
CANADA / JUDGMENT

Houston v. O'Connor

2011 BCSC 509

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 509 Houston v. O'Connor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Houston v. O'Connor,

2011 BCSC 509

Date: 20110421

Docket: 10 3503

Registry: Victoria

Between:

Angela Mary Comber Houston and Angela Mary Comber Houston,

Executrix of the Estate of George Frederick Houston

Plaintiff

And

Michael James O'Connor, Q.C.

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Plaintiffs:

J. Adelaar

R. Eichler

Counsel for the Defendant:

K.L. Simmons

Place and Date of Trial:

Victoria, B.C.

February 28-March 4, 2011

Place and Date of Judgment:

Victoria, B.C.

April 21, 2011

INTRODUCTION

- [1] This is one of two actions heard at the same time. The other is Action No. 09 3880. It names the same plaintiffs. The defendants in that action are Dr. James Gregg Houston and the Land Title and Survey Authority of British Columbia.
- [2] The defendant, Michael James O'Connor, is a lawyer. He sought to have the plaintiffs' case dismissed pursuant to Rule 12-5(4) and (5) of the Supreme Court Civil Rules.
- [3] At the end of the submissions made by the plaintiff and the defendant, I dismissed the plaintiff's case. I gave very short and abbreviated reasons, and agreed to give written reasons at a later time. These are my written reasons.

Background

- [4] The relevant facts in this action can be summarized more succinctly than in Victoria Action No. 09 3880.
- [5] The late Dr. George Frederick Houston, also known by friends and family as Bob, and Angela Mary Comber Houston, had been married for 34 years at the time of Dr. George Houston's death on May 8, 2009.
- [6] Each of them have children from a previous marriage. Mrs. Houston has a son and daughter. Dr. George Houston has two sons, one of whom is Dr. James Houston, and two daughters.
- [7] Dr. George Houston and Mrs. Houston owned a condominium as joint tenants. It was more particularly known and described as:

P.I.D.:023-864-559

Strata Lot 14, Sections 23 and 69, Victoria District, Strata Plan VIS4377

- [8] Dr. George Houston and Mrs. Houston, on July 5, 2005, granted enduring powers of attorney naming each other and Dr. James Houston as their attorney to act separately (the "first power of attorney"). After granting their respective powers of attorney, they signed wills that were mirror images of the other in which they left their entire estate to the other. Upon the death of the survivor of them, the surviving party's estate would be divided among Dr. George Houston's and Mrs. Houston's children.
- [9] Mrs. Houston was estranged from her daughter, Louise Fowler, for over 17 years. At the instigation of Dr. George Houston, Mrs. Houston and her daughter were reunited in the summer of 2007.
- [10] Dr. George Houston signed a new enduring power of attorney on March 12, 2008 (the "second power of attorney"). Dr. George Houston named Mrs. Houston as his attorney and Dr. James Houston as his alternate attorney in the event that Mrs. Houston was unable to act. At some point in time, Mrs. Houston appointed her daughter, Louise Fowler, as her attorney, and Dr. James Houston as an alternate attorney.
- [11] Dr. George Houston did not revoke his first power of attorney.
- [12] Shortly after Ms. Fowler and her mother were reunited, and certainly after Mrs. Houston named Ms. Fowler as her attorney, Ms. Fowler appeared to have a great influence over her mother and, in turn, over Dr. George Houston. Ms. Fowler became involved in obtaining information as to her mother's and Dr. George Houston's financial matters. Mrs. Houston often deferred to Ms. Fowler before making a decision. All of this alarmed Dr. George Houston's children.
- [13] It is alleged that Dr. George Houston gave certain instructions to his attorney, Dr. James Houston. These instructions are the subject matter of Action No. 09 3880, as is the validity of the first power of attorney.
- [14] Dr. James Houston, as the attorney for Dr. George Houston, retained the defendant lawyer, Mr. O'Connor. As a result of the instructions he received from Dr. James Houston, Mr. O'Connor prepared documents which severed the joint tenancy of the condominium owned by Mrs. Houston and Dr. George Houston. The first power of attorney was used by Dr. James Houston, as attorney for Dr. George Houston, to sever the joint tenancy.
- [15] On August 6, 2009, Mrs. Houston, as executrix of her late husband's estate, obtained letters probate.
- [16] The defendant made an application at the end of the plaintiff's case seeking to dismiss the plaintiff's action. The application was made pursuant to Rule 12-5(4) and (5) of the Supreme Court Civil Rules:

No evidence application

- (4) At the close of the plaintiff's case, the defendant may apply to have the action dismissed on the ground that there is no evidence to support the plaintiff's case.

