
CANADA / JUDGMENT

Johnson v. Monaghan

2015 BCSC 2104

COURT

Supreme Court of British Columbia

DECIDED

17 November 2015

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2015 BCSC 2104 Johnson v. Monaghan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnson v. Monaghan,

2015 BCSC 2104

Date: 20151117

Docket: 18495

Registry: Terrace

Between:

John Yves Henry Johnson

Claimant

And

Kelsey Marie Monaghan

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

On Costs

Counsel for the Claimant:

T.E. Hudson

Counsel for the Respondent:

W.C. MacGregor

Place and Date of Trial:

Terrace, B.C.

May 29, 2015

Written submissions of the Respondent received August 4 & September 28, 2015

Written submissions of the Claimant received September 17 & 29, 2015

Place and Date of Judgment:

Terrace, B.C.

November 17, 2015

- [1] These reasons relate to costs arising from the trial of this family law claim. The trial judgment is reported at *Johnson v. Monaghan*, 2015 BCSC 1286. The parties at trial asked to address costs after the trial decision was issued. Written submissions have now been received from both parties.

Background

- [2] The parties had a short marriage-like relationship of less than one year. They jointly owned what was to have been the long-term matrimonial home. At trial the only issues were property division. The respondent was successful in her claim for an interest in the real property. Judgment in her favour was granted in the sum of \$42,923 if the claimant wished to retain the property.
- [3] The respondent made an offer to settle on February 7, 2014 for the sum of \$20,000. The claimant rejected that offer on the same day.
- [4] Counsel for the respondent filed written submissions on August 4, 2015 seeking double costs as a result of the February 7, 2014 offer. On September 8, 2015 counsel for the claimant filed an email response to the respondent's submissions which stated:

[the Court] indicated that if submissions were required they should be submitted.

Mr. Johnson acknowledges that he lost, that costs are payable by him, and that they are double. I advised Mr. MacGregor he could submit his bill of costs

- [5] As the offer was more favourable to the claimant than the trial judgment, and the claimant did not oppose the respondent's claim for such costs, on September 10, 2015 I ordered that the respondent recover double costs after the first offer. That order has not yet been entered.

- [6] On September 15, 2015 counsel for the claimant advised that he had overlooked a second offer received September 9, 2014 from the respondent to settle the claim for \$45,000 plus double costs. Counsel asked if further submissions could be made in writing and leave was granted for them to do so.
- [7] As a result, in addition to the issue of whether double costs should be awarded, there is now the preliminary issue of whether the final order for costs should be re-opened.
- [8] There is no issue that the respondent was successful and is entitled to costs. The only issue is whether she is entitled to double costs given her second offer.

Position of the Respondent

- [9] The respondent raises the preliminary issue of whether the final order should be re-opened. She submits that it should not. In the alternative she seeks an order for double costs from the time of the rejected first offer.

Position of the Claimant

- [10] The claimant submits that the order should be re-opened because both parties neglected to bring to the attention of the Court the second offer. He submits that this was a relevant factor on the assessment of costs and the failure to advise the Court of the existence of the second offer has mislead the Court.
- [11] The claimant also submits that the first offer to settle was revoked by the second offer and that in the event the Court finds the first offer is to be considered the assessment of the reasonableness of that offer establishes it was not reasonable for the claimant to have accepted the offer.

Law and Analysis

Re-Opening

- [12] In *Bronson v. Hewitt*, 2011 BCSC 482, Mr. Justice Goepel (as he then was) summarized the law on reopening as follows:
- [3] Prior to the entry of an order, a trial judge has an unfettered discretion to reconsider or revise any aspect of a decision: *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28, [1935] D.L.R. 432 (C.A.). A judge may properly reopen if satisfied because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence or misapplied the law: *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 at para. 10 (C.A.).

- [13] This is not a situation where counsel are attempting to bring forward new evidence in the sense that it was available but counsel elected not to place it before the Court. It is evidence that was overlooked by both counsel and as a result not brought to the Court's attention. It is relevant to the issue of costs and it would be unjust for the Court not to consider it and the legal issue it raises. As a result I will set aside the existing order and permit receipt of the new evidence on the issue of costs.

Costs

- [14] The first issue is whether the first offer is to be considered in light of the fact it was rejected and that a later second offer was made, the latter offer exceeding the amount awarded.
- [15] In *Bains v. Indo Canadian Times Inc.* (1995), 54 A.C.W.S. (3d) 193, 57 B.C.A.C. 90 (C.A.) the British Columbia Court of Appeal addressed successive offers and the effect of such on a claim for double costs. Rule 37 was the then relevant Rule. The relevant portions of that Rule read:

Where available

- (2) A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceeding in the terms specified in the offer.

Acceptance of offer

- (13) An offer to settle which has not been withdrawn may be accepted at any time before the trial commences.

Consequences of failure to accept offer to settle a monetary claim

- (23) If the plaintiff has made an offer to settle a claim for money, and it has not expired or been withdrawn or been accepted, and if the plaintiff obtains a judgment for the amount of money specified in the offer or a greater amount, the plaintiff is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

- [16] In *Bains* the trial judge found that a second offer was for less than the first. He then stated (as quoted by the Court of Appeal) at para. 37:

37

If the second offer to settle for a lesser sum of money cannot be considered a proper offer because of its failure to meet the time limit then, for the same reason, it cannot serve as a revocation of the first offer. To view the matter any other way would result in an interpretation of the rule that would defeat the purpose of encouraging a responsible settlement process. Such a process must have consequences if it is to be effective.

