

CANADA / JUDGMENT

Anderson v. Routbard

2007 BCCA 193

COURT

British Columbia Court of Appeal

DECIDED

29 March 2007

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2007 BCCA 193 Anderson v. Routbard

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Anderson v. Routbard,

2007 BCCA 193

Date: 20070329

Docket: CA033778

Between:

Julian Patrick Anderson

Respondent

(Plaintiff)

And

Justin Edward Routbard

Appellant

(Defendant)

Before:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Thackray

The Honourable Mr. Justice Lowry

A.M. Gunn, Jr.

R.W. Parsons

Counsel for the Appellant

D.D. McKnight

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 14, 2007

Place and Date of Judgment:

Vancouver, British Columbia

March 29, 2007

Written Reasons by:

The Honourable Madam Justice Prowse

Concurred in by:

The Honourable Mr. Justice Thackray

The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Madam Justice Prowse:

NATURE OF APPEAL

- [1] This is an appeal from the order of a trial judge, made January 18, 2006, finding that an offer to settle made under Rule 37 of the Rules of Court was uncertain, such that it did not warrant an order of double costs under Rule 37(24).
- [2] This appeal also raises an issue concerning the interaction between subrules 66(29), (29.1), and Rule 37 with respect to costs where an offer to settle is made in "fast track litigation". There are conflicting decisions in the Supreme Court in that regard.
- [3] As a matter of convenience, I will refer to the appellant as "the defendant", and to the respondent as "the plaintiff".

ISSUES ON APPEAL

- [4] The defendant submits that the trial judge erred in:
 - (1) finding that the defendant's offer to settle under Rule 37 was uncertain in its terms and conflated the tort action which was before the court, with the plaintiff's claim to Part 7 benefits;

- (2) failing to award the defendant double costs in accordance with Rule 37(24)(b) and Appendix B.

BACKGROUND

- [5] In reasons for judgment pronounced May 24, 2005, the trial judge dismissed the plaintiff's action for damages he suffered in an accident when the bicycle he was riding collided with a motor vehicle. The action was heard pursuant to Rule 66 which permits a party to elect to proceed under "fast-track" rules where the action is expected to complete in two days or less.
- [6] The trial took place on April 27 and 28, 2005. Nineteen months earlier, on September 12, 2003, the defendant delivered a written offer to settle the action pursuant to Rule 37. The plaintiff did not accept the offer, which was never withdrawn. After the plaintiff's action was dismissed, the defendant sought costs at Scale 3 to the date of the offer to settle, and double costs from the date of the offer to trial, pursuant to Rule 37(24). The trial judge found that the offer did not comply with Rule 37 in that it was uncertain, and she awarded costs under subrule 66(29)(b) in the fixed amount of \$4800, as if no offer had been made.

THE DECISION ON COSTS

- [7] The offer to settle which was before the trial judge provided, in part:

The Defendant, JUSTIN EDWARD ROUTBARD, offers to settle this proceeding on the following terms:

1. The sum of FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500.00), after taking into account Part 7 benefits paid or payable pursuant to Section 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 and any advances paid to date; and
2. Disbursements only in accordance with Rule 37(22) and (37).

- [8] The plaintiff argued at trial that the offer was uncertain and ambiguous because he did not know what advances had already been paid and, although he had claimed Part 7 benefits, he had no way of determining what benefits ICBC would determine were "payable" in the future. The trial judge agreed with the plaintiff that the offer was uncertain and stated her reasons for coming to that conclusion at para. 10:

In my view, the plaintiff is correct. This offer is uncertain. First, ICBC has a contractual obligation to its insured to deal with Part 7 benefits; such a claim can be the subject of a separate action. This is not part of the tort action between the plaintiff and defendant which went to trial before me and in which the offer is purported to have been made. The offer conflates the two causes of action, when the parties are not the same. Second, the defendant purports to hold back an amount as yet undetermined. The plaintiff could not know, at the time of the offer, what Part 7 claims, if any, would be the subject of dispute. This offer is not capable of being accepted and paid out, as the words "or payable" mean an amount would have to be held back or dealt with by an arrangement for a future payment back. In these circumstances, the offer did not afford to the

plaintiff a meaningful opportunity to assess the amount that might actually be forthcoming, should the offer be accepted, and does not trigger the consequences of Rule 37(24).

