IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lantzius Estate*,
2015 BCSC 1687

Date: 20150918
Docket: P141261
Registry: Vancouver

Re: Estate of John L. Lantzius, also known as John Louis Lantzius, Deceased

Before: The Honourable Madam Justice Gropper

Reasons for Judgment on Costs

Counsel for Anne Maria Lantzius Strauss and the Canada Trust Company as the Executors of the Will of John Lantzius, Deceased:	A.D. Francis
Counsel for Anne Strauss and Susan Rich in their personal capacities:	E.J. Milton Q.C.
Counsel for the Respondent Annette Lantzius:	J.K.L. Ko
Counsel for the Respondent Renee Lantzius:	M.J. Gismondi
Written Submissions of the Executors:	May 29, 2015, and June 17, 2005
Written Submissions of the Respondent Renee Lantzius:	June 12, 2015
Written Submissions of the Respondent Annette Lantzius:	June 12, 2005
Reply Submissions of the Respondents Anne Strauss and Susan Rich in their personal capacities:	June 17, 2015
Place and Date of Judgment:	Vancouver, B.C. September 18, 2015

Introduction

[1] Anne Maria Lantzius Strauss and the Canada Trust Company (executors) successfully applied to approve the last will and testament of John L. Lantzius, the deceased, proven in solemn form.

[2] In my decision, *Lantzius Estate*, 2015 BCSC 935, I granted the application. I determined that the deceased knew and approved the contents of the will and possessed the requisite testamentary capacity. I found that Renee and Annette had not rebutted the presumption that the deceased, who appeared to understand the contents of the will, knew and approved it and possessed that capacity. I also concluded that no undue influence had been exerted by Anne and/or Susan.

[3] I invited the parties to make written submissions in respect of costs. They have done so.

Background

[4] John Lantzius died on February 10, 2014. He left a last will dated September 2, 2011. He left a spouse, Annette Lantzius, from whom he was separated and in the midst of matrimonial litigation, and three adult daughters, Anne, Susan and Renee.

[5] Anne and Susan were named as executors under the will. By deed of appointment, the Canada Trust Company was appointed an executor of the will. Anne and Canada Trust sought probate of the will. Susan reserved her right to apply for probate at a later time.

[6] The executors assert that costs should follow the event and that Annette and Renee should be jointly and severally liable for their costs. The executors also assert that the scale of costs should be special costs because Renee and Annette unsuccessfully alleged undue influence and their position in the litigation was bound to fail.

[7] Renee asserts that the estate should bear the costs of the application as the circumstances surrounding the creation of the will forced Renee into litigation. There were legitimate questions over testamentary capacity. If costs follow the event and Renee is jointly and severally liable for costs, she asserts that special costs are not warranted.

[8] Annette takes the same position.

Are the Executors Entitled to Costs?

[9] Rule 14-1(9) of the *Supreme Court Civil Rules* provides:

> (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[10] As the executors point out, the modern trend in probate proceeding is to order that costs follow the event: *Woodward v. Grant*, 2007 BCSC 1549; *Mawdsley v. Meshen*, 2011 BCSC 923.

[11] There is no real dispute about this: the executors were successful in the litigation and are entitled to their costs.

Should the Estate Pay the Costs?

[12] In *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341 at para. 13 (S.C.), Master Horn identified the question to be asked in determining whether the costs ought to be paid by the estate or the unsuccessful parties: “whether the parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.”

[13] Renee and Annette assert that their costs should be borne by the estate because the deceased's conduct raised issues about his capacity and caused the litigation.

[14] The executors disagree with that position. They established that the deceased’s instructions were clear, consistent and provided to his lawyers in independent meetings in which no third party was present. The executors called extensive evidence from third parties who worked with the deceased and provided

evidence as to his capacity. Annette and Renee attacked this evidence with unsupported speculation and innuendo. There was no evidence provided by anyone that the deceased lacked capacity at the time he provided instructions or executed his will. The will is not ambiguous, unclear or subject to interpretation. It is simple and concise. The deceased made his testamentary intentions clearly known.

[15] The executors say that at the time of his death, Annette and the deceased were engaged in family law proceedings. Annette commenced the proceedings and sought a division of family assets. The executors say that in these circumstances, it was reasonable and prudent that the deceased made a new will. His assets would have been divided with Annette. The will only affects the deceased's share of the assets.

[16] I agree with the executors that the application they made did not force either Renee or Annette into litigation. Although they both assert that there were questions over testamentary capacity that provided them with reasonable cause to seek the removal of doubt in respect of the creation of the will, neither of them provided any evidence in support of that position. Instead they asserted that the executors should have disclosed further evidence, including medical evidence about the deceased's state of mind when the will was executed. I make the same comment that I made at para. 90 of *Lantzius Estate*. Renee filed her caveat in February 2014, shortly after the deceased's death. She knew that the executors intended to make this application at least eight months before the application was made. She did not seek the production of any documents or the cross-examination of any witnesses. I found that if these were necessary to her case she would have made the appropriate applications.

