

CANADA / JUDGMENT

Bishop-Austin v. Brown

2004 BCSC 944

COURT

Supreme Court of British Columbia

DECIDED

14 July 2004

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2004 BCSC 944 Bishop-Austin v. Brown IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Bishop-Austin v. Brown, 2004 BCSC 944 Date: 20040714 Docket: 03 1930 Registry: Victoria

Between: Janette Bishop-Austin Plaintiff And: Russell Keith Brown Defendant Before: The

Honourable Mr. Justice Hutchison Reasons for Judgment Counsel for the Plaintiff: D. D.

McKnight Counsel for the Defendant: A. R. Borzoni Date and Place of Trial/Hearing: May 11, 2004
Victoria, B.C.

- [1] This case originally came before me February 26 and 27, 2004 under R. 66, the colloquially named "rocket docket" procedural rule permitting two-day trials to be fast tracked.
- [2] After trial the matter was adjourned to March 12, 2004 for oral reasons. The plaintiff was awarded a total sum in damages of \$21,800. Because of offers made formally under R. 37 by both parties, the question of costs was put off for another Chambers hearing. Counsel fixed the morning of May 11, 2004 for that hearing, by consent. Nonetheless, defence counsel was in another courtroom so written argument was ordered.
- [3] The parties' briefs concentrated on the effect of the new R. 66(29). Both parties made offers pursuant to R. 37. The plaintiff's, delivered to the defendant on December 9, 2003, some two months before trial, was in the sum of \$21,500, some \$300 under the court's award.
- [4] On the same day, the defendant delivered an offer in the amount of \$10,800 "all in", after taking into account Part 6 benefits paid or payable pursuant to s. 25 of the Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, and any advances paid to date. The defendant delivered a second offer under R. 37 on February 17, 2004, less than a week prior to the date scheduled for commencement of trial, at \$15,275, some \$6,500 short of the mark.
- [5] From these offers and their numbers, it can be seen that the litigation ensued for two days because counsel were unable to close the gap of over \$6,500.
- [6] Clearly, under R. 37, in any action other than one under R. 66, the plaintiff would be entitled to double costs.
- [7] Costs under R. 66 are governed by subrule (29), which reads as follows:

- (29) Unless the court orders otherwise or the parties consent, and subject to Rule 57(10), 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. In the case at bar, all matters save costs were concluded in the allotted two days.
- [8] After the introduction of the pilot project involving R. 66, designed by a joint committee of the Bench and Bar, chaired by Mr. Justice Shaw, there was some discrepancy concerning the application of subrule (29). The court was at odds as to whether or not the provisions of subrule (29) limiting costs to \$4,800 precluded parties using R. 66 from seeking double costs pursuant to R. 37. A jurisprudence developed, and resulted in some conflicts between various judges. This history is well summarized in the reasons of Macaulay J. in *Beaubier v. Klassen* (2003), 10 B.C.L.R. (4th) 169, 2003 BCSC 7, where he chose to follow the decision of Burnyeat J. in *Girvan v. Raffeale* (2002), 4 B.C.L.R. (4th) 52, 2002 BCSC 1105, in which Burnyeat J. awarded double costs. Both decisions were made despite the admonitions of Shaw J. in *Reid v. Insurance Corp. of British Columbia*, 2000 BCSC 1334, where he expressed the view that the costs' provisions of R. 66 exist for a specific reason, "to keep the cost of Fast Track actions relatively low". He concluded by denying double costs under R. 37, holding that such a result conflicted with the objective of making litigation less expensive.
- [9] Macaulay J. expressed the hope in *Beaubier*, *supra*, that the Court of Appeal might resolve this conflict.
- [10] However, the Rules Committee, perhaps just coincidentally chaired by Macaulay J., introduced a new R. 66(29.1) which came into effect on July 1, 2003. That rule, with a subheading "Court may consider settlement offers", reads as follows: (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.
- [11] Obviously, the court must consider the objective of R. 66 which, as Shaw J. points out, is to keep the costs of fast track actions relatively low.
- [12] On the other hand, as Burnyeat J. points out in *Girvan*, *supra*, the objective of R. 37 is to encourage litigants to avoid all costs of trial, through settlement.
- [13] Neither counsel found any cases, nor do I think there are any yet decided, under subrule (29.1). Thus, this can be said to be a case of first instance in the interpretation of subrule (29.1).
- [14] I think it is clear that the court must first exercise its discretion as to whether or not the costs' limit of R. 66(29) should be exceeded. I think subrule (29.1) contemplates the court finding special circumstances which would increase the amount of costs dictated by R. 66(29) and if such special circumstances existed, the "cap" could be exceeded.

- [15] In the case at bar, there is no reason for the costs to exceed the limit of R. 66(29)(b). Accordingly, the costs in the case at bar are "capped" at \$4,800.
- [16] It seems to me that subrule (29.1) contemplates that where an offer has been made under R. 37 by the plaintiff and the plaintiff is awarded more than the amount of the offer at trial, double costs should be awarded. Where, as here, there are no other special circumstances, double costs should not exceed double \$4,800, or \$9,600.
- [17] Accordingly, costs in the case at bar should be no more than \$9,600, assuming that Mr. McKnight is able to tax for the two-day trial costs reaching the maximum of \$4,800.
- [18] There was argument that because the offer was exceeded by only \$300, the court should exercise its discretion against awarding double costs. I do not think that is consistent with the objective of R. 37. The rule, as held by Southin J.A. in *Brown v. Lowe* (2002), 97 B.C.L.R. (3d) 246 at paragraph 154, is a "complete code and there is no room for any judicial discretion save that given by it". In my view, once the court has decided, under R. 66(29), that the maximum costs provided by the rule should apply, R. 37 speaks for itself. I conclude that was the intent of the drafters of R. 66(29.1).
- [19] For the above reasons, the plaintiff is entitled to double costs, to a maximum of \$9,600.
"R.B.McD. Hutchison, J." The Honourable Mr. Justice R.B.McD. Hutchison

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/04/09/2004bcsc0944.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bishop-austin-v-brown-2004>

Prepared on 29 October 2026 · Esheria