

CANADA / JUDGMENT

Chand v. Sran

2003 BCSC 578

COURT

Supreme Court of British Columbia

DECIDED

15 April 2003

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2003BCSC0578

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chand et al. v. Sran,

2003 BCSC 578

Date: 20030415

Docket: S016269

Registry: Vancouver

Between:

Sanjeev Chand, Hari Chand and Bimla Chand

Plaintiffs

And

Sukpal S. Sran

Defendant

Before: The Honourable Mr. Justice Edwards

Reasons for Judgment

Counsel for the Plaintiffs

K. E. Ducey

Counsel for the Defendant

R. Doran

Date and Place of Trial/Hearing:

April 3, 2003

Victoria, B.C.

- [1] Judgment was rendered in this case at 2002 BCSC 1802. Counsel were invited to make submissions on costs. They appeared by telephone to make submissions on costs and on two further issues, clarification of the judgment and release of funds held in trust.

Clarification of Judgment

- [2] The title page to 2002 BCSC 1802 wrongly indicates that the case was heard December 2-6, 12 & 13, 2002. It was in fact heard December 4-6, 12 & 13, 2002.
- [3] There is an apparent contradiction in paragraphs 31 and 34 of the judgment. Paragraph 31 says that items 2 and 42 refer to items in the further agreement. On review of the further agreement that needs to be clarified. There are references in the further agreement to "rug" (item 30) and "rugs"(basement item 20). Neither refers to the complete replacement of carpetting. The only reference in the further agreement to "driveway" is item 46, "second driveway to be made" which is scratched out. No reference is made to carpetting or the driveway in the definition of "work" in the Statement of Claim.
- [4] I ruled only items defined as "work" in the Statement of Claim could be the subject of an assessment of damages under the pleadings before the court.
- [5] Paragraph 34 says items 2 and 42 were excluded from the assessment. That is correct, since neither is mentioned in the "work" as particularized in the Statement of Claim.
- [6] Paragraph 32 says that item 22 in the further agreement was not included in the schedule. That is incorrect. It was included as item 5. It is also included as item 9(j) in the Statement of Claim. I confirm it was included in the assessment of damages.

Costs

- [7] The defendant made an offer to settle on November 27, 2002, a week before the trial, of \$40,000 "with costs to be assessed". Defendant's counsel advised that it was in the "usual form", which I take to mean in conformity with Rule 37.
- [8] The plaintiffs' counsel argued the offer had no effect because they had already obtained default judgment so pursuant to Rule 37(5), Rule 37(24)(a) did not apply. No authority was cited for that proposition.
- [9] Surely Rule 37(5) is intended to prevent a plaintiff from making an offer and then taking out default judgment for a liquidated sum in a higher amount, thereby obtaining double costs by default, or similar mischief.

