

CANADA / JUDGMENT

Bolin v. Lylick

2018 BCCA 127

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 127 Bolin v. Lylick COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Bolin v. Lylick, 2018 BCCA 127 Date: 20180328 Docket: CA44233 Between: Linda Bolin Respondent (Plaintiff) And Chelsea Lee Lylick, Sahil Sharma and Yellow Cabs (Kamloops) Ltd. Appellants (Defendants) Correction: The front cover was corrected on April 20, 2018 Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Harris The Honourable Madam Justice Fenlon On appeal from: an order of the Supreme Court of British Columbia, dated January 16, 2017 (Bolin v. Lylick, Kamloops Registry No. M47722) Oral Reasons for Judgment Counsel for the Appellant: J.A. Jakel Counsel for the Respondent: J.A. Zak Place and Date of Hearing: Kamloops, British Columbia March 28, 2018 Place and Date of Judgment: Kamloops, British Columbia March 28, 2018 Summary: With the trial date only six weeks out, the plaintiff successfully applied for a second adjournment of a trial. The defendants were precluded at the hearing of the application from making submissions on the issue of costs, and the judge did not express a reason for declining to make what one would term "the usual order" that the defendants recover costs of trial preparation thrown away, as a term of the adjournment, and costs of the application. Held: while an order of costs is a discretionary order, absent hearing the defendants on the issue although the defendants sought to address the issue, and absent reasons from the judge for departing from usual practice, this court could and should amend the costs order made. The defendants are entitled to costs of trial preparation thrown away in any event of the cause, and to costs of the application.

- [1] SAUNDERS J.A.: On January 16, 2017, facing a trial date of February 27, 2017, some six weeks on, Ms. Bolin applied to adjourn the trial of her personal injury action. Liability has been admitted, the issue remaining for trial is quantum of damages. That issue is vigorously contested and it appears it was anticipated that many expert medical reports would be introduced at trial with cross examination of at least some of the report authors.

- [2] Counsel for the defendants opposed the application for an adjournment, and observed that the trial had already been adjourned once from the first date set, November 16, 2015, to allow for Ms. Bolin's medical treatment. In opposing an adjournment, the defendants emphasized the trial preparation already completed, said they were ready for trial, and stated that a delay would entail further discoveries and a further independent medical examination so as to make available for trial evidence of the plaintiffs current situation.
- [3] In the alternative and in the event the trial was adjourned, the defendants sought terms of the adjournment including an order for further examinations for discovery, an order for a further independent medical examination, costs thrown away, and costs of the application.
- [4] The judge granted the adjournment and allowed for further examinations for discovery. He ordered costs of the application be in the cause and he declined to order costs thrown away in favour of the defendant as a term of the adjournment. In allowing an adjournment the judge said:
- [2] I have come to the conclusion that the actions of the plaintiff in discharging her former counsel, were neither objectively unreasonable nor done for any improper purpose such as delay. In my respectful view, the plaintiff acted reasonably promptly, when she became aware of certain circumstances impacting on a relationship with her then counsel, and acted reasonably promptly in discharging her counsel in the circumstances, and acted reasonably promptly in retaining new counsel.
- [3] I understand the extreme frustration on the part of the defendant. A lot of work has gone into this. They are ready to proceed and from the defendants' perspective, the plaintiff accomplished an adjournment by discharging her counsel.
- [4] If that were the case, I would be more favourably inclined to the defendants' position, but I am quite persuaded that the plaintiff acted entirely reasonably in the circumstances and I will grant the adjournment.
- [6] All right, costs of this application will be in the cause. I am not ordering costs be thrown away in any event of the cause, and I am not making an order with respect to possible future costs. That is something to be dealt with at trial.
- [5] This appeal is from the costs order. Leave to appeal was granted by a single justice of this court on May 2, 2017.
- [6] The appellants contend that the judge erred by:
1. refusing to permit counsel for the appellants to make meaningful submissions with respect to costs and the terms of the adjournment;
 2. failing to provide adequate reasons his costs order; and
 3. wrongly ordering costs of the application to be in the cause, and in failing to order both costs thrown away and costs of the application to the appellants.

