IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mainstream Canada v. Staniford,*
2012 BCSC 1923

Date: 20121219
Docket: S111908
Registry: Vancouver

Between:

Mainstream Canada, a division of EWOS Canada Ltd.

Plaintiff

And

Don Staniford and the said Don Staniford carrying on business as The Global Alliance against Industrial Aquaculture

Defendants

Before: The Honourable Madam Justice Adair

Supplementary Reasons for Judgment on Costs

Counsel for the Plaintiff:	David Wotherspoon and Gavin Cameron
Counsel for the Defendants:	David F. Sutherland
Place and Date of Hearing:	Vancouver, B.C. December 7, 2012
Place and Date of Judgment:	Vancouver, B.C. December 19, 2012

Introduction

[1] This is a defamation action. My reasons for judgment, following a 20-day trial, are indexed at 2012 BCSC 1433. I concluded that Mr. Staniford's statements were defamatory of the plaintiff, Mainstream. However, I concluded that Mr. Staniford should succeed on his defence of fair comment. Although I found that Mr. Staniford was actuated by express malice towards Mainstream, I found that he had an honest belief in the statements he made, and that injuring Mainstream because of spite or animosity was not his dominant purpose in publishing the words in issue. In the result, I dismissed the action.

[2] The parties were given leave to make submissions concerning costs, and they have now made those submissions.

[3] On behalf of Mainstream, Mr. Wotherspoon argues that, although the general rule is that costs follow the event and the successful party (in this case, Mr. Staniford) is usually entitled to an award of costs, no costs should be awarded to Mr. Staniford, because of his misconduct during the trial. Mr. Wotherspoon submits that, in addition, Mainstream should be awarded the lump sum of $15,000 on account of its costs and disbursements attributable to:

(a) the expense and time incurred by Mainstream in addressing Mr. Staniford's misconduct in the course of the trial; and

(b) ill-fated (and ill-timed) applications brought by Mr. Staniford during the trial, and his protracted cross-examination of Dr. Gallo, which (in Mainstream's submission) needlessly increased the expense and length of the trial.

[4] On behalf of Mr. Staniford, Mr. Sutherland submits that there is no proper basis to deprive Mr. Staniford, as the successful party at trial, of his costs. In Mr. Sutherland's submission, to the extent that some misconduct on Mr. Staniford's part can be identified, an order depriving him of costs of this litigation would be a punishment wholly out of proportion to any such misconduct. Mr. Sutherland

submits further that this is an appropriate case to award costs to Mr. Staniford on Scale C, which is reserved for matters of more than ordinary difficulty.

Should Mr. Staniford be deprived of costs?

[5] The general rule is stated in Rule 14-1(9) of the ***Supreme Court Civil Rules***: "costs of a proceeding must be awarded to the successful party unless the court otherwise orders." Thus, Rule 14-1(9) continues to confirm the residual discretion of the court to deny, on a principled basis, a successful party the costs to which it would otherwise be entitled: see ***LeClair v. Mibrella Inc.***, 2011 BCSC 533 ("***LeClair***"), at para. 9. Where the successful party has engaged in misconduct, the outcome of the litigation is irrelevant, and the court has the power to deprive the successful party of costs.

[6] In ***LeClair***, Mr. Justice Voith provides a helpful summary of applicable legal principles, at paras. 10-11:

> [10] The following legal principles are relevant:
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> i) Costs represent an important instrument by which courts can either promote or, conversely, sanction given conduct. Rule 14-1(9) provides one means of achieving this overarching object. . . .
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> ii) The onus is on the person who seeks to displace the usual rule that costs follow the event: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.
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> iii) Though Rule 14-1(9) conveys a discretion to the court, that discretion is to be exercised in a "principled way": *Rossmo v. Vancouver Police Board*, 2003 BCCA 677 at para. 59; or on "sound principle": *Brown v. Lowe*, 2002 BCCA 7 at para. 147.
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> iv) The exercise of discretion must be connected to the conduct (or misconduct) of a party in the litigation: *Lawrence v. Lawrence*, 2001 BCCA 386 at paras. 31-32; *Smith v. City of New Westminster*, 2004 BCSC 1304 at para. 9.
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> v) The conduct in question can arise either at trial or at some earlier stage in the proceeding. For example, conduct that has been held to justify a denial of costs includes giving false evidence on discovery: *Brown* at para. 149-150. It also includes a failure to make timely and thorough production of relevant documents; *Forsyth v. Pender Harbour Golf Club Society*, 2006 BCSC 1108 at para. 72.
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> vi) Costs are not to be used to sanction a party whose evidence was exaggerated or who gave evidence in error: *Brown* at para. 149.