[9] Because the trial judge found that the offer was uncertain and, therefore, not in compliance with Rule 37, it was unnecessary for her to consider the interplay between Rule 37 and subrules 66(29) and (29.1) in relation to costs.

DISCUSSION

1. Was the Offer to Settle Uncertain?

[10] In order to place this issue in context, it is necessary to have regard to Rule 37 and related authorities.

[11] Rule 37 provides, in part:

(2) A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceeding in the terms specified in the offer.

...

(24) If the defendant has made an offer to settle a claim for money and the offer has not expired or been withdrawn or been accepted,

...

(b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[Emphasis added.]

[12] Form 64, in turn, provides, in part:

The ... [party] ... offers to settle this proceeding [or, the following claims in this proceeding] on the following terms [set out terms in consecutively numbered paragraphs] and costs in accordance with Rule 37.

[13] It is also useful, at this point, to have regard to s. 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"), since a reference to that section was contained in the offer to settle.

[14] Section 25 provides, in part:

Liability reduced

25. (1) In this section and in section 26, "benefits" means a payment that is or may be made in respect of bodily injury or death under a plan established under this Act, ...

(2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the claim, is deemed to have released the claim to the extent of the benefits.

...

- (4) In an action in respect of bodily injury or death caused by a motor vehicle or trailer or its use or operation, the amount of benefits paid, or to which the claimant is or would have been entitled, must not be referred to or disclosed to the court or jury until the court has assessed the award of damages.
- (5) After assessing the award of damages under subsection (4), the amount of benefits referred to in that subsection must be disclosed to the court, and taken into account, or, if the amount of benefits has not been ascertained, the court must estimate it and take the estimate into account, and the person is entitled to enter judgment for the balance only.

[Emphasis added.]

- [15] It is not disputed that the words "taken into account" in subsection (5), mean deducted from the amount of the tort award of damages.
- [16] It is also common ground that, in order to comply with Rule 37, an offer has to be clear and unambiguous. In essence, the person receiving the offer must be able to determine, or readily ascertain, precisely what s(he) is being offered.
- [17] The defendant's offer to settle in this case is quoted at para. 7, supra.
- [18] In essence, the plaintiff submits that the offer is both unclear and ambiguous. He says that the words: "after taking into account Part 7 benefits paid or payable pursuant to section 25 of the Insurance (Motor Vehicle) Act", in particular, are incomprehensible to anyone who does not have a refined understanding of the law in this area. He submits that because he has no way of knowing whether and to what extent ICBC will provide Part 7 benefits, including benefits which he had claimed as of the date of trial, but had not received, it was not possible for him to know precisely how much he would actually receive (and be able to retain) if he accepted the offer. The plaintiff also supports the trial judge's conclusion that the offer conflates the tort action and his claim for Part 7 benefits.
- [19] The plaintiff lists a number of questions which, he submits, are raised by the offer and demonstrate that the offer is unclear:

Does the word "payable" mean that the Corporation agreed to pay some of the Plaintiff's submitted, but as yet unpaid, claims for benefits?

If so, which ones?

Does the inclusion of the words "after taking into account" mean that the Corporation had already exercised its discretion whether or not to pay the submitted, but as yet unpaid, claims for benefits?

Does the word "payable" mean that the Corporation would agree to pay future claims that the Plaintiff might make?

If so, which ones?

Does the inclusion of the words "after taking into account" mean that the Corporation had already exercised its discretion whether or not to pay any future claims that the Plaintiff might make?

