

CANADA / JUDGMENT

Lotimer v. Johnston

2020 BCSC 119

COURT

Supreme Court of British Columbia

DECIDED

31 January 2020

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2020 BCSC 119 Lotimer v. Johnston

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lotimer v. Johnston,

2020 BCSC 119

Date: 20200131

Docket: E171243

Registry: Vancouver

Between:

Holley Clara Lotimer, previously known as Holley Clara Johnston

Claimant

And

Ronald Harvey Johnston and John Johnston, Executor of the Estate of Evelyn May Johnston

Respondents

Before: The Honourable Mr. Justice Gomery

Supplementary Reasons for Judgment

Addressing Costs and Prejudgment Interest

Counsel for the Claimant:

P.J. Rowlands

Counsel for the Respondents:

B. Hardwick

J. Van Allen

Written Submissions Delivered:

Vancouver, B.C.

December 18, 2019, January 7, 2020 & January 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 31, 2020

Introduction

- [1] Pursuant to a separation agreement, Ms. Lotimer claimed to be paid a portion of an inheritance received by Ronald Johnston from his mother, May Johnston. Following a trial that commenced on November 4, 2019, I allowed the claim and ordered Ronald Johnston to pay Ms. Lotimer \$77,500 together with prejudgment interest. I dismissed Ms. Lotimer's claim against Ronald Johnston's brother, John Johnston, who is the executor of May Johnston's estate. My reasons for judgment are indexed at 2019 BCSC 2098.
- [2] As contemplated in my reasons for judgment, the parties have advanced written submissions concerning costs. They have also raised an issue concerning the calculation of prejudgment interest.

Costs

- [3] Ms. Lotimer seeks an order that Ronald Johnston pay costs until August 8, 2019 and double costs after that, based on an offer to settle made on that date. She also relies on a later offer to settle. She asks that any costs she must pay to John Johnston be set off against the costs payable by Ronald Johnston.
- [4] Ronald Johnston submits that he should only be required to pay ordinary costs to Ms. Lotimer. He also maintains that the costs order against him should take into account that Ms. Lotimer advanced a claim of unjust enrichment that was conceded in closing argument. John Johnston seeks special costs of the claim against him that was dismissed.
- [5] I will first address the position without reference to the offers to settle.
- [6] Ms. Lotimer was substantially successful at trial. She is presumptively entitled to recover costs of the entire action from Ronald Johnston, who was unsuccessful: Supreme Court Family Rules, R. 16-1(7); *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd, 2002 BCCA 454. These include the costs associated with the unjust enrichment claim. I cannot attribute time spent at the trial to the unjust enrichment claim independently of the contract claim and, in my view, it would not be just to apportion costs between the unjust

enrichment claim and the contract claim in the circumstances of this case; *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 31. It makes no difference that the unjust enrichment claim is one that was ultimately abandoned in final argument.

- [7] John Johnston is presumptively entitled to recover costs of the action from Ms. Lotimer, who was unsuccessful against him.
- [8] Ronald Johnston and John Johnston filed a common response to family claim and retained common counsel throughout the litigation. Obviously, they made arrangements amongst themselves to share the financial burden of the litigation. Neither is seeking the court's assistance in this regard. In these circumstances, it is appropriate to set off the costs payable by Ronald Johnston to Ms. Lotimer against the costs payable by Ms. Lotimer to John Johnston.
- [9] Special costs are payable where a litigant has engaged in reprehensible conduct that is deserving of reproof or rebuke: *J.M.C. v. Y.S.*, 2017 BCSC 59 at para. 7, citing *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), 119 D.L.R. (4th) 740 at paras. 11-17 and *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at paras. 21-75. This is a high threshold. John Johnston maintains that special costs are warranted because Ms. Lotimer's case against him was bound to fail from the outset. I do not agree that the mere lack of merit in the claim against John Johnston rendered Ms. Lotimer's conduct in pursuing the claim reprehensible, outrageous, or otherwise deserving of special reproof or rebuke beyond what is entailed in an ordinary costs award.
- [10] I turn to the offers to settle. Each was delivered pursuant to Supreme Court Family Rules, R. 11-1, with the offeror reserving the right to bring the offer to the court's attention following judgment on the merits. Ms. Lotimer relies on the following two offers:
- a) On August 8, 2019, Ms. Lotimer offered to accept a payment of \$75,000 from Ronald or John Johnston in exchange for a consent dismissal order and a release of all claims under the separation agreement. This offer expired on August 30, 2019; and
- b) On October 4, 2019, Ms. Lotimer offered to accept a payment of \$70,000 in exchange for a consent dismissal order but not a release of all claims under the separation agreement. This offer specifically contemplated a further claim to be advanced by Ms. Lotimer under the separation agreement and advanced an alternative offer to independently settle that claim. This offer was open for acceptance until October 17, 2019.
- [11] Both offers were made following document discovery and examinations for discovery. Neither was made on the eve of the trial. Both offers allowed substantial time for consideration. These were reasoned offers in which Ms. Lotimer's claim was explained.
- [12] Subrule 11-1(5)(b) authorizes me to award double costs in respect of steps taken following delivery of an offer to settle (among other possible orders), but I am not bound to do so. Subrule 11-1(6) directs me to consider:

