Special Costs Awarded For 'Reprehensible' Behaviour By Law Firm

March 4th, 2009

In reasons for judgement released today (Chudy v. Merchant Law Group) the BC Court of Appeal upheld a trial judge's award for special costs.

The Plaintiff was involved in a serious motor vehicle collision in 1995. The Plaintiff hired a lawyer and ultimately a $860,000 settlement was reached.

A fee dispute arose after this settlement and litigation ensued. At trial the Plaintiff's were granted judgement in the sum of $300,404.17 against the law firm. This award included a punitive damages award of $50,000 finding that the law firm acted in a '*malicious, oppressive and high-handed*' manner to their client.

The lawfirm appealed for various grounds. In a split decision handed down several months ago, the BC Court of Appeal dismissed the major grounds of appeal but did reduce the over-all judgement by $27,413.58.

Today's appeal provided supplemental reasons dealing with the narrow issue of whether the trial judge was correct in awarding special costs against the law firm. In upholding the award, the Court of Appeal said the following with respect to the law of 'special costs' and to the behaviour of the Defendant Law Firm:

[6] The trial judge discussed the claim for special costs at some length at paras. 216 to 261 of his reasons for judgment which are indexed as 2007 BCSC 279. It is not disputed that he correctly stated the applicable law:

[255] In Garcia v. Cresbrook Industries Ltd. (1994), 9 B.C.L.R. (3d) 242 (C.A.) [Garcia], the Court of Appeal considered the type of conduct required for an award of special costs under the Rules of Court, B.C. Reg. 221/90. After reviewing decided cases and the relationship of "special costs" to the concept of "solicitor-and-client costs", Lambert J.A. (for the Court) stated at ¶ 17:

Having regard to the terminology adopted by Madam Justice McLachlin in Young v. Young, to the terminology adopted by Mr. Justice Cumming in Fullerton v. Matsqui, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in Leung v. Leung in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[7] Davies J. stated his conclusion on the costs issue thus:

[257] I am satisfied that the conduct of the Merchant Law Group in this case was reprehensible within the meaning attributed in Garcia. The conduct and actions of the Merchant Law Group would be deserving of rebuke in an ordinary commercial transaction. In the context of litigation involving its own clients and the integrity which the Court and the public are entitled to expect from those who are privileged to be members of the legal profession, it was both outrageous and scandalous.

[258] I order that the plaintiffs recover special costs from the Merchant Law Group from the commencement of this litigation and throughout, including all costs related to the third party proceedings brought against Mr.

Shaw. Those proceedings were, in my view, not only devoid of evidentiary substance but also unnecessarily added to the length of these proceedings.

[259] Any costs that were paid to the plaintiffs pursuant to previous orders of the Court shall, of course, be deductible from the award of special costs.

[8] Before stating the above conclusion, the judge described the conduct of the appellant law firm. In the court's view, the bad conduct began with a pre-litigation letter from Mr. Merchant to the Law Society of British Columbia dated 2 December 2003 in which he falsely claimed for the appellant a solicitor's lien on the Chudy file. He also prepared a fictitious fee account to the Chudys. This "foreshadowed the way in which the Merchant Law Group was prepared to defend against the plaintiffs' claims" (para. 251). In our opinion, this did not amount to a colouration of the judge's assessment of litigation conduct. It was properly seen as an attempt by the appellant to put a chill on the appellant's unsophisticated former clients. This conduct was not a factor in the assessment of punitive damages. Rather, the award of punitive damages was based on an earlier breach of fiduciary duty. In these circumstances, an improper attempt by a legal professional to discourage a claim against that professional, although done before commencement of the action, is properly taken into account when considering litigation conduct. The trial judge's conclusion at para. 225 that Mr. Merchant's evidence about the draft account and an accompanying letter to the respondents "was a disingenuous attempt to cover up the fact that he did not want the plaintiffs to have the file and that he was prepared to go to unethical lengths to avoid delivering it to them" is unassailable. It was bad enough that Mr. Merchant improperly claimed the lien. But he exacerbated that conduct by offering an explanation at trial that was contrived. That was litigation conduct properly considered on the claim for special costs.

*[9] The appellant has not demonstrated error on the part of the trial judge in his conclusion that the conduct of the appellant during this litigation, both pre-trial and during the trial, was reprehensible as that term is used in **Garcia**. The evidence abundantly supports the conclusion. The appellant brought pre-trial motions that were without merit; it brought a specious application, based in part on false evidence, challenging the jurisdiction of the court to try the matter; it avoided a peremptory trial date by adding Mr. Shaw as a third party but did not require him to file a defence, did not examine him for discovery, did not cross examine him at trial with respect to its allegations against him, and in a lengthy written submission at the end of the trial, did not refer to its claim over against Mr. Shaw (the trial judge tersely dismissed the third party claim); it brought a motion (returnable on the date scheduled for the hearing of a R. 18A application for a summary trial brought by the respondents) for removal of the respondents' counsel on ridiculous grounds, a tactic which the trial judge at para. 236 stated, with the benefit of his unique perspective of the appellant's entire conduct, "was not only without merit but was calculated to prevent the Rule 18A application from proceeding as ordered"; on the hearing of the respondents' R. 18A motion, Mr. Merchant produced a large number of documents, not previously disclosed and not sworn to, in support of his position that the action could not be determined on a summary basis; and, finally but of most significance, Mr. Merchant offered evidence at trial that the trial judge determined was false and misleading.*

*[10] As to the final point, the respondents refer to **Brown v. Lowe**, 2002 BCCA 7, in which Southin J.A. said (at para. 149): "To give false evidence relating to the matters in question at any stage of the proceedings is a grave matter. By "false", I do not mean "erroneous"; I mean knowingly untrue." The falsity of Mr. Merchant's evidence is commented on by the trial judge at several points in his judgment and is referenced by the majority judgment in this court. There is no need to particularize it here.*

[11] The evidence as a whole clearly supports the conclusion of the trial judge that the legal basis for the awarding of special costs was established in this case.