- [17] The Court of Appeal said this:

38 There is a surface attraction to the idea that so long as previous offers to settle are at or below the amount awarded, the defendant should bear double costs from the first such offer. This approach is supported by the contention that the object of Rule 37 is to encourage settlements at the earliest opportunity. In this case, the defendant could have settled for less than the judgment from 11 June 1993 to the commencement of trial.

39 On reflection, I have reached the opinion that that approach cannot be sustained. Neither the fundamental rules of contract formation nor the language of Rule 37 support it. There can only be one valid offer at a time. As I read sub-rule 23, an offer is either extant, expired, withdrawn, or accepted. In this scheme of costs, one offer cannot logically or practically co-exist with another offer; otherwise, the defendant will not know to which offer he or she should respond. The award of double costs to cover the period beginning 11 June 1993 is tantamount to a holding that the offer made on that date remained operative even though it was replaced by a lower offer on 29 December 1993.

40 Although he expressed himself in the alternative, the trial judge's reasons indicate that he treated the second offer as valid having relieved against the seven day time limit. In my opinion, the necessary legal consequence of the trial judge's treatment of the second offer as valid is that the first offer was revoked. There is much to be said for the notion that previous offers to settle for amounts equal to, or less than, the judgment should be taken into account on the question of double costs; however, I think that would require an amendment to the Rules.

41 I would, therefore, hold that double costs are payable only from the date of the last offer.

[18] Rule 37 has been repealed. The current Rule 9-1(5) provides:

9-1 (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;

[19] The Rule does not address successive offers. As a result ordinary contract principles apply. While Bains dealt with Rule 37 Donald J.A. specifically noted that neither the rules of contract formation or Rule 37 permit more than one offer to exist at a time.

[20] The respondent concedes that two offers cannot exist at the same time. However, she submits that the issue is what is the effect of rejection of an offer to settle. In this instance the claimant rejected the first offer. It was therefore not "extant, expired, withdrawn, or accepted" but rather was rejected. But for the claimant's rejection of the first offer he could have accepted the offer at any time up to the second offer of September 9, 2014.

[21] The respondent submits that by rejecting the first offer shortly after it was made it was rendered void. As a result she argues the second offer cannot have either co-existed with the first or revoked it. She submits the Court should treat such a rejected offer in the same way as an offer that has not been responded to.

[22] Factually therefore this situation differs from that considered in Bains. The Court of Appeal in Bains specifically noted at para. 39:

39 one offer cannot logically or practically co-exist with another offer; otherwise, the defendant will not know to which offer he or she should respond.

[23] In the instant case the offer no longer exists as a result of the actions of the claimant. It is not a case of two offers co-existing. The first offer did not expire nor was it withdrawn by the respondent. It would be unjust to deprive the offeror of the potential cost benefits of their offer where the offeree has rendered the offer void not the offeror.

[24] Clearly if no further offers had been made the respondent could have relied on the first offer when seeking double costs given that offer was for less than she was awarded. The question then arises however is what is the effect of the respondent choosing to make the second offer on September 9, 2014 given that offer exceeded the amount awarded and as a result does not attract double costs? By making the second offer has the respondent deprived herself of the benefit of the first offer? In my opinion she has not, although any award of double costs would end at the time of the second offer given it exceeded the amount awarded at trial.

[25] In *Perry v. Perry*, 2012 BCSC 148, Madam Justice Gropper, albeit under the new Supreme Court Family Rules, B.C. Reg. 169/2009, considered a situation where there were two offers, the first of which should have been accepted. She held that under the new Rules and the factors to be considered that the first offer should have been accepted.

[26] I conclude that the rejection by the claimant of the first offer does not prevent the successful respondent from relying on that offer when considering the issue of costs. To do otherwise would defeat the purposes of cost rules. In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 74, Mr. Justice Fankel summarized the purposes of the cost rules being to encourage conduct that reduces the duration and expense of litigation, to encourage settlement and to have a winnowing function in the litigation process by requiring litigants to carefully assess their case through its course.

[27] The claimant submits double costs should not be awarded primarily because the first offer was made before a default judgment was set aside and secondly because the matter turned on the value of the property and he did not know its value at the time as the market was changing rapidly. In addition the claimant states that his financial position is weak and while he is in a position to refinance the home and buy out the respondent's interest in the property an award of double costs might make such refinancing impossible.

[28] Rule 9-1(6) of the Supreme Court Civil Rules addresses what the Court may consider when making an under subrule (5) as follows:

9-1 (6)

- (a) whether an 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 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.

[29] In my view the offer when made was clear and was capable of assessment. Any issue of the value of the home could have been resolved by the claimant taking steps to obtain such information whether by appraisal or the advice of a realtor and thereby properly consider the offer. I find that it would have been reasonable for the claimant to accept the offer. The rejection of the offer almost immediately after it was presented indicates that the claimant failed to give it reasonable consideration.

[30] With respect to the relative financial circumstances of the parties they are sufficiently similar that those circumstances do not favour refusing to award double costs.

[31] The respondent is entitled to her costs, including double costs from the date of the first offer to the date of the second offer and the costs of this application.

"Punnett J."

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