> Where the appropriate dividing line lies was explained in each of *Roberts v. Wilson* (1997), 10 C.P.C. (4th) 188 (B.C.S.C.) at para. 25; *Cardwell v. Perthen*, 2007 BCSC 366 at para. 13; *Noyes v. Stoffregen*, [1995] B.C.J. No. 73 at paras. 79-80.
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> vii) Where a court concludes that a party has intentionally or deliberately sought to mislead the court that party will normally be deprived of its costs: *Medeiros v. Vuong*, 2001 BCSC 326 at para. 12.
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> [11] I would add the following additional comments. First, Rule 14-1(9) is not intended to provide an unsuccessful party with an opportunity to parse through the litigation conduct of the opposing party searching for behaviour that might be criticized. I do not say that the discretion which is conferred in Rule 14-1(9) is limited to exceptional cases. The Rule is not, however, intended to address imperfect or less than optimal conduct. It is generally not intended to address questionable judgment. Instead it provides the court with an objective means of communicating its censure in relation to conduct that manifestly warrants rebuke.

[7] As Mr. Justice Voith observed in ***LeClair***, at para. 29:

> [29] In most cases where a court has concluded that some aspect of the successful party's litigation conduct warrants rebuke, the court has deprived that party of all the costs to which they would otherwise be entitled. But this need not be so. In some instances an "all or none" approach would provide the court with too blunt a tool and give rise to an inappropriate result.

[8] The discretion conveyed to a judge under Rule 14-1(9) is extremely broad: see ***LeClair***, at para. 30.

[9] I have concluded that Mr. Staniford's open disrespect for witnesses and disdain for the court and the judicial process are deserving of rebuke. Rule 14-1(9) provides me with the means to communicate to Mr. Staniford the court's censure in relation to his conduct during the trial.

[10] I am going to begin by saying that legal counsel on both sides of this case demonstrated a high degree of professionalism, decorum and civility toward one another, toward witnesses and toward the court throughout the trial. This is as it should and must be. The action never became bogged down in interlocutory applications or prolonged discoveries, and was brought to trial within 12 months of the notice of civil claim being filed. Counsel maintained a good working relationship, which is also as it should be.

[11] My focus here is on Mr. Staniford's conduct.

[12] I described some of Mr. Staniford's conduct in my Reasons for Judgment as follows, at paras. 88-92:

> [88] . . . During the trial, Mr. Staniford relaunched the GAAIA website, this time using a service provider outside of Canada. During his cross-examination, Mr. Staniford proclaimed that he would not be stopped by an injunction pronounced in this action.
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> [89] Shortly before the trial, and after the witness lists had been exchanged, Mr. Staniford accused the Ahousaht First Nation of accepting "blood money" from Cermaq in one of his Facebook postings.
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> [90] Mr. Staniford looked on the trial as an opportunity to get his message out, and he did not hold back. For example, in Internet postings during the trial, Mr. Staniford demeaned and mocked the physical appearance of three of Mainstream's witnesses, Mary Ellen Walling, Leanne Brunt and Dr. Gallo. Mr. Wotherspoon brought the comments concerning Ms. Walling and Ms. Brunt to my attention when court was convened the morning of January 26, 2012. The matter was discussed in court and was framed (appropriately) as an issue of Mr. Staniford victimizing Mainstream's witnesses by his insulting comments. Mr. Staniford was present during the discussion. Despite that, Mr. Staniford then repeated his comments about Ms. Walling and Ms. Brunt outside court for an interview that was published on YouTube.
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> [91] During his testimony, Mr. Staniford attempted to justify his comments about Ms. Walling and Ms. Brunt as being "very complimentary," and said he thought Ms. Walling should be "flattered" at being labelled a "fat-bottomed girl." The notion that Mr. Staniford would ever pay a sincere compliment to Ms. Walling is, itself, laughable and entirely unbelievable.
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> [92] In another Facebook posting during the first week of the trial, he compared the trial to a kangaroo court.

