
CANADA / JUDGMENT

Ostiguy v. Hui

2010 BCSC 641

COURT

Supreme Court of British Columbia

DECIDED

5 May 2010

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2010 BCSC 641 Ostiguy v. Hui

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ostiguy v. Hui,

2010 BCSC 641

Date: 20100505

Docket: M042823

Registry: Vancouver

Between:

Deborah Anne Ostiguy

Plaintiff

And

Katherine Hui and Victor Hui

Defendants

Before: The Honourable Mr. Justice Williams

Ruling re: Costs Application

Counsel for the Plaintiff:

E.P. Caissie

Counsel for the Defendants:

J.R. Walsh

Place and Date of Hearing:

New Westminster, B.C.

November 9, 2009

Place and Date of Judgment:

Vancouver, B.C.

May 5, 2010

Introduction

- [1] This is an application by the defendants seeking an order for costs against the plaintiff.
- [2] The trial of this matter proceeded before a jury, commencing August 10, 2009 and concluding August 18, 2009. The defendants admitted liability; the jury awarded the plaintiff the sum of \$10,000 non-pecuniary damages.

Background Facts

- [3] On December 12, 2003, the plaintiff, driving her automobile, was involved in a collision with a vehicle owned by one of the defendants and operated by the other. On July 7, 2004, she commenced a lawsuit against those defendants.
- [4] Initially, the plaintiff was represented by counsel, Mr. Knutson. He secured the original trial dates of August 2006.
- [5] On January 20, 2006, the plaintiff filed a notice of change of solicitor. One month later, on February 20, 2006, she retained new counsel, Mr. Kazimirski. Her first examination for discovery took place on March 10, 2006.
- [6] On July 28, 2006, the defendants delivered a formal offer to settle the plaintiff's claim for \$30,000 plus costs in accordance with Rule 37(22) and (37) of the Rules of Court (the "Offer").
- [7] In early August 2006, counsel for the plaintiff brought an application to adjourn the August 8, 2006 trial date, and that application was granted.
- [8] In March 2007, a new date was secured; the trial was scheduled to commence on September 22, 2008.
- [9] On March 28, 2008, the date following the scheduled continuation of the plaintiff's examination for discovery, the plaintiff delivered a notice of intention to act in person.
- [10] The continuation of the plaintiff's examination for discovery proceeded on July 14, 2008. On or about that date, the defendants admitted liability.

- [11] The September 22, 2008 trial date was adjourned on the first day of the trial on the application of the plaintiff. The plaintiff, although she had never filed a jury notice, indicated that she wished the case to be heard by a judge and jury.
- [12] The trial was rescheduled to commence April 27, 2009. It did not commence on that date because the plaintiff had not paid her jury fees in time. The trial was adjourned to August 10, 2009.
- [13] The trial proceeded with a jury, commencing August 10, 2009 and concluding on August 18, 2009. At the conclusion of proceedings, the jury awarded the plaintiff the sum of \$10,000 general damages.
- [14] The matter of costs was adjourned to a later date. The plaintiff retained counsel for the purpose of that application and submissions were made on November 9, 2009.

Position of the Defendants

- [15] The defendants say that they made a formal offer to settle which they delivered to the plaintiff on July 28, 2006. The sum offered (\$30,000) substantially exceeded the award of damages at trial.
- [16] In the submission of the defendants, the Offer tendered was clear, unambiguous, and substantially in compliance with the requirements of the Rules of Court. The defendants say that it should be recognized as a valid offer within the context of Rule 37B. They submit that the plaintiff should be entitled to recover her costs to the date of the Offer (July 28, 2006) and that she should be ordered to pay to the defendants their costs and disbursements from the date of that Offer forward.
- [17] In the event that the Offer is found not to comply with the requirements of the Rule, the defendants say that a reasonable application of the Court's discretion under Rule 37B, taking into account a number of applicable considerations, should lead to that same outcome. The considerations the defendants say are germane are these:
- (a) The Offer was one that ought reasonably to have been accepted by the plaintiff by late July 2006;
 - (b) The Offer significantly exceeded the judgment amount;
 - (c) It would not be unfair, financially, or otherwise, to the plaintiff to make the award sought by the defendants;
 - (d) The Offer was made under former Rule 37, thereby giving the plaintiff notice of the potential consequences of failing to accept it; and,
 - (e) The award sought by the defendants would be consistent with the principles established by the jurisprudence under Rule 37 and 37B.