Defendant need not elect whether to call evidence

- (5) A defendant is entitled to apply under subrule (4) without being called on to elect whether or not to call evidence.

[17] In *Edgar v. British Columbia*, 2004 BCSC 543, Madam Justice Stromberg-Stein stated that in order for the defendant to have the plaintiff's action dismissed, the Court must conclude that there is no evidence on which it could reasonably find for the plaintiff:

[6] ... The question to be asked on a no-evidence motion is whether there is any evidence on which the trier of fact can reasonably find for the plaintiff. It is for the trier of fact to determine whether there is some evidence to support each element of the cause of action that the plaintiff must prove in order to succeed.

[18] A plaintiff can be non-suited in British Columbia for failure to call evidence on an essential ingredient of the case: *Roberge v. Huberman*, 1999 BCCA 196.

[19] At this stage, I am not entitled to weigh the evidence or express an opinion on it: *Roberge*.

POSITIONS

[20] The position of the defendant is that the plaintiffs have failed to present evidence as to:

- the standard of care to be met by Mr. O'Connor; and
- the damages suffered by the plaintiffs.

[21] The plaintiffs' position is that in order to dismiss the case the defendant must show that there is no evidence to found a claim, not just that the evidence is weak.

[22] The plaintiffs argue that the question of whether Mr. O'Connor's actions fell below the standard of care may be determined by precedent. The plaintiffs use *Zink v. Adrian*, 2005 BCCA 93 as an example.

[23] The plaintiffs further argue that although the plaintiff, Angela Mary Comber Houston, has no expert evidence with respect to her health, she is able to describe her own state of health.

[24] The plaintiffs further argue that s. 27 of the Property Law Act, R.S.B.C. 1996, c. 377 was breached.

[25] The plaintiffs argue that Part 4, s. 3 and 6 of the Law Society's Code of Professional Conduct is a standard by which Mr. O'Connor may be judged.

[26] The plaintiffs list in their written submission a number of actions that Mr. O'Connor should have taken.

PLEADINGS

[27] The plaintiffs' action against Mr. O'Connor is pled in negligence. To find negligence, the plaintiff must establish:

- the existence of a duty of care;
- that the relevant standard of care was breached; and
- that the loss or damage caused by the breach was reasonably foreseeable.

[28] The plaintiffs have the burden of proving:

- the existence of a duty of care owed by Mr. O'Connor to Ms. Houston in her personal capacity;
- the existence of a duty of care owed by Mr. O'Connor to Dr. George Houston;
- the relevant standard of care required of Mr. O'Connor in dealing with anyone to whom he owes a duty;
- Mr. O'Connor breached the required standard of care; and
- the breach caused foreseeable loss or damage to Ms. Houston or to Dr. George Houston.

Establishing the Standard of Care

[29] The evidence required to prove a standard of care involving a professional was described by Mr. Justice Edwards in *Seiler v. Mutual Fire Insurance Co. of British Columbia*, 2003 BCSC 1423:

[15] Regardless of whether the plaintiffs' claim is in tort or contract, a key element they must prove is that the defendants failed to meet the tort law standards of care required of professionals in their respective disciplines, or standards they implicitly warranted in any contract that they would meet in carrying out the work they did. That work was insurance adjusting by Brouwer and Clingwall and water damage restoration by Cromwell.

[30] The standard of care in respect of lawyers was described in *De Yong v. Weeks* (1984), 55 A.R. 305 (C.A.) at para. 34 quoting from *Groom v. Crocker*, [1939] 1 K.B. 194:

Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability arises out of contract. The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor. It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.