- [20] The defendant submits that it is the trial judge and the plaintiff who have conflated the tort claim and the plaintiff's claim for Part 7 benefits. In his submission, it is clear from the terms of the offer that the amount of the offer is \$5,500. He says that it is also clear that this amount relates solely to the tort action and does not in any way affect what the plaintiff may be entitled to by way of Part 7 benefits. He submits that the reference to s. 25 of the Act makes it clear that the offer has taken into account (i.e. deducted) any Part 7 benefits which have been paid or are payable to the plaintiff, such that the plaintiff's claim for Part 7 benefits remains unimpaired. The defendant says that, at worst, the reference to s. 25 of the Act is "meaningless" as was found by Cole J. in relation to an offer to settle in identical terms, which Cole J. found was clear and in compliance with Rule 37 (see *Gill v. Gill* (2004), 42 B.C.L.R. (4th) 85 (S.C.)).
- [21] I am sympathetic to the plaintiff's submission that only a person with a working knowledge of s. 25 of the Act would understand that the defendant was offering to settle for \$5,500, no more and no less. Once it is understood by reference to s. 25, however, that benefits can only be "taken into account" by deducting them from the tort claim, I agree with the defendant that the offer to settle is clear and unambiguous. I also agree with the defendant that the plaintiff cannot utilize his ignorance of s. 25 or its application as a basis for arguing that the offer is unclear, at least in circumstances, as here, where s. 25 is referred to in the offer itself.
- [22] The plaintiff agrees that the clarity or legal effectiveness of an offer to settle cannot be based on the individual level of comprehension of the individual who receives the offer, whether a lawyer or a layperson. Rather, the determination of whether an offer is uncertain must be based on an objective standard which takes into account the legal context in which the offer is made, including, in this case, the operation of Rule 37 and s. 25 of the Act. Similarly, it has never been the case that a person receiving an offer under Rule 37 can claim ignorance of the operation of that rule as a means of avoiding the legal implications of an offer made pursuant to that rule. An offer to settle does not have to educate the person receiving it as to the state of the law in order for it to be effective. The same is true of an offer referring to s. 25 of the Act.
- [23] In that regard, the operation of the predecessor to s. 25 of the Act (then the Automobile Insurance Act, 1973 (B.C.), c. 6) in relation to no fault benefits was explained by Farris C.J.B.C., speaking for the Court, in *Fisher v. Wabischewich* (1978), 5 B.C.L.R. 335 (C.A.), at p. 336:

Before examining in detail the provisions of the Automobile Insurance Act, it is useful to consider the scope and intention of the legislation. It is an attempt by the legislature to deal with the inherent difficulties that have been apparent in granting lump sum awards for estimated cost

of future care of victims of automobile accidents. The clear purpose of the legislation is to discontinue lump sum awards for future care and to supply future benefits as and when required provided application is made within the time prescribed by the regulations. The maximum amount of the benefits to be paid under s. 25 is at the present time limited by Reg. 7.09(b). Accordingly (broadly speaking) it provides that where a plaintiff, who is entitled to the benefits provided under the Act, has brought an action for damages suffered as the result of a motor car accident, his damages shall be assessed and that following the assessment the judge shall deduct from his award the amount that the plaintiff will receive by way of benefits for future care.

The purpose of the deduction is two-fold:

- (1) It is to determine the sum that the plaintiff shall receive at the time of the judgment. It is not to fix the amount of the future benefits. The amount of benefits that the plaintiff will receive in the future is determined by the provisions the Act. These may well be in excess of the amount estimated by the trial judge in his award. However, by deducting the amount that the trial judge has estimated, the amount that is immediately payable to the plaintiff is determined; and
- (2) It is to prevent the plaintiff from being compensated twice. He cannot receive a lump sum in respect of future benefits and also receive the benefits.

[Emphasis added.]

[24] The offer made in this case is consistent with this purpose. It takes into account (i.e. deducts) no fault benefits paid or payable (together with tort advances already paid) in arriving at a net offer of \$5,500. Acceptance by the plaintiff of that amount does not in any way detract from his right to claim no fault benefits, or to sue ICBC in the event they are withheld.

[25] As earlier noted, the defendant referred to *Gill v. Gill*, supra, where Cole J. found that an offer in identical terms was clear and unambiguous. With respect to the reference in the offer to Part 7 benefits, and in answer to arguments similar to those raised by this plaintiff, Cole J. stated (at paras. 4-5):

The plaintiff argues that the Offer is not effective because the amount of the Offer is uncertain, the amount of the Offer changes, the amount of the Offer depends in part on future events and, it is likely that the parties cannot agree on the amount of Part VII benefits payable and hence on the amount of the offer.

