

CANADA / JUDGMENT

Hellberg v. Netherclift

2019 BCCA 24

COURT

British Columbia Court of Appeal

DECIDED

22 January 2019

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2019 BCCA 24 Hellberg v. Netherclift COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Hellberg v. Netherclift, 2019 BCCA 24 Date: 20190122 Docket: CA45208 Between: Lucy Hellberg Respondent (Claimant) And Simon Netherclift Appellant (Respondent) Before: The Honourable Mr. Justice Frankel The Honourable Mr. Justice Tysoe The Honourable Madam Justice Griffin Supplementary Reasons to: Hellberg v. Netherclift, 2018 BCCA 404. Counsel for the Appellant: S.G.L. Label Counsel for the Respondent: A.S. Perello Place and Date of Hearing: Vancouver, British Columbia September 24, 2018 Place and Date of Judgment: Vancouver, British Columbia October 31, 2018 Written Submissions Received: November 15, 21 and 23, 2018 January 15, 2019 Date of Supplementary Judgment January 22, 2019 Supplementary Reasons of the Court Summary: After the appellant's appeal was dismissed, the respondent seeks special costs of the appeal proceedings and trial below. Held: Application for special costs dismissed. The central issue on appeal was whether the parties' child would primarily live with the respondent in the UK or with the appellant in Canada. The respondent did not cross appeal the ordinary costs order at the appeal, therefore, this Court will not interfere with that order. Further, the respondent has not established that the appellant misconducted himself in the conduct of this appeal. The respondent made a settlement offer but it was not unreasonable for the appellant to not accept it given the importance of the child's primary residence to the parties. The respondent is entitled to her costs of the appeal on a party and party basis. The appellant is entitled to costs of the application for special costs. Supplementary Reasons for Judgment of the Court:

- [1] These supplemental reasons concern whether this Court should award special costs in this Court and in the court below against the appellant, Mr. Netherclift, in favour of the successful respondent, Ms. Hellberg.
- [2] In our reasons for judgment in this appeal, indexed as 2018 BCCA 404, this Court dismissed Mr. Netherclift's appeal from the order of the trial judge, which: (1) granted Ms. Hellberg sole custody of the parties' child and permitted her to relocate permanently to the United Kingdom with the child; and (2) provided Mr. Netherclift joint guardianship and access to the child.

- [3] Ms. Hellberg now applies for a variety of costs orders, including orders that Mr. Netherclift pay special costs in relation to certain proceedings in this Court and the court below. She argues that special costs are justified because Mr. Netherclift misled this Court, in an earlier appeal, as to facts that went to the inquiry into the best interests of the child.
- [4] The trial judge below, in reasons indexed at 2018 BCSC 357, found Mr. Netherclift to have misled this Court but did not award special costs. Ms. Hellberg was entitled to her ordinary costs.
- [5] Ms. Hellberg did not cross appeal the costs award made at trial.
- [6] It is not for this Court to change a costs order made in the court below unless that issue was made an issue in this Court: *Hill v. British Columbia (Minister of Forests)*, 1999 BCCA 305 at para. 5.
- [7] As a result, the only question is whether we should depart from the usual costs order in the appeal we heard.
- [8] Mr. Netherclift's conduct of the appeal was not outrageous or scandalous.
- [9] The fact that this matter involved somewhat protracted litigation and gave rise to two appeals is not ideal. Considering the underlying facts, however, this case falls into the category of unfortunate as opposed to an abuse of process.
- [10] The central issue of where the parties' child might live was of vital importance to both parties.
- [11] Further, we find that Ms. Hellberg's offer to settle is not one that this Court should consider in awarding costs. Considering that her offer required the child to relocate to the UK, it was not unreasonable for Mr. Netherclift to oppose it. Both parties are good parents. Because of the parties' desire to live in different countries, their positions could not be easily resolved by compromise.
- [12] We do not consider that the evidence supports a conclusion that the usual rule as to costs will cause Mr. Netherclift hardship or that it will upset the balance between the parties. Nor would awarding party and party costs to Ms. Hellberg cause an unjust result to her.
- [13] In conclusion, we do not find any reason for departing from the usual order that costs follow the event.
- [14] Ms. Hellberg is therefore entitled to her costs of this appeal on a party and party basis and not as special costs. The trial costs order stands.
- [15] Finally, we order that Mr. Netherclift be granted costs in relation to this application to settle costs, given that Ms. Hellberg did not succeed in her application for special costs. "The Honourable Mr. Justice Frankel" "The Honourable Mr. Justice Tysoe" "The Honourable Madam Justice Griffin"

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