

CANADA / JUDGMENT

Kelly v. McMillan

2003 BCSC 596

COURT

Supreme Court of British Columbia

DECIDED

1 May 2002

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2003BCSC0596

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. McMillan re costs

2003 BCSC 596

Date: 20020501

Docket: S059336

Registry: New Westminster

Between:

Dominick Thomas Kelly

Petitioner

And

Maris McMillan & Harbottle & Co.

Respondents

Before: The Honourable Mr. Justice Ralph

Ruling on Costs

Counsel for the petitioner

Joseph M. Prodor

Counsel for the respondents

D.C. Harbottle and

J. McKee

Date and Place of Trial/Hearing:

Written Submissions

- [1] On May 1, 2000 I issued reasons for judgment in this matter (2000 BCSC 709). The petitioner's claim for increased costs arising from that judgment was not filed until approximately two and a half years later, on November 21, 2002. These are the reasons dismissing that claim.

Factual Background

- [2] The petition giving rise to this costs application is a small part of the plaintiff's litigation history, which begins with a motor vehicle accident on December 18, 1996.
- [3] On December 18, 1996, Dr. Kelly was involved in a motor vehicle accident and sustained serious injuries. Dr. Kelly retained Joseph Prodor to prosecute his tort claim. In addition to the basic tort claim, Mr. Prodor commenced three bad-faith actions against various insurance companies and the British Columbia Medical Association.
- [4] Dr. Kelly discharged Mr. Prodor on or about October 5, 1999, and retained the respondent Harbottle & Co. The respondent Ms. McMillan had conduct of the file. After negotiations as to the appropriate division of payment between Mr. Prodor and Ms. McMillan, the litigation files were transferred to Harbottle & Co.
- [5] Approximately five months later, on March 20, 2000, Ms. McMillan was discharged and Dr. Kelly re-retained Mr. Prodor. During the course of Ms. McMillan's retainer, Dr. Kelly was offered a settlement of \$740,000.00 in the personal injury action but the settlement offer was rejected.
- [6] Mr. Prodor sought delivery of the files. Ms. McMillan faxed Mr. Prodor with the following proposal:

I am prepared to transfer all of Dr. and Mrs. Kelly's files to you on the following terms:

- a) you pay immediately the disbursement accounts for the various files in full prior to the transfer of any files. The disbursements total \$40,353.78. I have attached the accounts; and
- b) you undertake to protect and pay this firm's accounts for legal fees, as agreed or as reviewed before the Registrar, and acknowledge that such accounts constitute a lien and first charge over any settlement or judgment funds received on any of the above noted files.

This offer was withdrawn by Ms. McMillan later that same day.

- [7] A new offer was communicated to Mr. Prodor by fax on March 29, 2000. The offer was substantially similar, but for the inclusion of the following term:

- c) our account in the sum of \$253,080 is paid forthwith in full on the Kelly v. Dillon matter. This account is rendered pursuant to the terms of the contingency fee agreement between this firm and Dr. Kelly.

This sum represents 30% of the rejected settlement offer, plus tax.

[8] The matter was not resolved and Dr. Kelly issued the petition in this matter. While a number of remedies were sought in the petition, in the application before me Dr. Kelly sought:

- a) an order directing Ms. McMillan to deliver all of his records and files to Mr. Prodor without payment of the fee account rendered by Ms. McMillan and without providing security for the payment of that fee account; and
- b) an order directing Mr. Prodor to protect that account from the settlement or judgment in the tort action.

The respondents no longer sought immediate payment of an outstanding account based on the settlement offer; however, they asserted their right to

- a) an order requiring immediate payment of disbursements totalling \$33,657.37; and
- b) an order that the account for fees should be a first charge on the proceeds of the tort action.

[9] After hearing this application I made the following orders:

- 1. that Harbottle & Co. deliver to Mr. Prodor, Dr. Kelly's records relating to the four actions;
- 2. that such delivery be subject to payment to Harbottle & Co. by Dr. Kelly, as a part payment of disbursements, the sum of \$15,000; and
- 3. that such delivery be further subject to Dr. Kelly providing Mr. Prodor with authority to undertake and Mr. Prodor undertaking to retain in trust from the proceeds of any or all of the four actions, sufficient funds to cover the amount of the claim of Harbottle & Co. The funds must be retained in trust until the amount of the claim is settled by agreement or determined by order of the court under the provisions of the Legal Profession Act and the Rules of Court.