- [10] In my view it would be wrong to interpret Rule 37(5) to preclude a defendant or plaintiff from making an offer to settle in advance of a trial to assess damages after default judgment has been obtained. Neither Rule 37(23) nor Rule 37(24) can apply until the amount of a monetary judgment is determined after a trial.
- [11] I can see no reason why the fact that the trial was preceded by a default judgment for damages to be assessed should preclude the application of either Rule 37(23) or 37(24). I daresay that had the plaintiffs made an offer to settle lower than the award, they would now be seeking to rely on Rule 37(23).
- [12] Plaintiffs' counsel argued that accepting the offer would have precluded them from pursuing a claim for damages not covered by the default judgment.
- [13] I have not seen the terms of the offer. The plaintiffs had a week before trial to consider the offer and to counter offer or clarify any ambiguity in the scope of the offer. Normally a formal offer extends only to settlement of the claim pleaded. In the absence of any evidence to the contrary, I assume that was the case here.
- [14] I find that Rule 37(24) applies.
- [15] Alternatively the defendant says, relying on Rule 57, the plaintiffs should receive no more than 31% of their costs in proportion to the damages awarded of those claimed. In any event, the defendant seeks the costs of the issue of whether the concrete slab under the house had to be replaced, on which he succeeded.
- [16] Because I ruled that damages could be assessed only with respect to items for which default judgment had been entered, the plaintiffs have started a second action for damages for the remaining items. The defendant will argue it is barred by the Limitation Act, R.S.B.C. 1996, c.266.
- [17] If the plaintiffs were awarded the full costs they claim in this action, where they failed in their claim for items not pleaded and therefore not included in the default judgment, and if they were later to succeed in their second action to obtain judgment and costs for those items, the plaintiffs would effectively recover costs twice for litigating the same claim. That cannot be a just result.
- [18] On the other hand, if the plaintiffs' second action is barred by the Limitation Act then their only opportunity to recover costs will be in this action, where they claim full costs even though they received only \$38,000 of the \$140,000 claimed, about 31%.
- [19] At the outset of the trial, I reserved on the issue of whether the plaintiffs could recover damages beyond those pleaded, because it was unclear precisely what items were covered by the pleadings. The plaintiffs proceeded to call evidence on issues, including the slab, clearly not included in either the further agreement or the definition of "work" in the Statement of Claim. They cannot be faulted for this in light of the fact I reserved on the issue of the scope of the assessment.

- [20] On the other hand, the defendant succeeded on these issues and should not have to bear the costs associated with the extension of the hearing or the experts called on the slab issue, particularly when the same cost may have to be incurred at a second trial.
- [21] This long after the trial I have no way of determining how much trial time was devoted to issues on which the plaintiffs did not succeed. Some, if not most of them may be relitigated if the defendant's limitation defence fails.
- [22] If I am wrong that Rule 37(24) applies, I would award the plaintiffs the costs of the trial less two hearing days and the plaintiffs' disbursements on the slab issue and order the plaintiffs to pay the defendant's disbursements on the slab issue.

Release of Money held in trust by the Plaintiffs' Counsel

- [23] The plaintiffs registered their default judgment against properties owned by the defendant. In order to remove the judgment and sell the properties, the defendant agreed to pay money into trust to the credit of this action. Plaintiffs' counsel has \$150,000 in trust.
- [24] The defendant applies for immediate payment to him of up to \$80,000 of this amount on the basis the remainder will be sufficient to cover the plaintiffs' \$38,000 judgment and costs.
- [25] Plaintiffs' counsel acknowledges that the mere commencement of the second action does not permit the plaintiffs to hold the money in trust pending the outcome of that second action. It was not obtained to satisfy any judgment in that action. The plaintiffs are not seeking to enforce the terms of an agreement under which the money was paid into trust.
- [26] Rather, the plaintiffs seek in effect a Mareva type injunction to restrain the defendant taking this money from British Columbia, based on their assertion that the defendant told them in 2000 "he sends most of his money to India and keeps only a small amount in British Columbia in order to avoid paying taxes". The defendant denies any such conversation.
- [27] Even if true, the plaintiffs' evidence falls far short of that necessary to support a Mareva injunction. The fact the defendant may have no other assets in British Columbia does not alter that conclusion.
- [28] In effect, the plaintiffs have obtained garnishment before judgment in their second action against a resident of British Columbia in circumstances where such a garnishment would be unobtainable through normal procedures.
- [29] There is no basis in law or equity on which the plaintiffs can be permitted to hold the money in trust to secure any judgment they may obtain in their second action.
- [30] I direct that plaintiffs' counsel pay \$80,000 to the defendant forthwith and the balance of the money held in trust thereafter, less the amount necessary to satisfy the judgment and costs awarded in this action, as soon as that amount is agreed by the parties or certified by the registrar.

[31] The defendant is entitled to the costs of the three applications dealt with in these Reasons, which I assess at \$750 to avoid further submissions and expense to the parties.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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Prepared on 26 October 2026 · Esheria