- [31] Where a lay person cannot determine the standard of care by ordinary reasoning, and based on common knowledge, the plaintiff will be required to lead expert evidence: Edgar.
- [32] In Seiler, Mr. Justice Edwards gave examples where expert evidence was not required:
- [17] The defendants' submission is that this is not a case where a breach of the standard of professional competence is obvious to a lay person. It is not a case, like that posited by the Court in a question to counsel for Cromwell, of leaving a gaping hole in the roof. Nor is it a case like that posited by counsel for the adjuster, of the adjuster failing to secure the house against vandals.
- [33] In Roberge, the trial judge concluded that Mrs. Roberge ought to have presented evidence of a standard of care for the solicitor, Mr. Huberman. On appeal, Mr. Justice Esson disagreed and concluded at para. 58 that the real breach of duty of care was the failure of the lawyer to advise his client to seek independent legal advice:

What the court was called on to do by the case presented for the plaintiff was to consider and assess, with the assistance of counsel's submissions, any evidence adduced by the plaintiff which was potentially relevant to the question whether there had been a breach of duty by the solicitor. That process involves the court applying its experience and knowledge in the way that judges and juries do every day, most often without expert evidence.

- [34] The plaintiffs argue that s. 3 and 6 of c. 4 of the Law Society's Code of Professional Conduct is a sufficient standard to judge the defendant. These rules caution lawyers against participating in dishonest, criminal or fraudulent activities of their clients. It also warns lawyers not to become a tool or dupe of unscrupulous clients or persons.
- [35] The defendant argues that the Law Society's rules are of a general nature and cannot be applied to a specific case before the Court. The defendant argues that the plaintiff should have adduced expert evidence as to what a reasonably prudent solicitor would have done given a certain set of circumstances. They submit that the plaintiffs did not demonstrate that these rules are applicable in determining the standard of care by which to judge the defendant.
- [36] The plaintiffs argue that these guidelines required the defendant to have:
- confirmed Dr. George Houston's instructions directly; and
 - confirmed that the instructions under the power of attorney were not to benefit Dr. George Houston, but, rather, Dr. James Houston and his siblings.
- [37] In their written submissions, the plaintiffs raise what they view as breach of a standard of care by which Mr. O'Connor is to be judged. Yet they produce no evidence as to what that standard of care is.
- [38] The plaintiffs argue that the legal precedent can determine the standard of care as determined by the Court in Zink.

- [39] At the trial level in Zink, the Court did not have expert evidence. Madam Justice Southin, although not dissenting, stated:
- [43] ... judges can only rarely make such a finding in the absence of expert evidence as to the standard of a competent solicitor conducting the business in question.
- [44] The judge can only properly do so, in my opinion, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have knowledge." See *Anderson v. Chasney*, [1949] 2 W.W.R. 337 at 341 (Man. C.A.).
- [40] Madam Justice Southin's comments are dicta. However, she points out that the failure to call expert evidence was not raised in Zink. Accordingly, Zink is not helpful to the plaintiffs.
- [41] Non-technical matters are those which an ordinary person may be expected to have knowledge. This is what Mr. Justice Esson described in *Roberge* when he concluded that the lawyer, Mr. Huberman, had a duty to Ms. Roberge. He concluded that the lawyer breached that duty as there was a conflict of interest, which is something that an ordinary person would have knowledge.
- [42] The plaintiffs relied on *Oh v. Usher*, 2009 BCSC 1887, where Mr. Justice Cullen made reference to Madam Justice Southin's dicta in Zink. In *Oh*, Mr. Justice Cullen was not prepared to hold in its circumstances that the failure to call expert evidence amounted to no evidence in respect of the standard of care.
- [43] In *Oh*, Mr. Justice Cullen made findings of fact unrelated to expert evidence which permitted him to dismiss the plaintiff's case against the lawyer.
- [44] The plaintiffs, in their argument, raise s. 27 of the Property Law Act. This section does not permit an attorney to transfer property to himself or herself unless the power of attorney expressly authorizes it or the principal ratifies it. This statute and the section are not pled. That section is relied upon by the plaintiffs in Action No. 09 3880.
- [45] I conclude that there is no evidence before the Court identifying the standard of care that Mr. O'Connor is alleged to have breached.