[13] Later in my reasons, at para. 188, I said that, during the trial, Mr. Staniford:

> showed that he is extremely uncomfortable about having his views questioned. He was defensive, aggressively argumentative and insulting during his cross-examination. Even during his examination-in-chief, he demonstrated that he is a bad listener, and he often used questions as an opportunity to make speeches, rather than giving responsive answers. Although Mr. Staniford claims to be a champion of free-speech, he cruelly and publicly mocks people who have a different point of view (e.g., Ms. Walling and Ms. Brunt). His use of what he calls "humour" and "spoofing" is an example of strong passive aggression. In fact, he is aiming to ridicule and humiliate people who do not agree with his views. He sees that as a way of promoting his campaign.

[14] The “kangaroo court” comparison is yet another example of what I described as Mr. Staniford’s strong passive aggression. It is Mr. Staniford’s poor substitute for legitimate, good faith criticism.

[15] By engaging in the conduct I described, Mr. Staniford demonstrated his disrespect for witnesses and his disdain generally for the court and the judicial process.

[16] Mr. Staniford’s flagrant disregard of my comments during the discussion on January 26, 2012 concerning his victimization of witnesses and in my ruling (indexed at 2012 BCSC 1609) is particularly troubling. His YouTube interview shortly after my ruling is roughly equivalent to giving the court “the finger,” as he did to Mainstream and its lawyers in response to their demand letter. Mr. Staniford’s attitude (as expressed during his cross-examination) seemed to be that since Lord Denning’s comments (which I adopted) had been made in the early 1960s, they did not apply to him and he could ignore them. Once again, Mr. Staniford demonstrated that he is a bad listener. His repetition in court, and under oath, of his ridiculous justification for his sexist and puerile comments about Ms. Walling and Ms. Brunt – that the comments were complimentary and flattering – insulted the intelligence of anyone who had to listen to it.

[17] Mr. Staniford seemed to see the trial and the courtroom as simply different venues in his continuing public relations war against industrial aquaculture. He was upset and unhappy with what he saw as the narrowing of the issues in the case, to focus on the “sting” pleaded by Mainstream. As far as Mr. Staniford was concerned, since the trial was simply a different venue, there was therefore no need to modify his behaviour in any way. Mr. Staniford was wrong.

[18] In his submissions, Mr. Wotherspoon argues that Mr. Staniford’s misconduct was not fleeting; rather, it permeated the proceedings and was flagrant. I agree. His actions are worthy of rebuke through an order depriving the defendants of costs.

[19] However, as Mr. Justice Voith pointed out in ***LeClair***, the "all or none" approach to costs can be too blunt a tool and lead to inappropriate results. Depriving the successful party of all costs from a 20-day trial is a much more severe result than depriving the party of costs of a three- or five-day trial.

[20] Although I consider Mr. Staniford's misconduct in connection with the trial to be serious and clearly deserving of censure, I think that depriving the defendants of all of their costs of the action is too severe, given the dollar amounts likely involved for a 20-day trial. I have concluded that an appropriate order is that the defendants have 25% of their assessed costs and disbursements. (There should be only one set of costs for both defendants.) Depriving the defendants of 75% of their assessed costs and disbursements, in my view, reflects appropriate condemnation of Mr. Staniford's misconduct.

Should Mainstream be awarded any costs?

[21] Mainstream submits further that I have the discretion to award it with a portion of its costs and disbursements under Rule 14-1(14)(b), which provides that:

> (14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court . . . may order
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> . . .
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> (b) that the party pay the costs incurred by any other party by reason of the act or omission.

[22] Mainstream also notes that, with respect to the cross-examination of Dr. Gallo, I have the discretion under Rule 11-7(4) to order Mr. Staniford to pay costs. Rule 11-7(4) provides that:

> If an expert has been required to attend at trial for cross-examination by a demand under subrule (3) and the court is of the opinion that the cross-examination was not of assistance, the court may order the party who demanded the attendance of the expert to pay to the other party or to the expert costs in an amount the court considers appropriate.

[23] Mainstream relies on two points to justify an award of lump sum costs of $15,000: Mr. Staniford's misconduct, and his tactical choices (including those in relation to Dr. Gallo), which increased the length and expense of the trial.

[24] Mr. Staniford has already suffered the consequences of his misconduct: he has been deprived of 75% of his assessed costs of the action, despite being the successful party. Therefore, I do not think his misconduct can, in addition, justify an award of costs in favour of Mainstream.