Position of the Plaintiff

- [18] The plaintiff says that the Offer tendered by the defendants was defective; it was not in strict compliance with the requirements of Rule 37, and for the purpose of Rule 37B, should not be found to be an offer.
- [19] In the absence of an offer, the plaintiff says that there are good reasons for the Court to exercise its discretion to award her her costs on Scale B throughout.
- [20] As an alternative position, the plaintiff urges the Court to use the date on which the defendants admitted liability, July 14, 2008, and to award the plaintiff her costs to that point in time. Beyond that point, she contends that the defendants should be entitled to recover their disbursements only or, as a further alternative, she submits that each side should bear its own costs.

Issues

- [21] There is no dispute between the parties that the application of Rule 37B to the matter at bar must be determined.
- [22] There are two important issues to be resolved. The first is whether the Offer is an "offer to settle" as that term is defined in Rule 37B(1).
- [23] The second issue is a more general one: how the Court should exercise its discretion with respect to costs, taking into account the available options provided by the Rule and the various factors to be considered.
- [24] It should be noted that the defendants have not raised an argument seeking to invoke Rule 57(10), namely that because the plaintiff recovered a sum within the jurisdiction of the Provincial Court, under the Small Claims Act, R.S.B.C. 1996, c. 430, she is not entitled to costs other than disbursements. It should also be made clear that the defendants do not seek an order for double costs.

Discussion

- [25] The relevant provisions of Rule 37B are as follows:

RULE 37B -- OFFER TO SETTLE

Definition

- (1) In this rule, "offer to settle" means
- (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,

- (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule,

...

Offer may be considered in relation to costs

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

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
 - (a) deprive a party, in whole or in part, of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

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 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.

[26] The parties are at odds as to whether or not the Offer tendered in this case is properly considered an "offer to settle" within the meaning of the Rule. The plaintiff says it is not; the defendants say it is.

- [27] The parties are agreed that the Offer here was not in full and perfect compliance with the Rule as it was in force at the time.
- [28] Rule 37 required that an offer to settle was to be in Form 64 found at Appendix A of the Rules of Court.
- [29] Up to July 1, 2006, the relevant part of Form 64 was in this format:
- The _ [party] _ offers to settle this proceeding [or, the following claims in this proceeding] on the following terms [set out terms in consecutively numbered paragraphs] and costs in accordance with Rule 37(22) and (37).
- [30] On July 1, 2006, there was a change to Form 64. The change entailed "Rule 37(22) and (37)" being replaced with "Rule 37".
- [31] The Offer as tendered by the defendants was in the format of the earlier Form 64; it did not incorporate the change. In the result, it read as follows:
- The Defendants offer to settle the claim of the Plaintiff on the following terms:
1. Payment of the sum of Thirty Thousand Dollars (\$30,000.00), after taking into account Part 7 Benefits paid or payable, pursuant to Section 25 of the Insurance (Motor Vehicle) Act RSBC 1996, c. 231, and advances paid to date; and
 2. Payment of costs in accordance with Rule 37(22) and (37).
- [32] It seems that what happened here arose from an oversight on the part of the solicitor for the defendants, the failure to make the necessary change after July 1, 2006.
- [33] The plaintiff says that there is a line of authority that should be held to govern this situation, dictating that any deviance from precise compliance with the prescribed format is a proper basis to disregard the Offer. Specifically, she relies upon *Gosbjorn v. Krompocker Estate*, 2008 BCSC 1614, and *Lau v. Rai*, 2009 BCSC 696.
- [34] The defendants take the position that the determination of whether or not this is an offer entails a certain degree of flexibility, focusing upon the notion of whether the Offer was effectively communicated. They rely upon a line of authorities, principally *Mackenzie v. Brooks*, 1999 BCCA 623, and *Cimolai v. Hall*, 2007 BCCA 225.
- [35] In *Mackenzie*, the Court of Appeal dealt with an offer which complied with Form 64, but included one additional word, "for", preceding "costs". Starting from the basic proposition that, in order to rely on the benefits of Rule 37, the offer must strictly conform to the requirements of the Rule, the court then examined carefully the offer as it had been presented, concluding that its meaning was clear and that there was no ambiguity. It was found to be a valid offer.