I disagree. The Offer could only relate to the tort action which was the subject matter of the lawsuit. The reference in the Offer to Part VII benefits is meaningless, as those benefits were independent of this action and the plaintiff had her right to apply for benefits under the [Act]. ...

[26] I agree with Cole J. that this form of offer is clear and unambiguous. I do not agree, however, that the words "after taking into account Part 7 benefits paid or payable pursuant to Section 25 of the [Act]" are meaningless. Rather, because s. 25 benefits can only be taken into

account by deducting them, this reference removes any doubt there might otherwise have been that the plaintiff is entitled to the amount of \$5,500 without foregoing any claims he may have to future no fault benefits. Further, there is nothing in the offer which suggests that the plaintiff may have to repay any portion of this amount in the future.

- [27] In my view, the questions posed by the plaintiff at para. 19, supra, confuse his claims in the tort action with claims he has for no fault benefits, and fail to appreciate the effect of s. 25 of the Act. This confusion on the part of the plaintiff, however, does not make an offer which is otherwise clear, ambiguous.
- [28] Nor can the plaintiff succeed in showing that this offer is unclear by stating that, in his view, it would have been more clear if the reference to s. 25 of the Act were omitted. The Court must deal with the offer before it and there is little benefit in speculating on the efficacy of offers expressed in other terms.
- [29] In the result, I find that the trial judge erred in finding that the offer to settle was uncertain and did not comply with Rule 37.

2. Relationship Between Subrules 66(29) and (29.1), and Rule 37

- [30] As earlier noted, because the trial judge found that the defendant's offer did not comply with Rule 37, it was unnecessary for her to consider the interaction between the costs provisions in subrules 66(29) and (29.1) and those in Rule 37. Instead, she simply awarded costs in accordance with subrule 66(29).
- [31] I have set out the relevant provisions of Rule 37 at para. 11, supra. Subrules 66(29) and (29.1) provide as follows:

Costs

- (29) Unless the court orders otherwise or the parties consent, and subject to Rule 57(10) [costs in cases within small claims jurisdiction], the amount of costs, exclusive of disbursements, to which a party is entitled is as follows:
- (a) if the time spent on the hearing of the trial is one day or less, \$3,600;
 - (b) if the time spent on the hearing of the trial is more than one day, \$4,800.

Court may consider settlement offers

(29.1) In exercising its discretion under subrule (29), the court may consider a settlement offer delivered in accordance with Rule 37 or 37A whether or not other special circumstances exist.

[Emphasis added.]

[32] In actions which do not proceed under Rule 66, the application of Rule 37 has been held to be mandatory where the offer complies with Rule 37. The leading case in that regard is *Cridge v. De Vooght* (2005), 37 B.C.L.R. (4th) 62 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 127. There, after reviewing the earlier decisions of this Court in *Brown v. Lowe* (2002), 97 B.C.L.R. (3d) 246 (at para. 153), and *Jamieson v. Duteil* (2001), 92 B.C.L.R. (3d) 208 (at para. 34), Lowry J.A., speaking for the Court, stated (at paras. 23 and 24):

While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open to the Lieutenant Governor in Council in promulgating the Rules of Court to restrict the exercise of that discretion as may be appropriate where it is thought that to do so will achieve a desired objective. The purpose of Rule 37 is to encourage the settlement of litigation through prescribed consequences in costs as in sub-rule (24) [double costs]. Given that the sub-rule provides for the litigants' entitlement to costs while affording no discretionary alternative, I consider it clear that there is no room for judicial discretion where sub-rule (24) applies.

Rule 37 is, as stated in *Brown v. Lowe*, a complete code. It is important that the Rule be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that the Rule will be applied when costs are awarded.

[Emphasis added.]