[25] However, I agree with Mainstream that some of Mr. Staniford's tactical choices increased the length and expense of trial. There are three in particular that, in my view, justify an order for costs being made in favour of Mainstream.

[26] The first is the application that Mr. Staniford brought on the first day of trial for an order compelling Mainstream's representative, Mr. Isaksen, to respond to questions outstanding from his examination for discovery. In the result, I dismissed this application (see my reasons indexed at 2012 BCSC 1599). During the trial, no reference was ever made to the discovery transcript, apart from dealing with this application. There appeared to me to be no good reason why the application could not have been brought – if it was going to be pursued at all – in advance of trial.

[27] In my opinion, by the time the parties arrived at trial, the time and effort being spent by Mr. Staniford in pressing for answers to the discovery questions was simply wasted, and the application was pointless and unnecessary. There was no legal support for the proposition that information that might be within the knowledge or means of knowledge of Mainstream's indirect parent was information within the knowledge or means of knowledge of Mainstream. On that basic point, the application was doomed to fail. The application was not being pursued with a view to determining the issues in the action on their merits, because the chances were very small that Mr. Isaksen might have anything relevant to say on those issues, in response to the outstanding questions. Persisting with the application at the start of the trial was a tactical choice made by Mr. Staniford, and the application was ultimately unsuccessful.

[28] The second concerns Mr. Staniford's application, brought the first week of trial, to amend the Response to Civil Claim to plead lesser included meanings. I also dismissed this application (my reasons are indexed at 2012 BCSC 1691). It was, indeed, "déjà vu all over again," given Mr. Staniford's experience in the litigation brought against him by Creative Salmon Company Ltd. Like the application concerning outstanding discovery questions, there was no good reason why the application – if it was going to be made at all – could not have been brought in advance of trial.

[29] The third concerns the cross-examination of Mainstream's toxicology expert, Dr. Gallo.

[30] Dr. Gallo lives in New Jersey. The estimate given in the defendants' trial brief for Dr. Gallo's cross-examination was two hours. Arrangements were then made to have Dr. Gallo come to Vancouver to give his evidence on Friday, January 20, 2012. The expectation, at least on the part of Mainstream's counsel, and based on the estimate of two hours, was that his evidence would be completed that day. The cross-examination began shortly after 2 p.m. However, by 4 p.m., the cross-examination was not finished, and there was no indication that the cross-examination could or would be completed that day even with some reasonable extension of normal court hours.

[31] Arrangements were then made to have Dr. Gallo (who had to return to New Jersey) testify by means of a video-link on Wednesday, January 25, 2012. There are fees associated with witnesses testifying at trial by video. Even though Mainstream did not expect any of Dr. Gallo's evidence to be by video-link, Mainstream paid the fees (approximately $2,000). The continuation of Dr. Gallo's cross-examination began shortly after 10 a.m. on January 25, 2012. It was estimated to require another two hours. However, by 12:30 p.m., the cross-examination was still not complete. In the circumstances, court did not adjourn for lunch, but carried on. Dr. Gallo's examination (including very brief re-examination by Mr. Wotherspoon) was finally completed about 1:40 p.m. on January 25, 2012.

[32] During Dr. Gallo's cross-examination, it was apparent that Mr. Sutherland was taking instructions from Mr. Staniford and an instructing expert, Dr. Easton, and Mr. Sutherland consulted with them fairly regularly.

[33] Time estimates (in trial briefs and elsewhere) have a number of purposes. One is to ensure that trials will be completed in the time set. Counsel and parties are required therefore to turn their minds to how long an examination or cross-examination is likely to be, and to consider the estimate in a thoughtful and realistic way. Underestimating can create real havoc in a trial. Moreover, a time estimate needs to be respectful of the witness's time, and, in the case of an expert witness who is required for cross-examination, mindful of the costs associated with the witness's attendance. Witnesses and counsel need to be able to plan their time, within reason. Experienced trial counsel generally try to schedule witnesses to avoid having down-time during the trial. If a realistic time estimate is not given for cross-examination of a witness, other witnesses, who may have taken time off work or travelled from out of town, can be inconvenienced.