Subsequent to this order, the contingency fee agreement was found to be unreasonable by District Registrar Sainty and was cancelled: Kelly v. McMillan, 2001 BCSC 1556.

Issues

[10] The issues are:

- 1. Is the petitioner entitled to increased costs and if so, in what amount?
- 2. If not, was there divided success in the action such that each party should bear their own costs?

Analysis

1. Is the Petitioner entitled to increased costs?

[11] Before turning to the merits of the petitioner's claim, I note that the February 12, 2002 amendment to BC Reg. 201/202, Appendix B, Section 7(3) states that:

No order for increased costs may be made after July 1, 2002.

[12] The petitioner relies on Rule 1(10) as authority for this court to make an order for increased costs after July 1, 2002. Rule 1(10) provides:

The court may order that a proceeding, or a step in a proceeding, be continued and concluded under the rules in force at the time of its commencement.

[13] Applications of this type have been successful in certain circumstances. In *Seaboard Life Insurance Co. v. Bank of Montreal*, 2002 BCSC 1272, and *Kraus v. Fech*, 2003 BCSC 1594, the court invoked Rule 1(10) and ordered increased costs. In both cases, it appears that the timing of the judgments and applications were central to the exercise of discretion.

[14] In *Seaboard*, Madam Justice Koenigsberg stated (at ¶ 56):

Finally, I am aware that as of July 1, 2002, the Rules of Court provide there shall be no order for increased costs.

This proceeding began in 1997. Negotiations of a sort ensued and a settlement offer was made on September 18, 1997. The trial commenced May 11, 1998, and ended October 2, 1998. Reasons for Judgment were released on July 6, 1999. An appeal was heard and judgment released March 22, 2002. Rule 1(10) provides as follows:

(10) The court may order that a proceeding, or a step in a proceeding, be continued and concluded under the rule in force at the time of its commencement.

In my view, there is no bar to an order for increased costs where the proceeding began prior to July 1, 2002, and particularly where the costs application was brought before July 1, 2002.

[15] In *Kraus*, no specific mention was made of the relevant dates, but judgment was rendered on May 9, 2002 (before the cut-off, but after the amendment and Notice to the Profession) and the costs application was heard September 12, 2002.

[16] The circumstances of the case at bar are significantly different. Here, judgment was rendered on May 1, 2000. The issue of costs was left open to counsel, but lay dormant for two and a half years until November 21, 2002.

[17] For the purposes of increased costs, *Seaboard* and *Kraus* frame Rule 1(10) as a discretionary transition mechanism for actions spanning across the time frame of the amendment barring increased costs. This discretion should be employed to prevent an injustice. Here, the petitioner had ample time in which to apply for costs - including the full duration of the notice period. Additionally, to paraphrase Groberman J. in *Valmet Paper Machinery Inc. v.*

Hapag-Lloyd AG, 2002 BCSC 1475 at ¶ 25-26, I would be prepared to employ Rule 1(10) if the petitioner's case for increased costs was stronger. Here, there is a disparity, but it is not extraordinarily large. Also, there are no particularly aggravating factors.

[18] In the event that I am mistaken with respect to Rule 1(10), I will examine the petitioner's claim on its merits.

[19] Appendix B, sub-sections 7(1) and 7(2) set out the legal requirements for increased costs:

7(1) Where the court determines that for any reason there would be an unjust result if costs were assessed under Scales 1 to 5, the court may, at any time before the assessment has been completed, order that costs be assessed as increased costs under subsection (2).

(2) Where costs are ordered to be assessed as increased costs, the assessing officer shall fix the fees that would have been allowed if an order for special costs had been made under Rule 57(3), and shall then allow ½ of those fees, or a higher or lower proportion as the court may order, together with all proper expenses and disbursements.

