, paragraph 7 of the Statement of Claim alleges misrepresentation. It reads: "at the time of the Agreement, Phoenix did not hold title to the Golf Dome property, as represented." (emphasis added)

3) The plaintiff asserts that Phoenix failed to transfer title to reflect FIC's 20% ownership interest. Paragraph 11 of the Statement of Claim again alleges that "Phoenix misrepresented its interest in the Golf Dome property..." (emphasis added)

4) The plaintiff acknowledges that it knew as of May 5, 2010 that the transfer of the Golf Dome property to Phoenix had been effected. (paragraph 1 of the Statement of Claim)

5) The Statement of Claim does not ask for solicitor-client costs, enhanced costs, or punitive damages.

6) Specific performance or, in the alternative, damages in the amount of $1,000,000.00 is sought together with interest. An application for summary judgment was brought by FIC evidencing that it was well aware of the factual underpinnings supportive of its allegation of misrepresentation and fully appreciated that the Golf Dome property had been transferred to Phoenix on September 4, 2009 for consideration of $1.00.

[44] I would add only that my colleagues' reliance on the trial judge's finding (at paragraph [97] of the decision under appeal) that Phoenix was acting as a trustee is, with respect misplaced. The trial judge went on to observe at paragraph [104] that "...there was no evidence from what was produced at trial that Phoenix mismanaged the property contrary to the best interests of the beneficial owners" and that "...the Court is unable to determine whether Phoenix was in breach of its [fiduciary] duty."

[45] In so holding, and mindful that "courts often find that vulnerability is lacking in commercial settings: ***Ironside v. Smith***, (1998) 223 A.R. 379 (CA)", the trial judge explained (at paragraph [103]):

> There is no suggestion that the principals of FIC were not experienced businessmen. In fact, FIC was able to protect its claimed interest in the Golf Dome property through the timely filing of a caveat. Further, the evidence does not support that any particular relationship of trust and confidence between the parties developed beyond the preservation of FIC's beneficial interest in the Golf Dome property.

[46] In any event, ***Polar Ice Express Inc. v. Artic Glacier Inc.***, 2009 ABCA 20 is authority for the proposition that pre-litigation conduct should not be considered when awarding costs. This

Court stated that notwithstanding certain Court of Queen's Bench pronouncements to the contrary, a number of binding authorities "hold that in general solicitor-client costs for misconduct must relate to conduct during the suit, not the pre-suit conduct sued over." See ***Entreprises Ludco ltée c. Canada***, 2001 SCC 62, [2001] 2 S.C.R. 1082, 275 N.R. 90 (S.C.C.), 131 (para 79); ***Tree Savers International Ltd. v. Savoy***, (1992), 120 A.R. 368 (Alta. C.A.), 375 (para 30); ***Sidorsky v. CFCN Communications Ltd.***, (1997), 206 A.R. 382 (Alta. C.A.), 390, 392-93, recon. den. (April 27, 1998) [1998 CarswellAlta 325 (Alta. C.A.)]; ***Professional Sign Crafters (1988) Ltd. v. Seitanidis***, 1998 ABCA 303 (Alta. C.A.), [1998] A.R. Uned. 465 (Sep. 16).

[47] I do acknowledge that subsequent to ***Polar Ice*** a number of decisions in the Court of Queen's Bench suggest that the law may be unclear regarding the award of solicitor-client costs on the basis of pre-trial misconduct. See ***HSBC Bank Canada v. Lourenco***, 2012 ABQB 648 at para 66, ***HSBC Bank Canada v. 1100336 Alberta Ltd.***, (Incredible Electronics Wholesale), 2012 ABQB 27, ***Evans v. Sports Corp.***, 2011 ABQB at para 18, 54 AR 88.

[48] I also acknowledge that in unique circumstances an award of solicitor-client costs may be justified when an attempt to deceive the Court or engage in fraudulent conduct is made out. Such an award may also be made to ensure that "justice be done." See ***Meleshko v. Alberta***, 2013 ABQB 468, 557 A.R. 98. No such argument was advanced in the case at bar. In any event, the total absence of reasons for the award of solicitor-client costs in this case renders such contentions incapable of meaningful review on appeal.

