

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Popat v. MacLennan*,
2015 BCSC 403

Date: 20150313
Docket: S143832
Registry: Vancouver

Between:

Zahir Popat and LaRoche Capital Group Inc.

Petitioners

And

**Alistair MacLennan, Jasbinder Sanghera, Roger Kuypers and
SignalChem Lifesciences Corporation**

Respondents

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment Re: Costs

Counsel for the Petitioners:

T. Goepel

Counsel for the Respondents Alistair
MacLennan, Jasbinder Sanghera and Roger
Kuypers:

A. Crabtree

Counsel for the Respondent SignalChem
Lifesciences Corporation:

D. Wotherspoon

Place and Date of Trial/Hearing:

Vancouver, B.C.
March 4, 2015

Place and Date of Judgment:

Vancouver, B.C.
March 13, 2015

[1] These reasons address an application for special costs by the respondents following the dismissal, in reasons indexed at 2014 BCSC 2363, of the petitioners application pursuant to section 227 of the *Business Corporations Act*, S.B.C. 2002 c. 57 for, *inter alia*, a declaration that the personal defendants breached their fiduciary duties to the respondent company (hereafter "SLC") of which they are directors. The petitioners are shareholders in SLC. I will refer to the personal respondents as "the directors".

[2] In essence the petitioners complained that the respondents had issued shares which had the effect of improperly diluting the interest of the petitioners in SLC.

[3] On this application the respondents submit a special costs award is justified for a number of reasons including that the petitioners made personal allegations against the directors unnecessary to the success of the petition intending to cause harm to the reputation of the directors; the petitioner Mr. Popat misconducted himself during the proceedings, and further the claims advanced by the petitioners were devoid of merit. Part of the complaint about the manner in which the petitioners' conducted the proceedings, through their counsel prior to Mr. Goepel, is said to have been by instituting multiple proceedings which significantly increased the legal cost to the respondents and further the personal allegations against the directors caused them to instruct separate counsel from SLC.

[4] The directors particularly complain that the petition sought a number of remedies based on the alleged improper conduct of the directors, which amounted to acts of dishonesty, and the dismissal of the petition in such circumstances ought to attract a special costs award.

[5] The complaints about the prior counsel for the petitioners include assertions that they made allegations of deceit against a deponent in a related action; accused a junior lawyer for SLC involved in these proceedings of misconduct in relation to the petitioners' inspection of SLC's minute book; emailed another counsel, who acts for the respondent Mr. Kuypers in related litigation, vaguely alluding to unprofessional

conduct about which that previous counsel for the petitioners threatened to inform "the whole world".

[6] There are other emails from previous counsel which were at best intemperate. They were undoubtedly rude. I will not reproduce them in these reasons.

[7] One particular matter which I will address more fully is a complaint about conduct which arose during the course of the hearing. The facts are the following. The petition was heard on November 10, 2014. The directors say that after the morning break which would have been at about 11:00 o'clock, when the only persons in chambers were the petitioner Mr. Popat, Mr. Kuypers, Mr. Ready the Chief financial Officer of SLC, counsel, the court clerk and the presiding judge, "the court asked counsel 'then what are we to do with Mr. Kuypers'?" Mr. Kuypers deposes that he then received an offensive email at 11:48 from the "chief editor of TheLegalDirty.com". The respondents submit that only Mr. Popat could have informed someone outside chambers of the supposed question from the bench thus prompting The Legal Dirty's "chief editor" to inject himself into this proceeding to make offensive remarks about Mr. Kuypers.

[8] Mr. Popat denies he was involved in any of the conduct of The Legal Dirty. I am not prepared to make any finding that he was. The court's question, which was not worded as described in Mr. Kuypers' affidavit, was asked at 4:00 p.m. near the end of the court day, not in the morning. If the email from The Legal Dirty to Mr. Kuypers came at 11:48 a.m. it could not have been prompted by the question from the bench.

[9] SLC largely adopts the submissions of the directors.

[10] Mr. Goepel submits the hearing on November 10, 2014 related to a legitimate corporate dispute properly advanced and that only that dispute was the "main cost driver" in these proceedings. He acknowledges there was a "circus like atmosphere" surrounding some of the email correspondence but submits this Court ought to be

reluctant to police correspondence between counsel. He also submits some of the conduct of the respondents was related to other proceedings and should not attract an award of special costs in this proceeding.

[11] I agree that the correspondence in respect of other proceedings ought not to attract special costs in the matter before me. I accept there appears to have been a somewhat unsavoury atmosphere surrounding some of the correspondence. That conduct is indefensible, but I am unwilling to punish the petitioners for the conduct of their counsel by means of a special costs award, in the circumstances of this case. I do not know enough about the background of some of these matters nor the relationships of counsel to each other, and whether some habitually speak in a fashion, which when exposed in a courtroom, is distasteful. If they do that is regrettable and I understand the Law Society has become involved. It is better able to investigate these matters and impose discipline, if that is found to be necessary, than this Court.

[12] Mr. Goepel submits a “multiplicity of proceedings ought not in itself lead to special costs”. I agree. There is no necessary impropriety in a party commencing several proceedings to address related but different issues. If some or all fail there can be costs consequences in the other proceedings.

[13] Mr. Goepel submits the fact that the petitioners were unsuccessful does not lead in itself to the conclusion that the petitioners’ position was devoid of merit. Again I agree. I also agree that a failed challenge to the credibility of a witness or party in itself does not lead to special costs nor even when the person who is impugned is a lawyer. I appreciate the reasons Mr. Kuypers is offended by some of the conduct of the petitioners’ previous counsel but I doubt it will have a lasting effect.

[14] Special costs should be awarded sparingly. I accept the submissions of Mr. Goepel that this is not a proper case for special costs. The respondents are entitled to costs on Scale B. The petitioners are entitled to their costs for the hearing on March 4, 2015.

“Mr. Justice Affleck”