[36] In *Cimolai*, the court was called upon to consider an offer which did not completely comply with Form 64. There, the offer in question proposed "to settle this proceeding for the total sum of \$9,900 in accordance with Rule 37(22) and (37) inclusive of interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79." Conspicuously absent was any reference to costs, and so the offer did not properly and fully comply with Form 64. The court recognized the general rule that an offer must be unambiguous and unconditional, citing *Mackenzie* as authority and also observed that the costs consequences of the offer are stipulated by law and follow as a matter of course. In the result, it was concluded that:

The absence of "costs" in the offer had no effect on the outcome. The sum for damages was plainly and unconditionally stated. Had the appellant taken the offer, Rule 37(22)(b) would have automatically entitled the appellant to costs up to the date of the offer.

[37] In the result, the court found the offer as tendered was sufficient to constitute an offer for the purpose of Rule 37.

[38] I turn now to the contrary line of authorities.

[39] In *Gosbjorn*, Gray J. had to deal with an offer which included a term that the parties would bear their own costs. She concluded, on the basis of well-established authority, that "an offer to settle that includes the terms that the parties bear their own costs is not in Form 64 and therefore is not a valid offer under Rule 37."

[40] The correctness of that decision seems unassailable. After all, Form 64 specifically requires that costs will be part of the offer. An offer that provides otherwise is materially at odds with the Rule.

[41] *Powers J.* followed *Gosbjorn* in *Lau*. There, the offer which the defendants had tendered purported to limit the recovery of costs to disbursements only. It was a matter not unlike the situation in *Gosbjorn*, and again the outcome seems entirely logical. The court observed "... an attempt to make an offer that escapes the obligation to pay costs is not an offer which complies with Rule 37 or Rule 37A".

[42] *Powers J.* recognized that there was some conflict in the authorities. He went on to deal with the issue of whether the offer in that case should be considered nevertheless in the exercise of his discretion under Rule 37B. In deciding that it should not, he offered this observation:

26. Having considered the issue afresh, I am persuaded by the reasoning in *Gosbjorn*. When the *Rais* made their offer Rule 37 applied. The offer did not comply with the strict requirements of Rule 37. Mr. *Lau's* counsel would have been correct in advising Mr. *Lau* that he need not be concerned about the offer or its consequences because it was non-compliant. It would be unfair for that situation to change retroactively. The object of encouraging settlement would not be accomplished by finding that Rule 37B operated retroactively to include non-compliant offers. Rule 37B specifically defines what constitutes an offer. That definition does not include a non-compliant offer made pursuant to Rule 37 or Rule 37A prior to July 1, 2008. I reach this conclusion after consideration of the conflicting decisions and with the greatest

respect for the judges who decided each case.

- [43] In my view, the factual circumstances in both *Gosbjorn* and *Lau* were significantly different than those at bar. In each case, the deficiency in the offer was material and not simply a matter of form: each made an offer that specifically sought to deprive the offeree of something that Rule 37, by way of Form 64, entitled them to. I consider that quite relevant to the outcome.
- [44] The plaintiff argues that, by not mentioning the other subsections of Rule 37, the defendants restricted what options were open to the plaintiff, and therefore the order is deficient. She also contends that *Mackenzie v. Brooks* should not be relied upon as it has been overtaken by other authorities.
- [45] Specifically, the plaintiff points out that Burnyeat J. in *Reddemann v. McEachnie*, 2006 BCSC 332 referred to the decision of the Court of Appeal in *Mackenzie v. Brooks* being effectively overruled by subsequent Court of Appeal decisions in *Brown v. Lowe*, 2002 BCCA 7, and *Cridge v. Harper Grey Easton & Co.*, 2005 BCCA 33. She then uses this statement to support the conclusion that by mentioning only Rules 37(22) and 37(37), the defendants' offer had the effect of depriving the plaintiff of the benefit of other subrules that she was properly entitled to have.
- [46] In fact, the statement of Burnyeat J. in *Reddemann* regarding the overruling of *Mackenzie v. Brooks* refers specifically to the need for an offer to settle to be reasonable in order to be effective. *Reddemann* involved a dispute where one of the defendants made a formal offer in the amount of \$1.00, and that was refused by the plaintiff. The claim against that defendant was dismissed and he sought double costs pursuant to Rule 37. The issue was whether an offer had to be reasonable in order to entitle a party to double costs. In *Mackenzie*, the court had stated at para. 21. that a purpose of Rule 37 was for parties to make and accept "reasonable offers".
- [47] This statement was relied on in subsequent cases to conclude that an offer had to be reasonable in order to bring itself under Rule 37 (and the consequences of not accepting such an offer). *Cridge* and *Brown* both state that if Rule 37 applies, then a judge does not have any discretion as to whether or not to apply the framework of the Rule. Therefore formal offers for a dollar can bring liability to pay a party double costs if not accepted and the claim is dismissed.
- [48] The specific holding that I take from *Mackenzie v. Brooks* (and from *Cimolai*) is that absolute letter-perfect compliance with the prescribed form is not essential. It is however necessary that the offer be clear, unambiguous and unconditional. I do not understand *Reddemann* to have brought that proposition into any doubt.
- [49] Accordingly, I do not see how these authorities support the argument of the plaintiff. Nothing in these cases speaks to the unavailability of specific subrules outside of what is mentioned in the formal offer to settle.