[34] I do not think there can be any doubt that the lengthy cross-examination of Dr. Gallo imposed additional costs on Mainstream for the video facilities (which had to be arranged at the last minute) and for Dr. Gallo's time. A protracted cross-examination of Dr. Gallo might have been warranted if Mr. Staniford was relying on justification as a defence. However, Mr. Staniford's defence was fair comment, not justification. From my perspective, the assistance provided by the cross-examination did not justify either the length or costs associated with the continuation of the examination on January 25. I think it appropriate that Mr. Staniford share in some of those costs.

[35] I am therefore awarding Mainstream costs of the defendants' applications to compel answers to outstanding questions from Mr. Isaksen's examination for discovery and to amend their pleadings, and in connection with the continuation of Dr. Gallo's cross-examination on January 25, 2012. Pursuant to Rule 14-1(15), I am

fixing those costs at $7,500, inclusive of disbursements and taxes. Those costs may be set off against any costs payable to the defendants following assessment thereof.

Should costs be at Scale C?

[36] Turning finally to the scale of costs, Mr. Sutherland made very brief submissions in support of an order for costs at Scale C. In his submission, this case was one of more than ordinary difficulty, with a long trial, complex facts and legally complex issues concerning the defence of fair comment.

[37] I do not agree that Scale C costs are justified in this case.

[38] Concerning the length of trial, I agree with the observation of Mr. Justice Johnston in ***Meghji v. Lee***, 2012 BCSC 379, at para. 54, that:

> Measuring difficulty by length of trial can be an exercise in ambiguity: relatively straightforward issues assume complexity as a function of the time taken to explore them; conversely, the time spent exploring an issue, or, for example, cross-examining an expert on matters within his or her field of expertise, is not necessarily a function of the issue's difficulty.

[39] In this case, trial time was taken up unnecessarily with Mr. Staniford's applications concerning discovery questions and seeking to amend his pleadings, and to address Mr. Staniford's victimization of witnesses. I have concluded that Dr. Gallo's cross-examination went on longer than was helpful or necessary. Mr. Staniford himself added to the length of the trial by making speeches during his direct and cross-examination. The length of trial does not justify costs at Scale C.

[40] Examinations for discovery were neither numerous nor lengthy. There was only a single pre-trial application. These factors are neutral at best. The action was certainly hard fought. But many actions that come to trial are hard fought. I do not see this as a factor justifying Scale C costs here.

[41] The essential facts were not complex. Mr. Staniford admitted the fact of the publications. Whether the statements in issue were "of and concerning" Mainstream was a significant issue. However, there was recent Supreme Court of Canada

guidance on the point in ***Bou Malhab v. Diffusion Métromédia CMR inc.***, 2011 SCC 9, [2011] 1 S.C.R. 214 . The basic elements of a fair comment defence are thoroughly canvassed and explained in ***WIC Radio Ltd. v. Simpson***, 2008 SCC 40, [2008] 2 S.C.R. 420. I do not think the disagreement concerning the application in Canada of ***British Chiropractic Association v. Singh***, [2010] EWCA Civ 350, [2011] 1 W.L.R. 133 puts this case into the category of "more than ordinary difficulty." There was also recent Court of Appeal authority concerning proof of malice in a defamation action.

[42] Thus, on the challenging legal issues, there was ample appellate court guidance.

[43] Costs on Scale C are therefore not justified in this case, in my view. Costs at Scale B are appropriate.

Disposition

[44] In summary, Mr. Staniford's misconduct – his disrespect for witnesses and his disdain for the court and the judicial process – justifies a departure from the general rule that costs follow the event. Mr. Staniford's misconduct deserves a clear rebuke, however I have concluded that depriving him of all costs of a 20-day trial would be too great a punishment. I therefore order that the defendants have 25% of the costs and disbursements to which they would otherwise be entitled on assessment thereof. Costs are at Scale B, and there will be a single set of costs for both defendants.

[45] I award Mainstream lump sum costs of $7,500 (including taxes and disbursements) in respect of costs relating to the defendants' unsuccessful applications to compel answers to questions on Mr. Isaksen's examination for discovery and to amend their pleadings, and the unnecessarily prolonged continuation by video of Dr. Gallo's cross-examination.

[46] In addition, I award Mainstream costs of this hearing, which I fix at $800 (inclusive of disbursements and taxes).

[47] Mainstream may set off costs payable by it to the defendants against costs payable by the defendants to Mainstream.

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The Honourable Madam Justice Adair