

CANADA / JUDGMENT

Levere v. Moore

2020 BCSC 2083

COURT

Supreme Court of British Columbia

DECIDED

29 December 2020

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2020 BCSC 2083 Levere v. Moore IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Levere v. Moore, 2020 BCSC 2083 Date: 20201229 Docket: 163311 Registry: Victoria Between: Mary Jill Levere and Leonard Arthur Levere Petitioners And Tracey-Ann Moore Executor of the Estate of Barbara Moore Respondent Before: The Honourable Mr. Justice Punnnett Reasons for Judgment on Costs Counsel for the Petitioners: J.C.M. Main Counsel for the Respondent: P. Harrison Written Submissions of Petitioners: December 4, 2020 Written Submissions of Respondent December 4, 2020 Supplementary Submissions of Petitioners: December 7, 2020 Supplementary Submissions of Respondent: December 7, 2020 Place and Date of Judgment: Victoria, B.C. December 29, 2020

- [1] The petitioners proceeded to the hearing of their petition on one issue. The matter was referred to the trial list. Reasons are indexed at 2020 BCSC 1656. The parties received leave to address costs. They have now done so. The respondent seeks her costs while the petitioners submit they should be in the cause.

Background

- [2] The matter relates to a family dispute over the sale proceeds of the former residence of the deceased Barbara Moore, the mother of the petitioner Mary Jill Levere and the respondent Tracey-Ann Moore, executor of the estate. The deceased was also survived by four other children, one of whom is now deceased.
- [3] After the petitioners filed a requisition for a hearing date of the petition, the respondent filed a requisition for a hearing of an application to amend the response and an application for the production of documents to be heard at the same time. However, given the referral to the trial list those applications were not pursued. Position of the Petitioners
- [4] The petitioners submit costs should be in the cause. Position of the Respondent

- [5] As one of the executors of her late mother's will, the respondent was obligated to collect estate assets and administer the estate. She seeks full indemnity costs of the petition or, in the alternative, double costs as a result of settlement offers made that should have been accepted by the petitioners. The respondent also seeks that costs be assessed forthwith in any event of the cause. Law and Discussion
- [6] At the hearing in issue, the petition was converted to an action pursuant to Rule 16-1(18): Powers of court
- (18) Without limiting the court's right under Rule 22-1 (7)(d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.
- [7] Rule 22-1 - Chambers Proceedings, provides:
- (1) In this rule, "chambers proceeding" includes the following:
- (a) a petition proceeding; Power of the court
- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
- (a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,
- (b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,
- (c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and
- (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.
- [8] The parties were directed to file new pleadings given the petition and response did not sufficiently fulfil the requirements of pleadings for trial.
- [9] The respondent argues she should receive her costs to be assessed forthwith, given the petitioners pursued the hearing of their petition when the matter was clearly not suitable for summary resolution. She points out both the deceased's former counsel and the respondent's former counsel were of the view a trial was required and that the judge conducting a trial management conference noted the same concern. Given the petitioners pursued the hearing despite such concerns, the respondent submits that an award of costs in any event of the cause to "promote or sanction litigation conduct" is justified (Fraser & Horn, Conduct of Civil Litigation in British Columbia, loose-leaf edition, chapter 38). The respondent also notes the estate assets consist of the funds in trust, hence the respondent has had to assume personal responsibility for the costs of the litigation in order to fulfil her duties as executor. The respondent further submits the fair result is for her to receive full

indemnity costs because she engaged in the litigation as executor and made reasonable and appropriate settlement offers. Alternatively she submits that she should receive double costs at Scale B.

- [10] The petitioners submit that costs follow the event, the issue was not decided and as a result the issue of costs must await trial. They rely on Rule 14-1(9):
- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [11] The respondent submits the petition proceeding is concluded and costs "must be awarded to the successful party" unless the Court otherwise orders (Rule 14-1(9)).
- [12] The respondent refers to *Pacific Aviation Academy of British Columbia v. Hassan* 2018 BCSC 979, where Jenkins J. considered a petition for judicial review of a Small Claims Court matter where a default judgement had been obtained and the petitioner sought to set it aside. The petitioner succeeded and Jenkins J. followed the normal "practice of awarding costs to the successful party in the judicial review" (at para. 8).
- [13] *Pacific Aviation* does not assist the respondent. In *Pacific Aviation*, a judicial review was concluded. Here the petition was neither determined nor concluded.
- [14] The respondent's claim for costs is premised on the assumption the petition is concluded. That is not the result of a transfer of a petition to the trial list. The proceeding has not been concluded and a new one commenced. It has simply been transferred. No determination has been made on the merits. As no decision has been made on the substance of the relief sought, the hearing was not an "ultimate hearing" of the issue. For example, an argument for consideration of offers to settle and for double costs assumes the petition has been determined by the court. As a result, the offers made are not relevant.
- [15] In *Preferred Nutrition Inc. v. Vanderhaeghe*, 2010 BCSC 1206, Bowden J. stated: 11 Furthermore, case authorities referred to by the plaintiff indicate that costs should generally not be awarded at the interlocutory stage as the outcome of the litigation is not known. (*Stiles v. Workers Compensation Board*, (1989) 38 B.C.L.R. (2d) 307, and *Interior Health Authority v. Sellin*, 2005 BCSC 1819. A similar approach was taken by Hinkson J. (as he then was) to costs in a Rule 18A application, as it then was, in *Elsen v. Elsen*, 2009 BCSC 1282, recognizing that the party seeking costs might ultimately be unsuccessful at trial. 12 As the plaintiff argued, additional and perhaps different evidence may be presented at the trial of this matter and, indeed, the trial judge may find in favour of the plaintiff and not agree with my decision in the interlocutory proceedings.
- [16] As no determination of the issues was made, costs shall be in the cause. "Punnett, R.D., J." The Honourable Mr. Justice Punnett

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