DAMAGES

- [46] The plaintiffs concede that no damages flow from Mr. O'Connor's act of holding himself out as representing Mrs. Houston in letters that he wrote. The defendant acknowledged that the statements in the letters were factually incorrect.
- [47] Mr. O'Connor argues that there is no evidence to support the damages claimed by the plaintiffs. The damages claimed include:
- Probate fees and the legal cost for obtaining probate and the filing fees;

· The plaintiff also claims that she is unable to sell her condominium and move into a senior's residence because there is a certificate of pending litigation registered against the condominium; and

· the costs of litigation in both this action and Action No. 09 3880.

[48] There was no evidence led by the plaintiffs as to the probate fee paid. There is no evidence as to the value of the estate so the probate fees could be calculated. There is no evidence of the solicitor's costs or the filing fees incurred in order to obtain probate by Mrs. Houston.

[49] The plaintiffs argue that when Mr. O'Connor completed the property tax return so as to sever the joint tenancy, he placed a value on the condominium in 2009 at \$770,000.00. The plaintiffs argue that with that figure all of these calculations can be made. However, there is no evidence as to the value of the condominium declared in the probate application.

[50] The plaintiffs argue that Mrs. Houston can describe her own health. I agree. However, she stated that she suffered from anxiety and stress and had to see her doctor for the purpose of having her blood pressure checked. She also described an incident the night before the trial started where she passed out. I think the Court can conclude that a person may very well suffer some anxiety during litigation. This is certainly understandable in the case of Mrs. Houston, who is almost 92 years of age.

[51] However, the elevation of her blood pressure and her passing out incident have not been linked to Mr. O'Connor. No expert evidence was called in this respect.

[52] Despite some evidence of Mrs. Houston's health, the major hurdle is that Mrs. Houston must prove that Mr. O'Connor was negligent. The alleged negligence is measured against that of a competent solicitor conducting the business in question.

[53] There is no evidence before the Court that the condominium could not be sold, that Mrs. Houston wanted to sell it, or that an application was brought to sell under the Partition of Property Act, R.S.B.C. 1996, c. 347 and it failed. There is no evidence that the property could not be sold to allow Mrs. Houston to move into a senior care home. Even if this had been true, there is no evidence that Mrs. Houston needed additional home support to stay in her home or the additional costs of care.

[54] Further, there is no evidence that Mrs. Houston incurred costs of litigation against Dr. James Houston and the amount of those costs.

[55] There is no evidence before the Court that Mrs. Houston is not the sole beneficiary under Dr. George Houston's will.

COSTS

[56] The defendant seeks costs against the plaintiffs. The defendant argues that the case brought against him by the defendants was dismissed and, as a successful litigant, he is entitled to rely on Rule 14-1(9) of the Rules:

Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

[57] The defendant claims that he is entitled to special costs pursuant to Rule 14-1(1)(b)(i) rather than costs awarded under the tariff items under Appendix B, Party and Party Costs Scale B. Alternatively, if special costs are not awarded, then the costs should be pursuant to Appendix B, Party and Party Costs Scale B.

[58] As a result of an offer made to the plaintiffs by the defendant pursuant to Rule 9-1(4), the defendant seeks double costs pursuant to Rule 9-1(5)(b).

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

...

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

...

(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;

[59] The offer made by the defendant to the plaintiffs is dated February 17, 2011. It states:

I confirm you are authorized by Jack Adelaar to accept and respond to communications on the above-noted matter in his absence.

I am instructed to make an offer to settle this matter by the parties to this action entering a Consent Dismissal Order without costs payable by any party.

The Defendant reserves 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.

[60] The plaintiffs' counsel responded as follows:

I have discussed your offer to settle dated February 17, 2011 in the above matter with my client and she has indicated that she might be prepared to settle this matter upon payment of her legal fees and disbursements from April 22, 2009 to the present.

