

CANADA / JUDGMENT

Gandham v. Dhillon

2001 BCSC 1456

COURT

Supreme Court of British Columbia

DECIDED

31 October 2001

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Citation: Gandham v. Dhillon (Costs) Date:

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2001 BCSC 1456 Docket:

B974367

Registry: VANCOUVER

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MANJIT SINGH GANDHAM
PLAINTIFF

AND:

CHHINDA DHILLON AND MANMINDER DHILLON
DEFENDANTS
AND
Docket: S049429
Registry: NEW WESTMINSTER

BETWEEN:

MANJIT SINGH GANDHAM
PLAINTIFF

AND:

GEORGETTE FERGUSON
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE EDWARDS

Counsel for the Plaintiff: Mark C. Baron

Counsel for the Defendants: Andre duPlessis

Written submissions: October 5, 2001

Vancouver, BC

- [1] The issue for determination is entitlement to costs.
- [2] On May 6, 1999, these two actions were ordered heard together on the same day, by consent.
- [3] On August 2, 2000, the defendants served a formal offer to settle "these proceedings", specifically referring to both actions, for \$50,000 (less advances and benefits paid or payable under the Insurance (Motor Vehicle) Act) plus costs.
- [4] At a trial held September 17-21, 2001, a jury awarded damages totalling \$16,200, after being asked, as the parties agreed, to award damages for both actions without attributing a portion of the damages to each.
- [5] The defendants seek costs from August 2, 2000, pursuant to Rule 37(24)(a). The plaintiff's position is that the formal offer is "a nullity" and therefore the plaintiff is entitled to costs following the event.
- [6] The defendants rely on *Starling v. Martin* [1996] B.C.J. No 2486. In that case the plaintiff claimed double costs pursuant to Rule 37(23) from the date of an offer to settle two actions, referred to in the offer as "these proceedings", for \$28,500 plus costs. The two actions had been earlier ordered tried together. The trial commenced eight days after the offer. The award was \$32,988.92 for the two actions.
- [7] Dillon, J. stated at paragraph 7:
- [7] Here the actions were ordered to be tried together and, in that sense, became a single proceeding. Any ambiguity in the terms of the offer related only to the differentiation of amounts in the two actions. The rule should not be interpreted so strictly as to require two offers to settle to be made when actions are to be tried together and the damages are so intertwined that a single settlement offer is appropriate. If the receiver of the offer required differentiation of settlement amounts in the two actions, it should have requested clarification of the settlement in that regard.

and awarded the plaintiff double costs from the date of the offer.

- [8] In a thorough written submission, plaintiff's counsel did not attempt to distinguish *Starling*. He argued it was wrongly decided and that a global offer to settle multiple actions must be tendered by way of "Calderbank letter".
- [9] Plaintiff's counsel supported the latter proposition by reference to two Court of Appeal decisions, *Sandegren v. Hardy* (1999) 67 B.C.L.R. (3d) 123 and *White v. Nuraney* 2000 BCCA 675. Neither case is direct authority for the proposition asserted.

- [10] In Sandegren, there was a Calderbank letter and as noted at paragraph 44 "it was common ground that since there were separate actions, an offer under Rule 37 would not have been feasible and that the Calderbank procedure was appropriate". Since no party was relying on a Rule 37 offer the Court of Appeal did not deal with the point decided in Starling.
- [11] In White, there was a joint offer to settle by the defendants in two actions. The cases were heard together by a jury and the action against one defendant was dismissed. The jury award against the other defendant was less than the offer. The trial judge, apparently treating the offer to settle as a valid one under Rule 37, awarded the plaintiff her costs against both defendants to the date of the offer, notwithstanding the dismissal against one defendant, and awarded both defendants their costs against the plaintiff thereafter. On appeal the award was increased to exceed the offer. The dismissal was undisturbed. The costs issue before the Court of Appeal was whether the defendant who won the dismissal should pay the plaintiff's costs to the date of the offer. The Court of Appeal found the trial judge erred in awarding costs against the successful defendant and awarded him his costs throughout, despite the offer.
- [12] Again, the Court of Appeal did not deal directly with the point decided in Starling. However, Rowles, JA. observed "Whether the joint Offer to Settle was ineffective did not become an issue but, in my view, such a practice in a case such as this does not accord with the Rules of Court." That observation is clearly expressed as obiter dicta and since the considerations which led to the observation are not discussed in the judgment, it is of little assistance in deciding the issue. White does not expressly disapprove Starling, which was not referred to in the judgment in White.
- [13] Plaintiff's counsel also referred to several decisions of this court. The latest is Vescovi v. Haines 2001 BCSC 773. In that case there was no joint offer made by the defendants pursuant to Rule 37. The issue was not the validity of such a joint offer but whether a series of letters could be treated as having the same effect as a Calderbank letter. The point decided in Starling did not arise.
- [14] In Klonarakis v. Gregg October 8, 1999, Van. Reg. No.B965374, Macaulay, J. expressed the view that Rule 37 provides no mechanism for offering to settle multiple proceedings, referring to Martel v. Peetom (1996), 27 B.C.L.R. (3d) 175, and went on to consider the effect of a Calderbank letter. It had been forwarded less than seven days before trial, together with a joint Rule 37 offer to settle by two defendants. Macaulay, J who was apparently not referred to Starling, gave some effect to the Calderbank letter. He deprived the plaintiff of costs from the commencement of the trial which began five days after the offer was made but did not order the plaintiff to pay the defendants' trial costs.
- [15] The head note in Martel v. Peetoom, supra, states "The plaintiff could not have advanced an offer to settle both actions under R. 37". A case decides no more than what is embraced by the facts of that case. In Martel, Fraser, J. held that the plaintiff could not offer to settle, pursuant to Rule 37, both a tort action scheduled for trial and a dormant "Part 7 benefits"

