

CANADA / JUDGMENT

Crookall v. Higby

2018 BCSC 1544

COURT

Supreme Court of British Columbia

DECIDED

7 September 2018

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2018 BCSC 1544 Crookall v. Higby IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Crookall v. Higby, 2018 BCSC 1544 Date: 20180907 Docket: M75035 Registry: Nanaimo Between: Amy Crookall Plaintiff And William Higby Patricia Higby Defendants

- and - Docket: M73584 Registry: Nanaimo Between: Amy Crookall Plaintiff And Matthew O'Hagan Defendant Before: The Honourable Mr. Justice Basran Reasons for Judgment Re Costs Counsel for the Plaintiff in Both Actions: B. Falkenberg H. White Counsel for the Defendants in Both Actions R. Hornquist Date Written Submissions Received: Nanaimo, B.C. August 14, 2018 Place and Date of Judgment: Nanaimo, B.C. September 7, 2018

BACKGROUND

- [1] My reasons for judgment in this case were issued on July 17, 2018 and are indexed as 2018 BCSC 1200. The plaintiff received judgment in the amount of \$721,053.63. In that decision, I ordered that if the parties wished to make submissions on costs, they were to do so within 30 days of the judgment date with reply submission due 15 days thereafter.
- [2] The plaintiff is seeking costs payable by the defendants until the date of their offer and double costs thereafter pursuant to R. 14-1 and R. 9-1 of the Supreme Court Civil Rules.
- [3] Counsel for the plaintiff delivered a formal offer to settle to the defendants, in the form mandated by R. 9-1, for \$398,000 less what had already been paid by the Insurance Corporation of British Columbia on April 17, 2018. This was almost two weeks before the start of the trial. This offer remained open until April 27, 2018 which was the last business day before the trial.
- [4] The defendants countered on April 17, 2018 with a formal offer of \$238,000 less what had already been paid to ICBC plus costs and disbursements.

LEGAL FRAMEWORK

- [5] Rule 14-1(9) of the Rules, provides:

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- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [6] Rule 9-1 of the Rules governs the relationship between costs and formal offers to settle. This rule grants the Court broad discretion in the determination of cost consequences, including whether such consequences ought to follow where an offer to settle was made: *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1842, at para. 31.
- [7] The guiding principle of R. 9-1 is to encourage the early settlement of disputes by rewarding the party that makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25, while bearing in mind whether acceptance of a given offer would have resulted in any significant savings for either party or the Court: *LeFler v. Anderson*, 2008 BCSC 1563 at para. 18.
- [8] The relevant portions of Rule 9-1 are as follows:
- (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.
- (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.
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- [9] In the context of an order sought for double costs under R. 9-1(5), the British Columbia Court of Appeal in *Hartshorne* outlines some guiding principles with respect to determination of whether such an award should be granted. The Court states at para. 25:
- [25] 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), [1995 CanLII 1537 (BC CA)], 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), [1988 CanLII 186 (BCCA)], 37 B.C.L.R. (2d) 2 at 25, leave refd., [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), 1995 CanLII 1537 (BCCA), 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 (CanLII), 86 B.C.L.R. (4th) 343 at para. 33; • "[T]o have a winnowing function in the litigation process" by "requiring] 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 "discouraging] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegacao Norsul*, 2009 BCCA 16 (CanLII), 88 B.C.L.R. (4th) 17 at para. 16.
- [10] Similarly authoritative are the findings of that same Court; in *Evans v. Jensen*, 2011 BCCA 279, in the context of an analysis of former R. 37B (now R. 9-1), the Court writes:
- [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

- [42] This certainty in terms of the result of making, accepting, or refusing to accept an offer is also more conducive to the overall object of the Rules, which is "to secure the just, speedy and inexpensive determination of every proceeding on its merits". Settlements made to avoid the cost and delay associated with protracted litigation are an essential part of a healthy system for the resolution of disputes.
- [11] The notion of reasonableness, as it applies in R. 9-1(6)(a), must be considered with reference to the recipient's knowledge of the circumstances as they existed at the time the offer was made: *Martin v. Lavigne and Neufeld (Costs)*, 2010 BCSC 1610 at para. 10, and not with the benefit of hindsight or with reference to the ultimate outcome: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24, *Hartshorne* at para. 27.
- [12] In evaluating the question of reasonableness in this context, *Hartshorne* at para 27, sets out a non-exhaustive list of some factors for consideration, including:
- (a) the timing of the offer;
 - (b) whether the offer is related to the claim;
 - (c) whether the offer could be easily evaluated; and
 - (d) whether some rationale was provided for the offer. DISCUSSION
- [13] Having considered the plaintiff's submissions for an award of double costs, including the application of the factors set out in R. 9-1(6) and in *Hartshorne*, and given that counsel for the defendant has advised the Court that he consents to these costs being granted, I hereby award costs to the plaintiff in this matter at Scale B up to April 17, 2018 and double costs thereafter. "Basran J."

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