The Plaintiff reserves 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.

[61] The defendant seeks double costs from February 18, 2011 onwards.

[62] The plaintiffs argue that no costs should be ordered or, in the alternative, that costs should be based on the Sanderson order. They rely on Rule 14-1(18):

If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

[63] The plaintiffs in their written submissions make no submissions as it relates to special costs or double costs other than to reconfirm that the defendant should not be awarded costs.

[64] The defendant argues that *Currie v. Thomas Estate*, 19 D.L.R. (4th) 594 (C.A.) stands for the proposition that successful parties have a reasonable expectation of being awarded their costs, and that special circumstances must be established to defeat that expectation.

[65] The plaintiffs argue that no costs should be awarded to the defendant. The basis of this argument is set out in the plaintiff's written submissions. There, the plaintiffs argue that the defendant was not joined in Action No. 09 3880 despite being a proper person to be joined. This application to which the plaintiffs' refer was dismissed, but not on its merits. The application was not brought on again and this action was started.

[66] The plaintiffs in their written submissions re-argue the merits of this action and Action No. 09 3880.

[67] Further, the plaintiffs argue that it was reasonable to start this action. However, if this is the criteria for an award of costs, it would be a rare occasion for a successful litigant to be awarded costs.

[68] The plaintiffs have not described any facts or made any arguments that would permit a court to exercise its discretion and not award this successful defendant his costs.

SPECIAL COSTS

[69] In this action, the defendant seeks costs payable as special costs pursuant to Rule 14-1(1)(b) (i).

[70] The defendant argues that special costs should be awarded against the plaintiffs because the plaintiffs alleged the following in their notice of civil claim:

11. If the Defendant had not misrepresented his status with respect to his retainer on behalf of the Plaintiff, the Plaintiff would have had notice of the actions taken by the Defendant and the Plaintiff and the Deceased would have had an opportunity to rectify the title while the Plaintiff's husband was still alive.

12. As a result of the misrepresentation, the Plaintiff did not have the opportunity to set aside the action taken by the Defendant at a time when the Deceased was still alive.

...

16. All of the actions taken by the Defendant were taken in furtherance of the scheme to create an estate for the benefit of the Deceased's siblings and not for the Deceased or the Plaintiff.

[71] In their trial brief, the plaintiffs stated

2(c) the Defendant helped a long standing acquaintance engage in self-dealing in breach of that individual's duty as an Attorney.

[72] The defendant states that the plaintiffs continued to make these allegations in their opening statements.

[73] These allegations made by the plaintiff are serious. They are based on the plaintiffs' belief that the power of attorney used to sever the joint tenancy should not have been used.

[74] This is different from the allegations of false and fraudulent misrepresentation alleged in *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2009 BCSC 1049, where special damages were awarded.

[75] In *689531 B.C. Ltd. v. Anthem Works Ltd.*, 2009 BCSC 1005, at para. 27, Mr. Justice Hinkson found that although the comments made by counsel for the defendants were not allegations of criminal fraud, the statements were:

... allegations of impropriety and pejorative statements made about the plaintiffs in written and oral submissions, on the basis that they were only made in an attempt to persuade the court that the plaintiffs' conduct was contrary to public policy ...

Mr. Justice Hinkson found that the statements were deliberately made and had no evidentiary foundation. The behaviour was found to be reprehensible and special costs were ordered.

[76] In *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900, the Court ordered special costs when the plaintiff gave a false statement to preserve a limitation period in the litigation.

[77] In my view, the allegations made in this litigation by the plaintiffs should not attract special costs.

DOUBLE COSTS

[78] Rule 1-3(1) states:

- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[79] Rule 9-1(4) permits the Court to consider any offer to settle when exercising its discretion with respect to costs. Rule 9-1(5)(b) permits the Court to award double costs in respect of all or some of the steps taken after the delivery of the offer.

[80] The offer made by the defendant meets the definition of "offer to settle" under Rule 9-1(1)(c).