[17] I concluded that neither Renee nor Annette rebutted the presumption of testamentary capacity on the basis of suspicious circumstances. They did not provide any specific or focused evidence that was sufficiently well grounded to support a conclusion that suspicious circumstances existed.

[18] It would be inconsistent with those findings to determine that Renee and Annette were forced into litigation or that the litigation would have been necessary in any event. I reject that assertion.

Special Costs

[19] The executors seek special costs against Renee and Annette.

[20] The leading authority for special costs in British Columbia is *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). Mr. Justice Lambert determined that the threshold for awarding special costs is “reprehensible conduct” (at para. 17).

[21] Lambert J.A. recognized that the meaning of reprehensible conduct was quite broad. He discussed the exceptional circumstances that justified an award of special costs at paras. 23 and 25:

> 23 However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. See the reasons for Madam Justice McLachlin, for the majority in the Supreme Court of Canada on the question of costs, in Young v. Young at p. 28. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
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> …
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> 25 If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.

[22] *Garcia* instructs that the purpose of special costs is to chastise a litigant and distance the court from the conduct at issue. Special costs are not compensatory: *Grewal v. Sandhu*, 2012 BCCA 26 (leave to appeal refused, 34725 (21 June 2012)) at para. 106.

[23] I discussed the law of special costs in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, at para. 73:

> [73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:
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> a) the court must exercise restraint in awarding specials costs;
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> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
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> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
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> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
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> e) special costs can be ordered against parties and non-parties alike; and
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> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[24] I accept that Annette and Renee did not provide evidence to support their allegations of a lack of testamentary capacity and undue influence. Certainly their allegations were very serious. Nevertheless, the law is quite clear that unsuccessful allegations alone cannot support an order for special costs.

[25] In *Hung v. Gardiner*, 2003 BCSC 285, Mr. Justice Joyce considered whether allegations of bad faith and malice that had not been proven, justified an award of special costs. At para. 16 he stated:

> [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of

> malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations (see ***Native Citizens Fisheries et al. v. James Walkus***, (July 10, 2002) 2002 BCSC 1030).

[26] The statement was adopted by the B.C. Court of Appeal in *Cimolai v. Hall et al*, 2007 BCCA 225 at para. 68.

[27] I do not find that the unsuccessful allegation of undue influence in this case is sufficient to justify an award of special costs.

[28] The executors provide a secondary reason why special costs should be awarded and that is that Renee and Annette's attack on the will was bound to fail. They refer to *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at paras. 26 to 35.

[29] In *McLean*, Madam Justice MacKenzie (as she then was) noted that the plaintiff “led significant irrelevant evidence that unduly prolonged the trial" (at para. 21). The plaintiff also made a serious allegation against the defendants and had made no proper investigation into whether the testator had testamentary capacity. She concluded the allegations were based on “speculation and innuendo" (para. 25). The plaintiff was provided with all the evidence collected by the defendants on the issues, which demonstrated that there was no claim (para. 31-34). The plaintiff carelessly pursued the allegations.

[30] MacKenzie J. reviewed examples of meritless cases pursued carelessly, recklessly or for an improper purpose. These cases do not suggest that an unfounded allegation alone is sufficient to justify an award of special costs. The scope of reprehensibility would reframed too broadly otherwise. As noted by MacKenzie J. in para. 29:

> [29] The ground of weakness of claim was summarized in ***Webber v. Singh***, 2005 BCSC 224. Although this case was appealed on other grounds, the Court of Appeal did not disagree with this general statement of the test summarized at para. 28 as follows:
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> > (a) special costs may be ordered where a party has displayed "reckless indifference" by not seeing early on that its claim was manifestly deficient [citations omitted];

> (b) special costs may be ordered to punish careless conduct [citations omitted];
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> (c) special costs may be ordered where a party pursues a meritless claim and is reckless with regard to the truth [citation omitted].

[31] The carelessness and recklessness combined with the seriousness of the allegations and the undue delay of the trial process were bases for the special costs award in *McLean*. The outcome is consistent with the proposition that a meritless claim brought for an improper purpose may attract special costs.

[32] I agree with the executors that Annette and Renee had little prospect of success from the outset. I cannot find the conduct of Annette and Renee was reprehensible. I accept the position of Renee and Annette that they held a genuine belief that the deceased was suffering from psychological issues that could have affected his ability to make decisions about his estate plan. Though misconceived, their conduct does not engage the “something more” definition for reprehensible conduct. I find that special costs in this case are not justified.

Summary

[33] The executors are awarded costs at scale B. The costs are borne jointly and severally by Annette and Renee Lantzius.

“Gropper J.”