- [50] In many cases dealing with Rule 37, the offer process under the Rule has been described as cost-focused (Cridge at para. 23 and Mackenzie at para. 24). In *Sangha v. Azevedo*, 2004 BCSC 750, aff'd 2005 BCCA 184, the court stated that by mentioning Rule 37, the opposite party is put on notice that double costs could be pursued if the offer is refused. All of these cases took place when Form 64 specifically referred to subrules 22 and 37 but no others. The matter of double costs is addressed in subrule 24, which is not mentioned in Form 64. Nevertheless, many cases are litigated regarding the applicability of this provision, despite there being no mention of it in the formal offer to settle.
- [51] Statements are found in some of the cases suggesting that once Rule 37 is "in play", all subsections of the Rule are applicable. Finch C.J.B.C. in *Brown* dissented on the issue of whether a formal and informal offer to settle regime operated in tandem. In his judgement, at para. 107, he stated "If a party chooses to operate with the Rule 37, all of its provisions must apply." This quote has been relied on in *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2002 BCSC 396 at para 14; *Fulton v. Fulton*, 2002 BCSC 1194 at para. 33. In addition, in *Reddemann*, the court stated at para. 12, "I am also satisfied that nothing turns on the fact that the offer to Settle was said to be made pursuant to Rule 37(22) rather than pursuant to Rule 37(2) or Rule 37 generally."
- [52] Finally, I would note that Rule 1(4) states that the Rules govern, not the offer to settle.
- [53] In the result, I am unable to accede to the plaintiff's argument. The Offer does not restrict the applicability of the subrules.
- [54] In conclusion on this point, I am satisfied that it is not necessary that an offer to settle comply perfectly with Form 64. However, it must be clear, unambiguous and unconditional. It cannot purport to deprive the offeree of rights that Rule 37 confers, such as the offers in *Gosbjorn* and *Lau* did.
- [55] Specifically, I find that the Offer made by the defendants in the case at bar was a valid offer to settle for the purposes of Rule 37B, and may be considered in the exercise of this Court's discretion in deciding the issue of costs.
- [56] That discretion is to be exercised in accordance with subrule (6). The specific criteria that may be considered have been enumerated above at paragraph 25.
- [57] Both the first and second enumerated factors are based on the policy principles which underlie the rules relating to offers to settle and costs. The concept is to promote reasonable conduct in the course of litigation. Specifically, it is to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *Mackenzie v. Brooks*.
- [58] The first consideration is whether the Offer was one which ought reasonably to have been accepted. That is, did the defendants conduct themselves reasonably in making the Offer? Did the plaintiff conduct herself reasonably in choosing not to accept it? In making this examination, it is important to avoid a simple comparison of the award to the Offer and

mechanically deciding. Here, I have no doubt that the plaintiff was quite sure her claim was substantial. However, by July 2008, virtually all of the medical evidence (other than a physiotherapist report relied on by the plaintiff) had been received and disclosed. Furthermore, the plaintiff had not sought medical treatment from either a general practitioner or a specialist in the three years prior to trial, and the absence of an employment-earning history must be taken to be a real concern for her income loss claim.