- [7] Costs are a matter for the exercise of discretion by the judge at first instance. Accordingly our scope of interference with a costs order is limited. In *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 1999 BCCA 749, Madam Justice Newbury observed:
- [17] Obviously, the judge who heard the leave application is in the best position to assess those factors - a principle that is recognized in the broad discretion given by the Rules of Court to trial judges, and in the narrow scope for appellate interference. However, where the Chambers judge misstates the nature of the issues previously before him and their relationship to the issues to be tried, and where the result of his order is to skew substantially the balance that should be preserved between litigants until final judgment is rendered, appellate interference is required, at least in the unusual circumstances of this case. ...
- [8] The *Discovery Enterprises* approach and Madam Justice Newbury's comments presage statements from the Supreme Court of Canada in a series of cases in the years following. For example, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, Justice LeBel said at para. 43 concerning an interim costs award: 43] As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.
- [9] An error in process in the nature of failing to allow submissions from counsel and, in some cases, failing to give reasons for the exercise of discretion, may amount to an error of principle allowing appellate interference with a costs order.
- [10] In the first of these circumstances - a party wishing to make submissions who was denied the opportunity - it is open to this court to interfere with an order for costs if, in our view, the case is made for doing so. See, for example, *Price v. Zurich Insurance Co.*, 2003 BCCA 72; *Native Citizens Fisheries Ltd. v. Walkus*, 2001 BCCA 719.
- [11] In *Price*, Madam Justice Prowse said:
- [45] Having read the transcript of the proceedings relating to costs, I am satisfied that the chambers judge did not permit counsel for Zurich to make her submission with respect to costs, or to refer to relevant authorities. He invited counsel to take her concerns in that regard to the Court of Appeal. She has done so.
- [46] There are undoubtedly circumstances in which a chambers judge is entitled to advise counsel that he/she does not require submissions on a particular issue. The most obvious example is where the party bearing the burden of proof has not met that burden, such that it is unnecessary to call on the other side in response. In this case, however, the chambers

judge entertained full submissions by counsel for Mr. Price and was persuaded by those submissions that he should make the order sought by that counsel. Having come to that conclusion, he cut off counsel for Zurich without giving her any reasonable opportunity to reply. His statement that she had the right to take his decision to the Court of Appeal was gratuitous, at best.

- [47] In my view, the chambers judge's refusal to permit counsel for Zurich to address costs in any meaningful way amounted to an error in principle which entitles this Court to review his decision and, if appropriate, to interfere with it. [Emphasis added.]
- [12] In *Native Citizens Fisheries*, Madam Justice Prowse for the court observed:
- [70] ... It is an error in principle for a trial judge to refuse to permit counsel to address costs where counsel have not had the opportunity to do so and where they have requested that opportunity, as her. ...
- [71] It is not uncommon for trial judges to provide for costs in their reasons for judgment, subject to further submissions by counsel. In most cases, costs follow the event and further submissions are unnecessary. In this case, however, it is apparent that Walkus at all times wished to make submissions with respect to special and increased costs. The trial judge erred in failing to give them this opportunity.
- [13] As to the second mentioned circumstance - failing to give reasons - such conduct may open the possibility for us to amend the order. Where the appropriate order is so obvious, the identification of success is so plain, or the circumstances supporting a contrary order are so thin, and accordingly all participants should understand the basis for the costs award without more ado, failure to spell out the basis for the order will not be faulted. On the other hand, where the situation is not so clear, or counsel have vigorously contested the costs outcome, it is open to this court to say the judge should have explained the reasons for the order and the absence of reasons provides room for this court to make a contrary order. In *Crepnjak v. Crepnjak*, 2011 BCCA 177, Madam Justice Smith made these comments on a failure to provide reasons:
- [23] ...The reasons do not need to be extensive or detailed. They simply have to provide some indication of the basis upon which the orders granted were made. Absent such reasons, if the record is unable to demonstrate how the judge arrived at his or her determination, an appeal from the orders must be allowed and the legal issues revisited ...
- [14] In this case, both of the problems with process that I have just mentioned are apparent in the transcript of the proceedings in regard to the disposition of costs. The transcript reveals these exchanges: MR. JAKEL: Well I must admit, I'm not quite as prepared for this as I should have been. There is, you know, some case law. I've listed two of them, Gill and Zhang, and Grewal Berryfarm and Purewal at paragraph 40 of the - of the submissions of the respondent, and at paragraph 39 I've listed some of the terms that -- that I submit are appropriate: that the defendants be entitled to a further discovery of the plaintiff; that the

