
CANADA / JUDGMENT

Connor Estate

2017 BCSC 1341

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1341 Connor Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Connor Estate,

2017 BCSC 1341

Date: 20170801

Docket: P12638, P128 and P129

Registry: Chilliwack

In the Matter of the Estate of Patricia Colleen

Connor, Deceased

Before: The Honourable Mr. Justice Kent

Reasons for Judgment (Costs)

Counsel for Joseph Chambers:

Gerald J. Lecovin, Q.C.

Mark J. Lecovin

Counsel for Sabrina Bidal and the other respondents:

Ian D. MacKinnon

Jessie C. Legaree

Place and Dates of Hearing:

Vancouver, B.C.

May 23 and June 6, 2017

Written Submissions of the Applicant Chambers:

July 7, 2017

Written Submissions of the Respondents:

July 25, 2017

Place and Date of Judgment:

Chilliwack, B.C.

August 1, 2017

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Introduction

- [1] Mr. Joseph Chambers applied for a declaration that he was the "spouse" of the deceased, Ms. Patricia Connor, within the meaning of s. 2 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA"). Judgment was issued in his favour on June 13, 2017. The reasons are indexed at 2017 BCSC 978.
- [2] At the time of her death Ms. Connor was not legally married, nor did she have any children. She had been predeceased by both her parents and her only full sibling. She did, however, have five half-siblings who were her father's children by a subsequent marriage. These half-siblings were unknown to Ms. Connor.
- [3] As they were entitled to do, the five half-siblings opposed the application by Mr. Chambers. They did so for a sensible reason; if Mr. Chambers did not qualify as a "spouse" under WESA, then Ms. Connor's estate would be distributed to the half-siblings pursuant to WESA.
- [4] The June 13, 2017 judgment made no ruling respecting the costs of Mr. Chambers' application. Rather, if the parties were unable to agree on that issue, they were granted liberty to make further submissions to the Court. The submissions have been received and reviewed and this is the Court's decision on costs.

Mr. Chambers' Offer to Settle

- [5] On April 12, 2016 Mr. Chambers delivered to the respondents a written offer to settle. The correspondence provided a brief explanation of the background, emphasizing the nature of the relationship between Mr. Chambers and Ms. Connor and the absence of any meaningful relationship between Ms. Connor and both her father and her half-siblings. Mr. Chambers offered to settle the dispute between the parties on the following terms:
1. the respondents would each execute a release of any interest in the estate of Ms. Connor;
 2. one of the respondents, Ms. Bidal, would withdraw the Notice of Dispute filed in the probate proceeding;
 3. the respondents would consent to an order declaring Mr. Chambers to be the "spouse" of the deceased at the time of her death;
 4. upon receipt of the releases and entry of the consent order, Mr. Chambers would pay the sum of \$10,000 to each respondent, i.e., the aggregate sum of \$50,000; and
 5. both the applicant and the respondents would bear their own costs.
- [6] The offer contained the language mandated by subrule 9-1(1)(c)(iii), i.e., that Mr. Chambers was "reserv[ing] the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding".

Positions of the Parties

- [7] Mr. Chambers submits that he is entitled to an award of costs against the respondents. In view of the formal offer to settle, he asks that double costs be awarded in respect of all steps taken in the proceeding following the date of delivery of the offer to the respondents, i.e., April 12, 2016.
- [8] The respondents concede that Mr. Chambers is entitled to costs. However they submit there should be no award of double costs given the "relative financial circumstances of the parties".
- [9] The respondents submit in the alternative that if double costs are to be awarded, such award should be limited to steps taken subsequent to March 1, 2017 "because the respondents needed some time after the applicant's January 2017 examination for discovery to properly consider the offer".

Law re Costs

- [10] Rule 14-1 addresses costs. Subrule 14-1(1)(9) provides that, generally speaking, "costs of a proceeding must be awarded to the successful party unless the court otherwise orders".

- [11] Success has been equated to "substantial success". In *Fotheringham v. Fotheringham*, 2001 BCSC 1321, the court held that, as a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute, considered globally.
- [12] Offers to settle are not considered in determining substantial success. That is because substantial success is determined by comparing the positions taken by the parties at the trial or the hearing against the end result. The position taken by a party at this later date may be substantially different than that set out in any earlier offer to settle.
- [13] Another reason why the court initially considers costs without reference to an offer to settle is that implementation of the costs options found in the offer to settle rules depend upon the initial cost order. Rule 9-1 governs offers to settle. Subrules 9-1(5) and (6) provide:

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (a) 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 proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
- (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] In the often cited case of *Hartshorne v. Hartshorne*, 2011 BCCA 29, the Court of Appeal provided some guidance concerning the cost consequences of offers to settle. At para. 25 the court stated:

An award of double costs 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. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[15] The first factor to be considered respecting any double costs application is whether the offer to settle ought reasonably to have been accepted. Here, two philosophically divergent views emerge. One school of thought is that a party should not be penalized for declining an offer that did not provide a genuine incentive to settle. The other is that an offering party should not be required to compromise beyond its own objective assessment of the case in order to obtain the benefit of an offer to settle.