- [59] The plaintiff clearly had a sense of the worth of her claim which was quite inflated, certainly as compared to the view of the members of the jury. She believed it to be in the range approaching \$1,000,000, although that is not the yardstick by which this factor should be measured. That said, on a fair reflection, it is reasonable to conclude that the Offer was one which was within the range of results that an objective observer might reasonably have expected to ensue, although I am not certain that it would be fair to say that she was outrageously irresponsible in declining to accept the defendants' Offer.
- [60] The plaintiff has advanced a number of submissions on this issue:
- (a) The plaintiff argues that consideration of this factor must take into account that the plaintiff does not recall receiving the Offer allegedly delivered to her former counsel, an offer apparently delivered when her former counsel was applying for an adjournment of the date first set for trial. It will be recalled that this counsel subsequently withdrew on the basis of lack of instructions.
 - (b) It is also submitted that the plaintiff suffers from an obviously serious case of Attention Deficit Disorder, a fact that would be "apparent to counsel for the defence" after the examination for discovery of the plaintiff on February 20, 2006 and discovery of medical documents.
 - (c) Further, it is contended that the jury, in awarding the plaintiff only \$10,000 in general damages, was likely affected by the obvious difficulty the plaintiff had, as a self-represented litigant, in presenting her case in accordance with the rules of evidence.
- [61] With respect to the first of these points, there is no evidence before me of her knowledge of the Offer or the circumstances under which it was received. Furthermore, service of the Offer has been established. Accordingly, I consider myself obliged to proceed on the basis that the plaintiff was made aware of the Offer and had knowledge of it as she took conduct of the litigation.
- [62] As for the second point, if the thrust of the submission is to cast a higher than ordinary duty on defence counsel in these particular circumstances, then I must reject that. The plaintiff elected to represent herself in this litigation, and with that role comes responsibility for the conduct of her case.

- [63] I would add parenthetically that, based on my observations of the plaintiff at trial, while she may be somewhat disorganized, she appeared to take the matter of the presentation of her case seriously and by no means could it be concluded that deficiencies in her organizational focus rendered her ineffective.
- [64] Finally, with respect to the third point, I decline the subtle invitation contained within the submission, namely to conclude that the case was worth substantially more than the jury decided, and that they were in error.
- [65] The second criterion spelled out in Rule 37B deals with a comparison between the terms of the Offer and the final judgment of the Court.
- [66] This is somewhat related to the first consideration. While it can be argued that the plaintiff's recovery was one-third of the Offer tendered and that the monetary difference was \$20,000, an important perspective of the analysis must be with respect to the conduct of the defendants. Here, they made an offer that quite substantially exceeded the final outcome, whether measured in quantum or relationally. In that sense, they acted responsibly in trying to resolve the dispute without the necessity of a trial. That should not be ignored. Consideration of this factor weighs in favour of the defendants.
- [67] The third criterion is the relative financial circumstances of the parties. In this case, there is no evidence before me, although I am entitled to conclude from the evidence of the plaintiff at trial that she is a person of some substance. She testified there that she has landholdings worth a value in the multiples of millions of dollars, and that she derives income from that property. She is not what one would call impecunious.
- [68] I have no knowledge as to the circumstances of the defendants; I will proceed on the basis that they are ordinary people of ordinary means. I should note parenthetically that, although they were represented by an insurer, it is their circumstances and not those of the insurer which are to be considered.
- [69] Accordingly, I do not find this consideration to be determinative, but I am also prepared to conclude that it does not stand as a compelling bar to rescue the plaintiff from the responsibility of paying an appropriate award of costs.
- [70] Rule 37B also invites the Court to consider other circumstances that may be relevant.
- [71] In this case, the costs which the plaintiff is liable to pay are substantial. That is attributable in significant part to the fact that this litigation dragged on considerably. The plaintiff hired and subsequently discharged two different lawyers before proceeding to act for herself. There were a number of delays. Costs have mounted.
- [72] The law is clear that sympathy is not a basis to determine the outcome of matters such as this. Nevertheless, it is quite disconcerting to see the plaintiff's award of damages for her injury completely obliterated and overshadowed by a costs obligation, and for the consequences in fact to go further, to leave the plaintiff with a huge bill to pay as well.

- [73] At the same time, the Court must be cautious that the sound and basic principles that underlie the costs regime are not simply disregarded because the plaintiff chose to represent herself and chose to proceed as she did.
- [74] In the final result, the matter requires a balancing of a number of considerations and a significant application of judgment to try and fashion an outcome that is fair in the circumstances. Approaching the task in that fashion, I have decided as follows:
- (a) The effective date of the Offer will be July 14, 2008, when the defendants advised the plaintiff that liability was being admitted.
 - (b) Up to July 14, 2008, the plaintiff is entitled to recover from the defendants her costs and disbursements.
 - (c) For the time period following July 14, 2008, the defendants are entitled to recover from the plaintiff their disbursements and 60% of their costs.
- [75] In her submissions, the plaintiff has asked that the matter of costs orders for proceedings where there has been no specific order of costs already made by the judicial officer hearing the application be referred to a Registrar or a Master for assessment on appropriate evidence.
- [76] On the basis of her submissions, I conclude that is appropriate and so order.

"The Honourable Mr. Justice Williams"

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