[81] One of the goals of Rule 9-1(4) and (6) is to promote settlement: *Riley v. Riley*, 2010 BCSC 822 at para. 8.

[82] In *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, Mr. Justice Hall made the following statement at para. 16:

It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[83] The factors that the Court may consider in making an award of double costs are listed in Rule 9-1(1)(6):

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.

[84] In *Riley*, the defendant made an offer to settle the proceedings by waiver of costs and by consent dismissal order on a no costs basis. This is the same offer made by the defendant to the plaintiffs in this case.

[85] In *Riley* Mr. Justice Greyell stated the following at para. 21:

I see no logical distinction between a nominal offer and an offer such as that made by the defendant in this case. The principle is the same. One party is provided with an offer to settle and if not successful at trial in advancing its position relative to the offer it may be held accountable for costs of pursuing the matter to trial.

- [86] On January 17, 2011, one month prior to delivery of the offer, the plaintiffs received the defendant's trial brief which contained a detailed summary of the issues, and list of witnesses and documents on which the defendant intended to rely. The trial brief also contained a complete list of authorities that the defendant intended to rely on at the trial. Included in the authorities that the defendant intended to rely upon was the case of Dejong. This is one of the cases that the defendant relied on to bring on the no evidence motion upon which this case was dismissed.
- [87] I have concluded that the offer received by the plaintiff from the defendant ought to have reasonably been considered.
- [88] On February 21, 2011, the plaintiffs rejected the offer by making a counter-offer. In that counter-offer the plaintiff was prepared to have the case dismissed so long as she was paid all of her legal fees and disbursements from April 22, 2009 to February 21, 2011. The defendant's offer was made ten days before trial. By that time, all of the documents had been exchanged and the defendant had been examined for discovery. The counter-offer made by the plaintiff, though tentative, sought no monetary claim for damages, which was the remedy sought by the plaintiff. This shows that the plaintiffs had assessed the strength of their case.
- [89] The terms of the offer were more favourable to the plaintiffs compared to the outcome they obtained at trial.
- [90] The difference in the two offers was the defendant's payment of the plaintiffs' legal fees and disbursements.
- [91] The counter-offer made by the plaintiffs reflects, in some ways, their view of the case. What the plaintiff wanted was all the fees that she expended with her solicitors together with the disbursements from April 27, 2009 to February 21, 2011. In short, the plaintiffs wished to take no responsibility for starting an action which could not succeed.
- [92] There is no evidence before me as to the financial circumstances of the plaintiffs.
- [93] The plaintiffs rely on *Skinner v. Guo*, 2010 BCSC 30. This is a case in which a nominal offer was made. The case involved former Rule 66. In that case, Mr. Justice Harvey concluded that the circumstances were not "ordinary". The defendant had not shown up for an examination for discovery and liability was the central issue between the litigants. In this particular instance, Mr. Justice Harvey did not think that the nominal offer was appropriate. Mr. Justice Harvey concluded that if he was wrong he would exercise his discretion under Rule 66(29). Accordingly, *Skinner* is of no assistance in this case.
- [94] The plaintiffs argue that a Sanderson order should be granted. A Sanderson order permits the successful defendant to recover costs from the plaintiffs as disbursements. That is not the situation here. Rather, the plaintiffs are seeking a Bollock order. Both orders presuppose that the defendant, Houston, will be unsuccessful in Action No. 09 3880.

- [95] In these proceedings, there have been no issues between Dr. James Houston in Action No. 09 3880 and the defendant, Mr. O'Connor, in this action.
- [96] The plaintiffs have not met the test set out in Gill v. Lindstrom, 2004 BCCA 632 or Grassi v. WIC Radio Ltd.(c.o.b. CKNW/98), 2001 BCCA 376.

CONCLUSION

- [97] I order that the defendant have his costs assessed up to February 21, 2011 pursuant to Appendix B, Party and Party costs, Scale B. Thereafter, the defendant will have double costs assessed based on Appendix B, Party and Party costs, Scale B. The defendant will have his reasonable disbursements.

"H.C. Hyslop J."

HYSLOP J.

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