

CANADA / JUDGMENT

Berthin v. Berthin

2021 BCSC 1480

COURT

Supreme Court of British Columbia

DECIDED

29 July 2021

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2021 BCSC 1480 Berthin v. Berthin IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Berthin v. Berthin, 2021 BCSC 1480 Date: 20210729 Docket: S162376 Registry: Victoria Between: Wayne Douglas Berthin Plaintiff And Helen Claire Berthin Roy Lyn Sherrod and Patsy Spikes Sherrod Defendants Before: Master Harper Ruling on Effect of Offer to Settle Bill of Special Costs Counsel for the Plaintiff: K. Hauer Counsel for the Defendant, Helen Claire Berthin: N.W. Lott Written Submissions received from the Defendant, Helen Claire Berthin: June 18, 2021 Responding Submissions received from the Plaintiff: June 23, 2021 Reply Submissions received from the Defendant, Helen Claire Berthin: June 30, 2021 Place and Date of Ruling: Victoria, B.C. July 29, 2021

Introduction

- [1] After a registrar's hearing on June 7, 2021, I assessed the special costs of the proceeding payable by the plaintiff, Mr. Berthin, to the defendant, Ms. Berthin, pursuant to the order of Justice Gaul. I assessed the special costs at \$68,000 plus agreed upon disbursements of about \$2,500, plus \$10,000 for the costs of the assessment process, plus GST and PST.
- [2] Ms. Berthin now seeks additional special costs of \$10,000 because she delivered a formal offer to settle the special costs in the amount of \$62,000 on April 22, 2021.

Issues

- [3] The question is whether a registrar has the authority to award additional special costs where the successful party has achieved a better result than the formal offer. If a registrar does have such authority, the question is then whether I ought to exercise my discretion and award additional special costs on the basis that Mr. Berthin ought to have accepted the offer.
- Discussion
- [4] Rule 14-1(19) provides that, if after pronouncement of judgment, a party puts another party to unnecessary proceedings or expense, a registrar may award costs as the registrar considers appropriate against the offending party. Ms. Berthin's position is that by failing to accept her offer, Mr. Berthin put her to the unnecessary expense of a special costs hearing.

- [5] Rule 14-1(19) gives a broad discretion to registrars with respect to costs, which encompasses the power to award special costs: *Vandokkumberg v. H. Meyer Construction Ltd. et al*, 2007 BCSC 239 at para. 18. Mr. Berthin agrees that a registrar has discretion to make a further costs award at the conclusion of a special costs assessment, including where an offer to settle was made prior to the assessment. However, he argues that this discretion does not permit the registrar to assess costs in excess of special costs.
- [6] Section 8 of Appendix B deals with offers to settle made in a "regular" (i.e. not special costs) assessment. Section 8 provides that if the registrar determines that the offer should have been accepted by the party liable to pay costs, the registrar may allow double the value of Tariff items that relate to the assessment to the party presenting the bill and making the offer.
- [7] There is no specific provision in the Supreme Court Civil Rules that would permit the registrar to order double special costs. However, Ms. Berthin suggests that s. 8 of Appendix B provides a potential approach for a registrar considering the effect of an offer to settle special costs. Arguing by analogy that a registrar should have the ability to consider the effect of a party failing to accept an offer to settle a bill of special costs as an "unnecessary proceeding or expense", Ms. Berthin suggests that an appropriate amount to award would be double the \$10,000 in special costs I attributed to the assessment process.
- [8] Mr. Berthin relies on case authorities that set out the principle that the court cannot award double special costs. Double costs only apply to party and party costs and do not apply if the court has ordered special costs: *Insurance Corporation of British Columbia v. Eurosport Auto Co. Ltd.*, 2007 BCCA 279 at para. 39; *Hochsteiner v. Kilback*, 2014 BCSC 167 at para. 21; *Kyle Estate v. Kyle*, 2017 BCSC 752 at paras. 17-19. Justice Jenkins concludes in *Hochsteiner* at para. 21: "If the legislature had intended to provide the court with the authority to award double special costs, it could have easily done so with specific words." These cases do not apply in the present case because a registrar is not a "court" and because the authority relied on by Ms. Berthin is Rule 14-1(19) which deals with unnecessary expense after judgment.
- [9] There are policy reasons to give effect to offers to settle. An award of double costs in the usual case encourages settlement by rewarding the litigant who makes an offer to settle that ought to be accepted and by punishing the litigant who fails to accept it. However, the difficulty with Ms. Berthin's position is that she has already been awarded special costs. I have assessed the special costs for the assessment process at \$10,000 which is close to the amount of her actual legal expenses on a "fair fee" basis of \$13,000.
- [10] Special costs awards are meant to be an indemnity for fees incurred rather than to provide a windfall: *Gichuru v. Smith*, 2014 BCCA 414 at para. 103. While there may be a close relationship between actual legal expenses and special costs, they are not necessarily the same: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 49. A special costs award of 80% to 90% of actual legal fees incurred is typical, but not inevitable. Special costs can reach the level of a full indemnity if the registrar determines that circumstances

warrant such a result: Gichuru, para. 125. I considered that an award of approximately 77% of the actual legal fees attributable to the assessment process on a "fair fee" basis was appropriate. Even if were inclined to exercise my discretion to award additional special costs, the amount would be limited to the \$3,000 difference between the "fair fee" and the amount I assessed as special costs (in other words, a full indemnity, but not a windfall). To award more than \$3,000 would amount to a fine or penalty against Mr. Berthin in the absence of clear authority to do so in the Rules.

- [11] In any event, I do not think an additional award of special costs is warranted in this case. The award of special costs made by Gaul J. was for Mr. Berthin's reprehensible conduct in the litigation. There was nothing reprehensible about Mr. Berthin not accepting Ms. Berthin's formal offer. Mr. Berthin was entitled to test the reasonableness of the fees underlying the award. Mr. Berthin is now obligated to pay Ms. Berthin about \$20,000 more than he would have had to pay if he had accepted the formal offer. Ms. Berthin has been compensated, and Mr. Berthin has been duly penalized, for the time, trouble, and expense of proceeding to the assessment because Ms. Berthin is now \$20,000 further ahead than she would have been if Mr. Berthin had accepted her offer.

Conclusion

- [12] The application for additional special costs is dismissed without costs. "Master Harper"

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