

CANADA / JUDGMENT

Cameron v. Cameron

2014 BCSC 142

COURT

Supreme Court of British Columbia

DECIDED

30 January 2014

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2014 BCSC 142 Cameron v. Cameron IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cameron v. Cameron, 2014 BCSC 142 Date: 20140130 Docket: E123621 Registry: Vancouver Between: Shannon Marie Cameron Claimant And Gary Craig Cameron Respondent Before: The Honourable Mr. Justice Sewell Reasons for Judgment on Costs Counsel for the Claimant: L. Spencer Counsel for the Respondent: P. Khaira Written Submissions of the Claimant received: September 30, 2013 October 4, 2013 Written Submissions of the Respondent received: September 30, 2013 Place and Date of Judgment: Vancouver, B.C. January 30, 2014 Table of Contents Background. 3 Issues. 3 Summary. 4 Discussion. 4 Legislation and case law. 4 The position of the claimant 6 The position of the respondent 6 Analysis. 7 Was the claimant's offer one that ought reasonably to have been accepted?. 7 Did the claimant meet or beat her offer?. 7 Are the financial circumstances of the parties relevant?. 9 Should any other factors influence costs following the offer to settle?. 9 The respondent's offer to settle. 9 Order 10

Background

- [1] The parties in this trial ended a ten-year relationship in July 2011. They resolved many divisive issues before and during the proceedings and came to court primarily to settle support issues.
- [2] After a five-day trial, the court granted a decree of divorce in favour of the respondent and ordered the respondent to pay: · Spousal support of \$1,359 / month, with a review in January 2015; · Retroactive spousal maintenance of \$10,231; · Child support arrears of \$850; · 73.2% of section 7 amounts; · Section 7 arrears of approximately \$4000; and, · The costs of the claimant for a matter of ordinary difficulty.
- [3] Under Rule 11-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009, the claimant now seeks double costs from July 2, 2013, the date she delivered to the respondent an offer to settle, until the end of the trial. She says the respondent ought to have accepted her offer right away. Instead, one month later, he made his own offer. The parties settled on some items in the offers but argued the remaining matters at trial.
- [4] The respondent submits the court should limit the claimant to one-half of her costs.

Issues

- [5] The parties' offers to settle and their submissions as to costs, the result at trial, and the law governing the exercise of discretion with respect to cost awards in the event that an offer to settle was made raise the following issues:
1. Should the respondent have accepted the claimant's offer; how do the terms of the judgment compare to the offer; and how should the Court exercise its discretion with respect to costs under Rule 11-1(5)?
 2. Alternatively, should the claimant have accepted the respondent's offer; and, if so, should the Court exercise its discretion to limit the claimant to one-half of her costs, under Rule 11-1(5)(a)? Summary
- [6] The offer was not one that the respondent ought reasonably to have accepted. There is no basis to deprive the claimant of her costs as ordered in the reasons for judgment. Discussion Legislation and case law
- [7] Under Rule 11-1(1) an offer to settle is made in writing, served on all the parties, and advises the recipient the party making the offer may bring it to the attention of the court for consideration in relation to costs.
- [8] Rule 11-1(4) permits but does not oblige the court "to consider an offer to settle when exercising the court's discretion in relation to costs."
- [9] Under Rule 11-1(5)(a) the court may: deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle; award double costs of all or some of the steps in the family law case after the date of delivery of service of the offer to settle.
- [10] In *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25, the court confirmed that costs rules encourage early settlement, and an award of double costs under Rule 11-1 "is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted."
- [11] As the claimant emphasizes, Warren J. in *Crick v. Crick*, 1997 CanLII 4395 (BCSC) at para 8, said in the context of a family law dispute: Where there has been an accurate and timely offer to settle such important and potentially destructive litigation, double costs ought to be the rule rather than the exception, subject always to the judicially exercised discretion of the Court.
- [12] The discretion of the court can be exercised to ensure, for example, that litigants are not "penalized for declining an offer that did not provide a genuine incentive to settle" (*Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282). This observation is an important counterpoint to the position in *Crick*.

- [13] Rule 11-1(6) guides the exercise of discretion by allowing but not requiring the court to consider the following factors when making an order under Rule 11-1(5):
- a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - b) the relationship between the terms of settlement offered and the final judgment of the court;
 - c) the relative financial circumstances of the parties;
 - d) any other factor the court considers appropriate.
- [14] The court in *Hartshorne* said at para. 27 the first factor, whether the recipient ought to have accepted an offer, is not to be determined by reference to the eventual judgment. Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided.
- [15] The second factor is a significant modification of the former Rule 37(26.1), which automatically awarded double costs if a party met or beat their offer in a subsequent judgment (*Graham v Graham*, 2005 BCCA 278). In that version of the Rule comparing an offer to the final award was a threshold question. In contrast the present wording allows but does not demand a comparison of the offer to the judgment.
- [16] The third factor is self-explanatory.
- [17] The fourth factor reconfirms the "unfettered" (*Bailey v Jang*, 2008 BCSC 1372) discretion of the court. It can be invoked to sanction blameworthy conduct such as bringing frivolous motions or otherwise prolonging a trial, or account for complexities in the nature of a proceeding or the content of an offer. The position of the claimant
- [18] At trial I found the claimant was substantially successful and awarded costs for a matter of ordinary difficulty. The claimant now seeks double costs on the strength of her July 2, 2013 offer to settle.
- [19] That offer addressed the division of proceeds from the sale of the matrimonial home, retroactive and ongoing spousal support, and child support and s. 7 expenses. The offer also explained the basis for the claimant's position. For example, the offer stated that uncertainty about the parties' circumstances in the next few years would lead a court to consider a lump sum award of spousal support unfair.
- [20] The claimant cites *Khunkhun v. Titus*, 2011 BCSC 1677 at para. 25 for the proposition that the respondent ought to have accepted because reasonable counsel aware of all the evidence when the offer was made would have encouraged acceptance. The claimant supports her argument on this point by comparing the terms of the offer to the result at trial. She

concedes on certain terms the court awarded her less than she would have received if the respondent had accepted her offer but maintains overall the judgment met or beat her offer. She says the respondent would have been better off had he accepted her offer and avoided litigation.