[33] The issue on this appeal is whether the court is bound to apply Rule 37, and, in particular, the double costs provision in Rule 37(24), where an offer to settle is made in fast track litigation. Assuming the defendant is entitled to double costs, an additional issue arises as to whether those costs are to be determined by reference to the limits on costs set forth in Rule 66, or by reference to the usual tariff (Appendix B).

[34] In addressing these issues, counsel have referred to numerous trial decisions. I need refer to only a few of them.

[35] The weight of the authority in the Supreme Court favours the view that the court has a discretion under subrule 66(29.1) to depart from the fixed costs set forth in subrule (29). This view turns on the language of subrule 66(29.1) which provides that "In exercising its discretion under subrule (29)" the court "may consider a settlement offer delivered in accordance with Rule 37 or 37A". This language is unlike that of Rule 37 which refers to the party making the offer being "entitled" to double costs from the date of the offer. It is more similar to the language of Rule 37A which deals with offers to settle other than those made under Rule 37. Rule 37A provides, in part:

(1) In any circumstances to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.

- (2) If an offer of settlement has been delivered under subrule (1) and brought to the attention of the court, the court may
- (a) award costs to the offering party in an amount not greater than the costs to which the party would have been entitled had the offer been made under Rule 37, or
 - (b) deprive the party to whom the offer was made of costs to an extent not greater than that which the court could have ordered had the offer been made under Rule 37.

[Emphasis added.]

- [36] The plaintiff notes that both Rule 37A and subrule 66(29.1) are framed in permissive language and do not use the words of "entitlement" to costs which this Court in *Cridge* found excluded the exercise of discretion with respect to costs where the offer complied with Rule 37.
- [37] It is common ground that subrule 66(29.1) was enacted in response to decisions of the Supreme Court, including *Reid v. Insurance Corp. of British Columbia*, [2000] B.C.J. No. 1810 (S.C.), which held that the costs provisions of Rule 66 were designed to decrease the cost of litigation and that the fixed costs set forth in that Rule could only be departed from in "special circumstances". In *Reid*, the trial judge found that an offer pursuant to Rule 37 would rarely, if ever, be sufficient to justify such a departure. Following the enactment of subrule 66(29.1), it was accepted that an offer under Rule 37 was sufficient, in itself, to constitute a special circumstance which would justify the court in departing from the fixed costs otherwise payable. It is also apparent, however, that by retaining the reference to "special circumstances", Rule 66 contemplated that there may be circumstances other than a Rule 37 offer which could justify a departure from fixed costs.
- [38] A discussion of the relationship between Rule 37 and Rule 66, including the history of the enactment of subrule 66(29.1), is found in *B.C. Marine Industry Standard Welfare Plan (Trustees of) v. Dizdarevich* (2004), 34 B.C.L.R. (4th) 350 (S.C.). There, after tracing the history of the Rule, Ralph J. concluded that Rule 37 was a special circumstance which justified the court in departing from the fixed costs otherwise payable, but that it was not a circumstance which required the court to do so.
- [39] In *Duong v. Howarth*, 2005 BCSC 128, Macaulay J. confirmed that the court had a discretion as to whether to award double costs under Rule 66. At para. 8 of that decision, he stated:
- There is ample authority in this court for the proposition that awarding double costs in a Rule 66 action is a matter of discretion even where the plaintiff beats his formal offer to settle. See *Beaubier [v. Klassen, (2003 BCSC 7)*, at para. 14 (pre-amendment), as well as *Engler v. Dizdarevich* [citation omitted] and *Linekar v. Andreiko*, [2004] B.C.J. No. 1986, at para. 8 (post-amendment).