[16] From an objective perspective both viewpoints have much to recommend. Why should a party be penalized for not accepting an offer which does not provide an incentive to settle? On the other hand, why should a party be forced to pay more or accept less than a claim is actually worth? How this conflict plays out can sometimes depend on the nature of the claims and dispute.

Analysis and Application

- [17] In the present case there is no doubt that Mr. Chambers enjoyed substantial success in the outcome. He is therefore entitled to an award of costs against the respondents. Indeed, the respondents concede as much.
- [18] The more contentious question is whether Mr. Chambers should be awarded double costs either from the date the offer to settle was delivered or on any later date.
- [19] The respondents seem to rely only upon the relative financial circumstances of the parties as a basis for resisting any award of double costs. But they have provided no evidence respecting their financial circumstances. They merely point out that the judgment rendered in Mr. Chambers favour "will [see him] inherit an estate worth well in excess of \$2 million". The submission wrongly seems to treat Mr. Chambers' success as some sort of windfall. The simple fact of the matter, however, is that the Court's declaration is effectively an affirmation that Mr. Chambers has a perfectly legal entitlement to that estate.
- [20] There is, however, more to be said in favour of refusing double costs.
- [21] First one must bear in mind that the reasonableness of any acceptance or rejection of a settlement offer is not to be assessed in light of the actual outcome. Rather, it is to be assessed in light of the circumstances existing between the date of the offer and the ultimate trial or hearing. As stated by the Court of Appeal in *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105 at para. 112:
- The reasonableness of the offer must be assessed at the time the offer was made and thereafter. The court should look at the circumstances as they stood at the time the offer was made, and since, and should bear in mind information in the hands of the parties at the relevant times. The reasonableness of the acceptance or rejection of the settlement offer is not to be judged in retrospect, in light of the judgment at trial.
- [22] Second, while consideration of the final outcome is not permitted, the nature of the dispute is nonetheless a factor in assessing the reasonableness of any offer to settle and response to same. Here, the amount of money at stake is a valid consideration; the estate is worth in excess of \$2 million and the offer of settlement represented a little more than 2% of that value.
- [23] I belong to the school of thought which holds that an offer to settle which does not reflect a significantly compromised outcome should generally not lead to double costs. A without-costs offer of \$10,000 per respondent did not constitute a meaningful compromise of the dispute between the parties. Rather, it was a relatively nominal offer and one clearly designed only to obtain the benefit of the rule, should Mr. Chambers be successful at the end of the day.

- [24] This view is reinforced by the fact that the outcome in this case was by no means assured. Unusual circumstances were at play; Mr. Chambers was legally married to another woman throughout the entirety of his relationship with the deceased. He and the deceased did not reside together, except on a temporary basis when the two of them were on vacation. The relationship became more distant from a geographical perspective in the later years. These factors, and others, arguably support the position taken by the respondents at the hearing, i.e., that this was actually a long-term "affair" rather than a marriage-like relationship.
- [25] The point is that this was not a case which the respondents had no hope of winning. It was certainly not frivolous and nor, in my opinion, was it sufficiently doubtful that its continuance by the respondents should have been discouraged.
- [26] In the result, I award Mr. Chambers the costs of the proceedings against the respondents, however I exercise my discretion to decline any order for double costs whether from the date of delivery of the offer to settle or at any later date.
- [27] The parties made no submissions respecting the scale of costs. That question is governed by Appendix B to the B.C. Supreme Court Civil Rules which provides that costs can be fixed on one of three different scales depending on the difficulty of the matter before the court.
- [28] Scale A applies to matters of "little or less than ordinary difficulty". Scale B applies to matters of "ordinary difficulty". Scale C applies to matters of "more than ordinary difficulty". And in fixing the appropriate scale, the court may take into account the following:
- (a) whether a difficult issue of law, fact or construction is involved;
 - (b) whether an issue is of importance to a classical body of persons, or is of general interest; and
 - (c) whether the result is proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- [29] While there was an interesting issue of law involved in this case, it was resolved by application of first principles applied to an unusual fact situation. Counsel is to be commended for marshaling considerable evidence from diverse sources sufficient to win the day, but such diligence does not make the matter one of "more than ordinary difficulty". In my view, Scale B is the norm to be applied in most

cases, including the one at hand, and I therefore fix the scale under which Mr. Chambers' costs will be assessed at Scale B.

"KENT J."

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