- [21] The claimant reinforces her position on double costs by alleging the respondent prolonged the trial unnecessarily by raising issues at the last minute and arguing points on which he was bound to fail. The position of the respondent
- [22] The respondent asks the court to reconsider its initial order and limit the claimant to one-half of her costs and disbursements. He refers to but does not rely on his offer. He says he did not contest entitlement to spousal support but sought a lump sum payment for finality. He also says s. 7 expenses could not be settled because the claimant did not provide relevant particulars. Further, he asks the court to acknowledge his difficult financial circumstances.

Analysis

- [23] Both the claimant's offer of July 2, 2013 and the respondent's offer of August 1, 2013 are offers to settle under Rule 11-1. The impact of these offers to settle on costs may be determined according to some or all the factors listed in Rule 11-1(6), cited above. I will address each of these factors, but find that in this case comparing the claimant's offer to what she received at trial is the most significant. Was the claimant's offer one that ought reasonably to have been accepted?
- [24] Counsel for the claimant served the initial offer to settle three days before the first examination for discovery and nearly two months before the trial. I do not think the respondent ought reasonably to have accepted the offer before discoveries began. He might reasonably have required more time, and the benefit of discoveries, to make an informed decision.
- [25] After examinations for discovery but before trial the parties settled some of their differences on terms slightly more favourable to the respondent than what was proposed in the original offer. This partial settlement suggests it was not unreasonable for the respondent to negotiate rather than simply accept the entire original offer.
- [26] The claimant submits that the respondent ought to have accepted her offer with respect to spousal maintenance and that a significant portion of the trial was taken up with the respondent's unsuccessful attempt to have maintenance awarded on a lump sum basis. Did the claimant meet or beat her offer?
- [27] The claimant says she met or beat her position on child support and s. 7 arrears, but her offer did not specify an amount for either of those items.

[28] The claimant's claim for an award of double costs thus rests on a determination of whether the respondent ought reasonably to have accepted her offer with respect to spousal maintenance.

[29] The relevant offer and judgment amounts on this issue are as follows: Item Offer

Judgment

Retroactive spousal support \$13,500 \$10,231 Ongoing spousal support \$1,218 / month \$1,359 / month Review of spousal support 24 months 15 months Future s. 7 expenses 75% respondent 25% claimant 73.2% respondent 26.8% claimant

[30] The only item for which it may be said the claimant met or beat her offer was ongoing spousal support. However, the bare figures in the table mask the claimant's request, in her offer to settle, for two years of medical and dental coverage in addition to the monthly amount.

[31] I am not satisfied that the respondent ought reasonably to have accepted the claimant's offer with respect to spousal maintenance. The claimant's position throughout the trial was that the respondent should maintain her as a beneficiary on his employee extended benefit plan or provide compensation to her for the loss of benefits under the plan. In addition the claimant sought spousal maintenance based on no income being imputed to her for 24 months.

[32] The claimant therefore did not meet her offer with respect to spousal maintenance.

[33] In addition, the claimant's offer was at or near the upper range of spousal maintenance and duration that could reasonably be ordered and I do not think the respondent acted unreasonably in not accepting it.

[34] In addition I think the court should be cautious in making an award for double costs based on an offer that was partially accepted. On its face, the offer did not contemplate a partial acceptance. I am satisfied that the respondent made a genuine effort to settle the issues between the parties. I do not think the respondent should be sanctioned by an award of double costs because the issue of spousal maintenance had to be resolved at trial. Are the financial circumstances of the parties relevant?

[35] Both parties face financial challenges, however the respondent is currently bearing the brunt of meeting the family's financial needs. A substantial portion of his net income is going to child and spousal support and to pay significant part 7 expenses. I am of the view that an award of double costs, which is punitive in nature, would be unduly burdensome to him and his present circumstances. Should any other factors influence costs following the offer to settle?

- [36] Although the conduct of the respondent in this proceeding was perhaps less than exemplary I do not think it or any additional factors are significant to exercising the discretion to order double costs under Rule 11-1(5)(b). The respondent's offer to settle
- [37] I infer from the respondent's written submissions as to costs that he is asking the court to exercise its discretion under Rule 11-1(5)(a). Although the respondent referred to his own offer to settle, the thrust of his submission was to refute the claimant's request for double costs. In these circumstances I think an abbreviated analysis of the factors under Rule 11-1(6) is appropriate.
- [38] In short, I do not think the respondent's offer to settle should cause the court to change its original order of costs to the claimant on scale B. He did not meet his offer and it was not unreasonable for the claimant to proceed to trial in light of the respondent's insistence on a lump sum payment and his failure to provide a compelling rationale for his position. Order
- [39] The order for costs set out in the reasons for judgment shall therefore remain in place. The parties will bear their own costs of the applications dealt with in these reasons. "The Honourable Mr. Justice Sewell"

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