[40] Mr. Justice Macaulay concluded that it was appropriate to give effect to the Rule 37 offer in the case before him by awarding double costs, but he declined to express an opinion on whether the Cridge decision required the court to do so. He then went on to discuss the manner in which the court could exercise its discretion in assessing the costs where there has been a Rule 37 offer in a Rule 66 action. In that regard, he referred to four possible approaches set forth by Joyce J. in *Linekar v. Andreiko*, at para. 10 of that decision:

- (1) Ordinary assessment of costs applying Rule 37 subject to a "double cap" [double the costs allowable under Rule 66], as in [*Bishop-Austin v. Brown* (2004), 34 B.C.L.R. (4th) 355 (S.C.)];
- (2) Ordinary assessment of costs applying Rule 37 without any cap;
- (3) Allow the fixed costs ordinarily provided by Rule 66(29) plus additional costs in accordance with the tariff for those items that occurred after the offer was delivered;
- (4) Apply a pro-rated formula as was done in *Girvan v. Raffe*, [2002] B.C.J. No. 1795 (S.C.), where the plaintiff was directed to prepare a bill of costs (B1) in accordance with the tariff without regard to the effect of the offer and a second bill of costs (B2) in accordance with the tariff giving double units for those items that occurred after the offer was made. The difference between the two amounts created a percentage increase that was to be applied to the fixed costs under Rule 66(29) (in that case \$4,800), in accordance with the following formula: $B2-B1/B1 \times \$4,800$.

[41] Mr. Justice Macaulay agreed with Joyce J. that, where the only special circumstance under subrule 66(29.1) was an offer to settle, the first approach was preferable on the basis that it did not use a fixed amount of costs as a starting point, but it did provide a ceiling for costs equal to double the amount of fixed costs. In coming to that conclusion, Macaulay J. observed that the fixed costs set forth in subrule 66(29) were not designed to deprive a successful litigant of costs otherwise payable under the rules, but were designed to reflect the actual costs of a typical one or two day trial. In his view, the main purpose of subrules 66(29) and (29.1) was to avoid the necessity of a taxation. He sets forth his views in that regard at paras. 15-19 of his reasons:

... In my view, the \$4,800 cap in Rule 66(29) reasonably reflects the assessed costs under Scale 3 that would be available for any case of ordinary difficulty where there has been discovery of documents; limited examinations for discovery; perhaps a chambers application; and a two day trial. Without regard to Rule 66, such a case could typically result in an overall award of costs of about \$4,800.

For example, under Appendix B, items 24 and 25 relate to preparation for and attendance at each day of trial: five units for the former and ten for the latter. At Scale 3, one would reasonably expect to tax a bill of costs for each day of trial at \$1,200 (15 x \$80).

Under Rule 66(29), the costs of a one day trial are capped at \$3,600, exactly \$1,200 below the cap for a two day trial. If one assumes that average pre-trial costs remain constant for a one or two day case, it is evident that the cap is not designed to deprive a successful litigant of costs available outside of the rule. Instead, the rule seeks to displace the need for unnecessary and expensive taxations in the relatively modest cases that proceed under the rule.

Because Rule 66 does not, in itself, break down the apportionment between pre-trial and trial costs, this review is also helpful in considering how the court should apply the Rule 37 requirement that double costs only apply to steps taken in the litigation after delivery of the offer. It would be unfair to the defendant to impose a double cost burden for the litigation steps that preceded preparation for trial because the plaintiff chose not to deliver the offer until ten days before trial. If I were to accede to the plaintiff's position, he would receive a greater cost benefit than is available under Rule 37.

For these reasons, I reject the approach urged on behalf of the plaintiff. The plaintiff is entitled to the pre-trial portion of costs envisaged by Rule 66(29), that is \$2,400 (\$3,600-\$1,200) to cover the period up to delivery of the offer, and double costs for the period thereafter attributable to preparation and two days of trial, a further \$4,800 (2 days x 2 x \$1,200). In the result, the plaintiff is entitled to a maximum of \$7,200 in costs, exclusive of disbursements.

[Emphasis added.]

[42] Mr. Justice Macaulay stated that, in his view, the costs so awarded should not have to be taxed, but he considered himself bound by a previous decision of the Supreme Court (Bishop-Austin v. Brown) in which the court held that Rule 66 provided for maximum costs which should remain subject to taxation.