action against ICBC arising from the same accident because both actions were not before the trial judge, that is, both were not to be decided simultaneously. Martel is not authority for the proposition that Rule 37 cannot be used by two defendants to make a joint offer of settlement embracing two actions which are set to be tried together where the parties agree, as they did here, there is no need to attribute any damage award between the defendants. Martel is not inconsistent with Starling.

- [16] In *McCallum v. Hough* (2001) 88 B.C.L.R. (3d) 175, Martinson, J. held an offer under Rule 37(31) made by eight defendants in a single action was invalid because the defendants were not jointly liable. Martinson, J. distinguished and therefore did not apply Starling on the basis that in *McCallum* the defendants insisted that the jury had to assess damages separately for each of eight accidents while in *Starling* the court found there was no need for such differentiation, an issue the parties agreed on in the case at bar. *McCallum* is not therefore inconsistent with *Starling*.
- [17] I find the assertion that *Starling* is wrongly decided is not supported by any of the authorities cited by plaintiff's counsel.
- [18] In *Scott v. Friedrich* (1992), 70 B.C.C.L.R. (2d) 890, two defendants in separate actions with the same plaintiff were awarded costs pursuant to Rule 37 from seven days after joint payment into court of a sum which exceeded the damages awarded against both defendants at a trial of the two actions at the same time, notwithstanding technical defects in the documentation relating to the payment into court. The facts and reasoning in that case parallel those in *Starling*.
- [19] Unless the present case can be distinguished from *Starling*, I am bound to follow *Starling*. The only factual basis for distinguishing this case is that *Starling* involved an offer by one plaintiff to two defendants who were not jointly and severally liable. This case is the converse, two defendants in separate actions, not jointly and severally liable, made a joint offer to the same plaintiff.
- [20] The reason the joint offers were made in each case, I think it is safe to say, is that the two defendants in each case had an insurer, ICBC, in common. In effect, costs awarded or saved as a result of the offer in each case would be paid by or benefit that common insurer.
- [21] The Rules are blind to the existence of insurers. The fact the defendants in this case and the defendants in *Starling* had an insurer in common does not put them in a special position under the Rules to make or have made to them a joint offer in separate proceedings. In this case and *Starling*, the separate actions are related only because they have the same plaintiff and same insurer for the defendants.
- [22] There is no difference in the total costs payable under a successful joint offer in two actions rather than two separate simultaneous offers by or to the two defendants in each separate action. In other words, there is no financial benefit to either a plaintiff or two defendants from one successful joint offer rather than two successful offers. There may be a practical

benefit from linking settlement of the two actions in a joint offer, in that the simultaneous settlement of two actions may be more attractive to the plaintiff or defendants (or defendants' insurer) receiving the offer, thus giving the party or parties making the offer a bargaining advantage. Since Starling involved a plaintiff's offer and this case a defendants' offer, it seems any such advantage may benefit either "side" depending on circumstances.

[23] The point of Rule 37 is to encourage the acceptance of reasonable offers. The discrepancy in the plaintiff's favour between the joint offer and the jury award in this case indicates the offer was more than reasonable. It was generous. The case rested largely on the plaintiff's credibility as to the extent of his injuries, which was undermined dramatically by surveillance video he saw before the trial. There was nothing ambiguous about the defendants' offer. It was open for over a year. There was no reason for the plaintiff not to consider the offer a serious one.

[24] I find this case is indistinguishable from Starling.

[25] I find the defendants are entitled to their cost from the date of the offer, August 2, 2000, pursuant to Rule 37(24)(a).

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

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

January 4, 2002 -- Corrigendum to the Reasons for Judgment issued by Mr. Justice E.R.A. Edwards advising that there is a typographical error in the first line of paragraph 18 on page 8 which should, in fact, read as follows:

"[18] In Scott v. Friedrich (1992), 70 B.C.L.R. (2d) 890, ..."

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