- (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.
- [13] The analysis is the same under the Supreme Court Family Rules, R. 11-1 as under the Supreme Court Civil Rules, R. 9-1.
- [14] The first consideration is whether the offers to settle were ones that ought reasonably to have been accepted. The reasonableness of an offer is to be assessed at the time it was made, without regard to the result at trial, because a comparison to the result is carried out independently under subrule 11-1(6)(b): *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27; *Kobetitch v. Belski*, 2018 BCSC 2247 at para. 22 [Kobetitch]. Sometimes, the court may find that a defendant's offer was not one that ought reasonably to have been accepted but it is nevertheless appropriate that the defendant be awarded costs from the date of the offer; this was the outcome in *Bailey v. Jang*, 2008 BCSC 1372.
- [15] The consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the recipient to refuse it; *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at paras. 30-31.
- [16] Prior to trial, it would have been obvious to the parties that their dispute turned on the proper interpretation of ss. 40-42 of the separation agreement. There was not substantive disagreement as to what had occurred leading up to the making of the agreement and subsequently, but there was uncertainty as to what it all meant. Both sides had reasonable arguments to advance.
- [17] Ms. Lotimer's best reasonable case would result in her obtaining a judgment for \$85,000. A plausible alternative outcome would see her recover a judgment for just \$2,500. Ronald Johnston had tendered to Ms. Lotimer a cheque for \$2,500 before the litigation began. She had refused to cash the cheque and it was stale dated by the time the offers were made.
- [18] In short, the outcome of the case was uncertain and Ms. Lotimer's offers represented only a relatively modest discount from her best case. It was open to Ronald Johnston, acting reasonably, to view his case more positively. For these reasons, in my view, neither of Ms. Lotimer's offers was one that ought reasonably to have been accepted. It was not unreasonable for Ronald Johnston to refuse them.

- [19] The second consideration is the relationship between the terms of settlement offered and the final judgment of the court. Ms. Lotimer recovered judgment in an amount exceeding the amount of her offer to settle in both cases: by \$2,500 in the case of the August 8, 2019 offer; and by \$7,500 in the case of the October 4, 2019 offer.
- [20] Ronald Johnston argues that the August 8, 2019 offer must be understood as preserving to Ms. Lotimer her right to recover payment on the \$2,500 stale dated cheque he had tendered before the litigation began. I do not agree. Ms. Lotimer's offer was to accept \$75,000 "in full and final satisfaction of all claims herein". Had the offer been accepted, the defendants would have been justified in opposing any claim by her to recover an additional \$2,500 by virtue of the stale dated cheque.
- [21] Ronald Johnston argues that the October 4, 2019 offer cannot be considered as having a relationship to the amount recovered at trial because it contemplated further litigation under the separation agreement. While that it did, it was unequivocally an offer to settle this action on terms better than those obtained by Ronald Johnston at trial. He would have been better off had he accepted the offer than he is today.
- [22] The third consideration is the relative financial circumstances of the parties. The parties agree that this is not a significant consideration in this case.
- [23] The fourth consideration is any other factor the court considers appropriate. Under this heading, I may consider whether, even though it was not unreasonable for Ronald Johnston to refuse the offers, it would nonetheless have been reasonable for him to have accepted them; Kobetitch at paras. 26 and 49.
- [24] I think that the offers could reasonably have been accepted. As I have already noted, they were well-timed, substantive, reasoned, and offered some compromise. Ronald Johnston would have been better off, and he could have reduced the duration and expense of the litigation and freed up judicial resources had he accepted either offer.
- [25] I should have regard to the purpose of R. 11-1. It is intended to encourage parties to settle prior to trial by attaching costs consequences to a failure to accept an offer of settlement by which further legal proceedings could have been avoided, in an appropriate case; C.P. v. RBC Life Insurance Company, 2015 BCCA 30, leave to appeal ref'd, 36360 (10 September 2015).
- [26] The offer of August 8, 2019 was barely better than the result obtained at trial. The offer of October 4, 2019 represented an improvement of approximately 10% for Ronald Johnston over the result eventually obtained. Ronald Johnston had two weeks to consider the October offer. In all the circumstances, I think that double costs are appropriate from October 17, 2019. Setting off Ms. Lotimer's costs obligation to John Johnston, she will probably recover a net amount that will be slightly less than she would have recovered without an offer, had she not sued John Johnston. In my view, this is a just outcome.