[49] Justice Veit, in ***155569 Canada Ltd. v. 248524 Alberta Ltd.***, 1999 ABQB 682 at para 11, 251 AR 393 explained what wrongdoing costs are meant to address and what wrongdoing punitive damages are meant to address:

> Wrongdoing in the legal process, rather than wrongdoing on the substantive issues, is the type of wrongdoing that is usually associated with costs; wrongdoing on the substantive issues is dealt with by an award of damages, for example punitive damages. **The distinction between these two types of wrongdoing is useful because it allows litigants to consider their positions on the issues separately, and to give notice of those positions to the parties opposite.** [emphasis added]

[50] As explained above, no such notice was given by FIC to Phoenix in the instant case in its Statement of Claim or in the course of the trial. No application was made to amend the Statement of Claim at any time to seek solicitor-client costs. Counsel for Phoenix was afforded no opportunity to speak to the issue of solicitor-client costs in the Court below.

[51] The New Brunswick Court of Appeal has established a general principle that solicitor-client costs should not be awarded absent submissions from the affected party given their exceptional nature. In ***Blanchard v. Canadian Paperworkers Union***, Local 263 (1991), 49 CPC (2d) 151, [1991] NBJ No 132 (CA)(cited to QL), the trial judge had declared a mistrial and ordered solicitor-client costs to the respondent, despite the respondent's counsel not asking for them.

Justice Hoyt, writing for a majority of the Court, concluded that this was a reversible error (at page 2):

> It has been held that an order to pay costs on a solicitor and client basis should be made only in rare and exceptional cases. While the awarding of costs is within the discretion of a trial judge, that discretion must be exercised judicially. An appellate court will interfere when the exercise of discretion is manifestly wrong.
>
> The failure of the Judge to alert Mr. Blanchard of the fact that he was thinking of solicitor and client costs and the failure to ask him to speak to the question was, in my opinion, manifestly wrong and, for that reason, I would allow the appeal.

[52] The Ontario Court of Appeal substituted party-party costs for solicitor-client costs that a trial judge awarded without either party having made submissions in ***Wiley v. Toronto Star Newspapers Ltd.***, (1990), 69 DLR (4th) 448, 74 OR (2d) 100 (CA). In that case the trial judge also failed to provide reasons for the enhanced costs award as did the judge in the case at bar.

[53] Indeed, any award of solicitor-client costs bereft of reasons may warrant appellate intervention. The Saskatchewan Court of Appeal in ***Hope v. Pylypow***, 2015 SKCA 26 at para 48, 384 DLR (4th) 255, stated:

> Solicitor-client costs must not be awarded casually and, in my view, never without reasons as to why they are being awarded and an identification of the conduct which is said to warrant them. The Chambers judge should have offered a clear explanation as to his perceived basis for awarding solicitor-client costs. He did not do so. (emphasis added)

[54] The Nova Scotia Court of Appeal in ***Minas Basin Holdings Ltd. v. Paul Bryant Enterprises Ltd.***, 2010 NSCA 17 at para 43, 289 NSR (2d) 26, so held:

> Other than indicating that Minas Basin had sought solicitor-client costs in the application documents it filed, the application judge gave no reasons for awarding costs on that basis. In particular, his decision does not mention the general test for the award of solicitor-client costs, namely reprehensible, scandalous or outrageous conduct. Nor does it include any analysis of the matter before him that would bring it within any of the examples in ***Wiley v. Toronto Star Newspapers Ltd.,*** (1990), 69 DLR (4th) 448, 74 OR (2d) 100 (CA). (emphasis added)

[55] Finally, the Ontario Court of Appeal held that a court errs in awarding solicitor-client costs without reasons: ***Wiley***, supra. A superior trial court acting in an appellate capacity also endorsed that view in ***Kenlinton Plaza v. 466740 Ontario Ltd.,*** (1992), 32 ACWS (3d) 888, 8 OR (3d) 26 (Gen Div).