defendants be entitled to send to the plaintiff two updated IMEs; that costs be thrown away in any event of the cause; and that any future costs of the plaintiff associated with duplication of efforts, any updated expert reports that she's now going to be required to obtain should not be compensable; and then costs of this application to the defendant in any event of the cause. I'm prepared to go through - THE COURT: Let me get the response from your friend first. MR. JAKEL: Okay. Here followed submissions on matters other than costs, after which this exchange occurred: THE COURT: Costs with respect to this application, what do you say? MS. O'BRAY: I say that costs are inappropriate of this application, or costs thrown away, or anything of that nature, because this plaintiff, she wanted to proceed to trial - THE COURT: Yes. MS. O'BRAY: - on the scheduled trial date, so she hasn't engaged in any kind of delay here, and that's why costs of any nature against her would be inappropriate in my submission.

- [15] Following that, the judge gave the decision from which I have quoted earlier, including his para. 6 disposing of the costs issue. There then followed this further exchange: MR. JAKEL: My Lord, did you want me to go through the case law or -- I suppose not? THE COURT: No, I - I - that's not necessary. I've made my mind up. And, further, after the judge discussed again the defendants' request for a further independent medical examination come this: MR. JAKEL: I missed the order as to costs, My Lord. THE COURT: Costs are in the cause. MR. JAKEL: So she'll have the costs at the end of the day if -- if she's successful. THE COURT: Yes.
- [16] From this review of the proceedings I conclude that the judge, by canvassing the plaintiff's position before hearing Mr. Jakel out on the costs question, became sidetracked on the costs issue. This is demonstrated by the judge's failure to hear counsel for the defendants after it was clear the plaintiff did not agree with the defendants' position on the appropriate costs order. In becoming sidetracked, the judge foreclosed the defendants' submission referring to the jurisprudence first mentioned. Had Mr. Jakel had the opportunity to finish his submission before the judge diverted attention to the plaintiff, he would have been directed in the hearing to jurisprudence at odds with the order he made, for example, the decisions of Masters in *Gill v. Zhang*, 2016 BCSC 341; and *Grewal Berry Farm Inc. v. Purewal Blueberry Farms Ltd.*, 2006 BCSC 1602. In both cases of a late adjournment, the court ordered costs thrown away to the respondent.
- [17] In this case not only did the judge not hear out counsel for the defendants on the matter of costs, he then gave no reason for departing from the approach applied in those cases which I consider illustrate the approach usually brought to bear in such circumstances. While the judge had discretion to take a different path than is commonly taken, I consider that some explanation, however brief, then should have been given so as to allow this court to review the order.
- [18] Both of these circumstances, in my view, are a basis upon which to interfere with the order made. Should we do so?

- [19] In these circumstances, there is no apparent reason to depart from the usual approach to costs in circumstances of a late adjournment; in other words, there is no apparent reason not to relieve the defendants from the prejudice of the late adjournment by an award of costs thrown away. It is to be remembered that even though the judge did not attribute fault to the plaintiff in the adjournment application, in asking for an adjournment the plaintiff was asking for an indulgence from the court that had adverse consequences for the defendants. I would add to the order made for the adjournment a term that the defendants are entitled to their costs of trial preparation thrown away. I would not define the degree of such wasted costs in the circumstances of this case as was done, for example in *Dhillon v. Foster*, 2004 BCSC 1782, to which we have been referred, and I note further, that what fits within the waste captured by the term "costs thrown away" is properly a matter for the trial court's determination.
- [20] Last is the issue of costs of the application. I observe that the defendants were entitled to oppose the adjournment without attribution of fault to them. In my view, the appeal of the costs order of the application should be allowed. I would set aside paragraph 3 of the order appealed and substitute for it an order that the defendants are entitled to costs of the application in any event of the cause.
- [21] HARRIS J.A.: I agree.
- [22] FENLON J.A.: I agree.
- [23] SAUNDERS J.A.: The appeal is allowed to the extent that I have described. "The Honourable Madam Justice Saunders"

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