Prejudgment interest

[27] As set out in my reasons for judgment, Ronald Johnston received from his mother gifts that constituted an inheritance contemplated by the separation agreement as follows:

- \$200,000 on October 22, 2010;
- \$100,000 received as a loan on September 30, 2010 and made into a gift by forgiveness of the loan in 2012;
- \$10,000 in July 2016, pursuant to his mother's will.

[28] Pursuant to s. 1(1) of the Court Order Interest Act, R.S.B.C. 1996, c. 79, prejudgment interest is calculated on the amount or amounts ordered from the date on which the cause of action arose until the date of the order. Ms. Lotimer maintains that her cause of action accrued when Ronald Johnston received these gifts, each constituting an inheritance. Mr. Johnston submits that Ms. Lotimer's cause of action did not accrue until his mother's death in January 2016, citing *Gould v. Royal Trust Corp. of Canada*, 2010 BCSC 16 at paras. 36-37, *aff'd* 2010 BCCA 512 [Gould] and *Clarke v. Rothwell*, 2018 BCSC 2413 [Clarke].

[29] I agree with Ms. Lotimer. Upon receipt of each gift constituting an inheritance, the separation agreement required Mr. Johnston to pay an amount equal to 25% of the gift to Ms. Lotimer. Mr. Johnston had use of the funds and Ms. Lotimer could have sued immediately, had she known of the gifts at the time.

[30] Mr. Johnston submits that "May Johnston's Last Will and Testament could have accounted for the inter vivos transfers and held Ron Johnston indebted to the estate". This submission is without merit. It was open to May Johnston to make a further gift to Mr. Johnston in her will (as she did) or to give him a share of her estate expressly taking into account the gifts he had already received on account of his inheritance. She was not in a position to claw back the gifts she had already made. With each additional gift to Mr. Johnston, additional entitlements accrued to Ms. Lotimer.

[31] Gould and Clarke do not call this analysis into question.

[32] In Gould, the trial judge held that a mother's estate was unjustly enriched as a result of personal services provided by a daughter in caring for her mother prior to the mother's death in the reasonable expectation of reimbursement in the mother's will. That cause of action accrued on the death of the mother because it was not until the death that it could be finally determined that the daughter would receive nothing under the will.

[33] Clarke is a case involving a claim by an estate against a beneficiary who breached duties owed to the deceased prior to her death and engaged in further misconduct as an executor of the estate. The estate suffered a loss that was realized when an estate asset was sold. Because of the misconduct, the estate received less for the asset than it should have. In those circumstances, prejudgment interest accrued from the date the loss was realized.

Disposition

[34] For these reasons, I order that:

- a) Ms. Lotimer is entitled to recover from Ronald Johnston ordinary costs of the action until October 17, 2019 and double costs after that;
- b) John Johnston is entitled to recover from Ms. Lotimer ordinary costs of the action;
- c) The costs payable by Ms. Lotimer to John Johnston are to be set off against the costs Ms. Lotimer is entitled to be paid by Ronald Johnston; and

Prejudgment interest should be calculated on the basis that the cause of action first accrued on October 22, 2010 (as to \$50,000), and was augmented in 2012 (as to \$25,000) and in July 2016 (as to \$2,500).

"Gomery J."

The Honourable Mr. Justice Gomery

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