[56] In the course of oral argument, counsel for FIC confirmed that "outrageous conduct" must relate to the conduct of the litigation. He conceded that the only conduct that would justify an award of solicitor-client costs is found in the trial judge's observations that he was very unhappy (to use counsel's language) with the testimonial demeanor or Mr. Tansowny and Mr. O'Dowd. Counsel referenced paragraphs 69, 75 and 86 of the reasons for judgment in the Court below:

> [69] I start with Tansowny, whose version of events was unburdened by any need to reconcile or distinguish between his vested interest in the outcome and the events as they actually occurred. Overall, I found his testimony to be glib, facile, and dismissive of any real basis for dispute. As the key representative of FIC at the critical time, this would typically not bode well for the Plaintiff's claim. But he had a significant falling out with FIC, and I find that his assertions at trial openly in favour of Phoenix simply do not withstand scrutiny.
>
> [75] Tansowny indicated that the deals with Borealis and Prima were more favourable because they paid in first. He thought they both invested in late April or May 2007, but he was not involved. I find he was guessing almost 8 years later as to which lawyer's trust account was used, just as he guessed, wrongly, in reporting on the FIC investment four months later in October 2007. The errors in his communication at that time mirror his casual attention to details in giving evidence in this trial. It did not help that he tried to excuse his various misstatements by saying his memo reflected the intent when the project would be finalized, and that they were still shovelling fog. He said he wrote the summary e-mail to FIC in a hurry and the words he used to report were not accurate at that time, including that the joint venture did not own the property.
>
> [86] Standing alone, the explanations of discrepancies between the trust agreements are unconvincing. Taken with all of the evidence and what later transpired, I find the evidence of both Tansowny and O'Dowd that the investors acquired a commitment for shares only in a yet to be formed company to be unreliable assertions driven by their own interests in the outcome of this litigation.

[57] In the result, it is the negative view of the evidence and credibility of Mr. Tansowny and Mr. O'Dowd which is the basis upon which the respondent seeks to uphold the solicitor-client costs award of the trial judge. Neither was a party to the litigation.

[58] It cannot be said that the testimonial assessments of Mr. Tansowny and Mr. O'Dowd equate with a stain on the litigation conduct of Phoenix, particularly in the absence of such a finding by the trial judge. After all, without more, can it be said that if Phoenix had not called Mr. Tansowny that an adverse inference would not have been drawn? Moreover, given the failure to provide reasons, it remains uncertain whether Phoenix knew or could know that Mr. Tansowny would be "driven by his own interests." Phoenix was denied the opportunity to make such arguments and others.

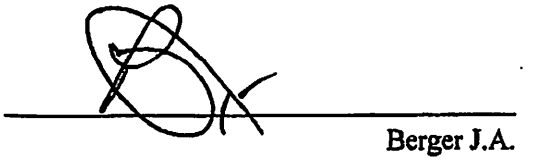
[59] The failure to provide notice to Phoenix of the judge's intention to award solicitor-client costs and the failure to afford to counsel the opportunity to speak to that issue is, in my opinion, fatal. In any event, it is not open to an appellate court in such circumstances to exercise the discretion otherwise vested in and reserved to a trial judge who has the advantage of seeing and observing the witnesses upon whose demeanor this Court is in no position to pronounce. Moreover, given that the judge gave no reasons for awarding solicitor-client costs, it cannot be said what motivated his decision and whether that decision was predicated upon flawed considerations. Nor can it be said that with the benefit of submissions from counsel, he would not have been persuaded to refrain from ordering solicitor-client costs.

[60] In the result, the appeal on ground one is dismissed. I would allow the appeal on ground two and set aside the order of solicitor-client costs.

[61] The result is mixed success on appeal. In my opinion, given the relative significance of the two grounds of appeal, I would have awarded the respondent costs in the Court of Queen's Bench and on appeal to be taxed on column 4.

Appeal heard on June 06, 2016

Memorandum filed at Edmonton, Alberta
this 12th day of October, 2016



Berger J.A.

Appearances:

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