[20] The proper application of these provisions has been canvassed by the Court of Appeal in *Rieta v. North American Air Travel Insurance Agents Ltd.* (1998), 52 B.C.L.R. (3d) 114 at ¶ 40 (C.A.):

The law on costs has now evolved to the point where a discrepancy must be accompanied by some other reasons in order to justify an order of increased costs. My use of the phrase "presumptive injustice" in referring to any discrepancy greater than 50% in *Just v. British Columbia* (1992), 9 C.P.C. (3d) 302 at 308, may not have been happily chosen. The better and current view is that a discrepancy is only a factor, and by itself not a decisive factor, in deciding a claim for increased costs. As has been observed in a number of the cases cited to us, a large disparity is often associated with some additional factor relating to the nature of the case or the conduct of the parties which usually provides an explanation for the disparity. The following statement by Madam Justice Rowles in *Edgar v. Freedman*, [1997] B.C.J. No. 1643 at ¶79 reflects the present state of the law:

My impression is that a quite significant disparity must be found to trigger an order for increased costs and even then, such an order is by no means likely to be made "as of course" or automatically. Usually, there must be found special importance, difficulties or complication associated with the litigation or as seen in *National Hockey League*, supra, conduct of a litigant which the court finds deserving of a penalty in added costs.

[21] I am also mindful that the rationale for increased costs is "not to fine tune every costs award to bring it up to 50%." *Rieta*, supra at ¶ 38.

[22] Applying this analysis to the facts before me, the disparity between the different scales of costs is not sufficient to warrant an award of increased costs as there are no noteworthy aggravating factors.

- [23] The appropriate Scale of costs in this case is 3. The matter was neither factually, nor legally complex; however, it was important to the petitioner - the return of his files was a necessary step in the ongoing litigation of his actions.
- [24] The actual cost of the action was \$4,500.
- [25] In most cases, special costs will amount to approximately 80-90 per cent of actual costs: Seaboard, supra at ¶ 19. Assuming 90 per cent of actual costs, the amount of special costs would be \$4,050.
- [26] The petitioner says that Party and Party costs at Scale 3 would result in an award of approximately \$1,200 to \$1,500. Taking the mean (\$1,350), ordinary costs would equal 33.3 per cent of special costs.
- [27] As noted above, this matter was not complex. The application was heard in one-half day. While the outcome was of importance to the petitioner, the return of his files was never in doubt - the crux of the issue was under what conditions and terms the transfer would occur. Moreover, although there appears to be considerable tension between the parties, I do not find that there has been conduct deserving of punishment or sanction or conduct that unjustly prolonged or increased the costs of the litigation.
- [28] Consequently, the petitioner is not entitled to increased costs.
2. Was there divided success in the action such that each party should bear their own costs?
- [29] Rule 57(15), which allows the court to divide the costs of a proceeding between the parties in certain circumstances, states:
- The court may award costs that relate to some particular issue or part of the proceedings or may award costs except so far as they relate to some particular issue or part of the proceeding.
- [30] As noted by Low J. (as he was then) in *Krangle (Guardian ad litem of) v. Brisco* (1998), 25 C.P.C. (4th) 134 at ¶ 12 (B.C.S.C.):
- It is clear from the authorities that apportionment based on divided success is used sparingly and is usually confined to those cases in which each party has succeeded on one or more of the major issues in the case.
- [31] In the case at bar, the dominant issue related to the conditions on which delivery of the files was to be made. While the petitioner may not have succeeded on every aspect of the terms of transfer, there was substantial success on the only issue of significance.
- [32] As described above, Dr. Kelly sought to avoid the payment of the fee account provided by the respondent and to set aside the contingency agreement upon which that fee account was based.

- [33] The respondent had withdrawn its claim to the entirety of the fee account by the date of the application, but asserted a claim to disbursements in the amount of \$41,224.29. Also, the respondent sought a first charge on the proceeds of the tort action.
- [34] Mr. Prodor offered to undertake to protect the account of the respondent, although not on the terms requested. Dr. Kelly and Mr. Prodor disputed the validity of certain disbursements.
- [35] Based on my order, the only success that the respondents enjoyed is that Dr. Kelly was required to pay a portion of the disbursements claimed. The respondents were unsuccessful in either obtaining payment on the fee account, or obtaining a first charge over the proceeds of the tort action, the latter of which I view as the most significant issue from the viewpoint of the respondents.
- [36] To address an issue that was argued by both sides, I do not consider any subsequent decisions of the Registrar or this court with respect to the validity of the contingency fee agreement or the appropriate amount of the respondent's account to have a bearing on any part of the "success" or "failure" in the instant case. The costs of those applications must be determined independently.

Conclusion

- [37] The petitioner is entitled to his costs of the action and this application on Scale 3.

"Bryan F. Ralph, J."

The Honourable Mr. Justice Bryan F. Ralph

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/03/05/2003bcsc0596.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kelly-v-mcmillan-2002>

Prepared on 28 October 2026 · Esheria