[43] The defendant urges upon this Court the view that the only discretion available to the court under Rule 66 is the discretion to depart from the fixed costs under subrule (29) if special circumstances exist. He further submits, however, that if the only special circumstance before the court is an offer under Rule 37 (as in Duong), then the court has no alternative but to apply Rule 37 according to its terms just as in an ordinary action. Since Cridge states that the court has no discretion in an ordinary action not to award double costs in circumstances such as these, there should be no discretion in the court to depart from Rule 37 in an action under Rule 66. If this is so, it follows that the defendant is entitled to double costs based on an assessment under Appendix B, and is not restricted to an assessment of costs limited by the maximums set forth in subrule 66(29).

[44] The defendant did not purport to say that the court's discretion was limited in the case of other special circumstances, but only where the special circumstance was an offer under Rule 37. For example, he did not say that the court's discretion would be limited if there were an offer under Rule 37A, since that rule is framed in discretionary terms.

- [45] Nor did the defendant provide a satisfactory answer when asked whether the court had a discretion whether to award double costs if there were special circumstances in addition to a Rule 37 offer. I understood him to say that, in those circumstances, Rule 37 would prevail.
- [46] I do not find the defendant's submission persuasive. In my view, a plain reading of subrules 66(29) and (29.1) makes it clear that the court can exercise a discretion to depart from the fixed costs set forth in subrule (29) if there are special circumstances, and an offer under Rule 37 is simply one of the circumstances in which it may do so. Rule 37 is not given elite status as a special circumstance and, in some cases, it may be only one of many special circumstances which the court may consider in determining whether the fixed costs under subrule (29) should apply. If it is the only special circumstance, however, it is reasonable to expect that the court's discretion would generally be exercised to award double costs, as was the case in *Duong*. This is so because, as earlier indicated, the fixed costs under Rule 66 are designed to reflect the costs that would normally flow in an action which can be heard in one or two days, and the need to encourage settlements by penalties in costs is present in these actions, just as in the case of ordinary actions. Thus, I agree with Macaulay J.'s suggested approach to the exercise of discretion where a Rule 37 offer is the only special circumstances before the court.
- [47] I also agree with Macaulay J. that the intent of the Rule was to avoid the necessity of a taxation and that it would frustrate that intent to order a taxation of costs under the Rule. For that reason, his approach to double costs also makes sense. Rather than have double costs assessed under Appendix B and then taxed, Rule 66 provides a mechanism whereby double costs can be given effect without the necessity of taxation. That methodology is described by Macaulay J. in the passage quoted from his reasons for judgment at para. 40, *supra*.
- [48] Counsel have invited this Court to exercise the requisite discretion under subrules 66(29) and (29.1) rather than remitting the matter to the trial court. I agree that is an appropriate disposition of the matter in this case since to do otherwise would unnecessarily increase the costs of the parties and delay a final resolution of this matter.
- [49] I would give credence to the offer to settle in this case following the same general approach as Macaulay J. in *Duong*. In this case, however, the offer was delivered much earlier in the proceedings (19 months prior to trial, as compared with ten days prior to trial) at a time when it appears the only pre-trial work which had been done was the filing of pleadings. By far, the greatest portion of the legal preparation was done following the offer to settle. In these circumstances, I would exercise my discretion to award the defendant double costs for the entire period ($\$4,800 \times 2 = \$9,600$) less a 10% discount for work done prior to the offer to settle. The result is an order of costs in the amount of \$8,640. While this estimate of costs is somewhat arbitrary, it avoids the need for taxation, as envisaged by subrule 66(29), and gives significant credit to the defendant for making an early offer to settle, in accordance with Rule 37.

[50] Before leaving this point, I note that the plaintiff has suggested that there were special circumstances in addition to the offer under Rule 37 which should be taken into account in the award of costs. I did not find it necessary to itemize those circumstances since, in my view, none of them can be raised to the level of a special circumstance. As in Duong, the only special circumstance present is the Rule 37 offer.

CONCLUSION

[51] I would allow the appeal, set aside the order of the trial judge, and award the defendant costs of the action in the amount of \$8,640.

[52] Since this appeal raised an issue of general interest to the practice, the defendant is not seeking the costs of the appeal. In my view, the defendant's position in that regard is to be commended.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Mr. Justice Lowry"

I Agree:

"The Honourable Mr. Justice Thackray"

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