

CANADA / JUDGMENT

Peace River Greenhouses Ltd., v. Taylor (District)

2016 BCSC 1455

COURT

Supreme Court of British Columbia

DECIDED

9 August 2016

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2016 BCSC 1455 Peace River Greenhouses Ltd. v. Taylor (District) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Peace River Greenhouses Ltd. v. Taylor (District), 2016 BCSC 1455 Date: 20160809 Docket: 22501 Registry: Fort St. John Between: Peace River Greenhouses Ltd. Plaintiff And District of Taylor Defendant Before: The Honourable Mr. Justice Ball Reasons for Judgment on Costs Appearing for the Plaintiff: L. Shurtliff Counsel for the Defendant: S. Twining L. Nilsson Written Submissions of Defendant: May 5, 2016 Written Submission of Plaintiff: June 7, 2016 Place and Date of Judgment: Fort St. John, B.C. August 9, 2016

Introduction

- [1] The plaintiff's claim in negligence was dismissed at trial following the close of plaintiff's case. At that time a no-evidence motion brought by the defendant was granted for reasons cited as 2016 BCSC 1448.
- [2] The remaining issue to be decided is the award of costs. The parties were required to make written submissions on this issue. The defendant's submissions were filed on May 5, 2016. The plaintiff's submissions were filed on June 7, 2016.

Background

- [3] The plaintiff, Peace River Greenhouses Ltd., commenced this action alleging negligence against the defendant, the District of Taylor and its volunteer fire department. The defendant was unable to extinguish a fire on the plaintiff's property that resulted in the substantial destruction of the greenhouse facilities.
- [4] The plaintiff was repeatedly made aware by this Court, and even by its own counsel, that in order to have any hope of success at trial, a report of a firefighting expert was essential to prove the standard of care of a volunteer fire department.

- [5] Following a Trial Management Conference, on February 17, 2016, the defendant presented the plaintiff with a formal offer to settle the claim in exchange for a waiver of costs pursuant to Rule 9-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. That offer remained open for acceptance until 5:00 p.m. on February 22, 2016.
- [6] The plaintiff responded via e-mail on February 21, 2016, with a rejection of the defendant's offer.
- [7] The plaintiff's proposed expert report was not served on the defendant until April 6, 2016. The defendant responded that it would be objecting to the admissibility of the report on numerous grounds, including the fact that it was not served in accordance with the 84-day time limit set out in Rule 11-6(3) for the service of such reports.
- [8] When the matter proceeded to trial on April 20, 2016, the Court declined to admit the plaintiff's expert report into evidence.
- [9] Thereafter, on April 21, 2016, the defendant brought a no evidence motion on the basis that the plaintiff had failed to adduce any evidence on the applicable standard of care. That motion was granted by the Court the next day.

Issues

- [10] The issues now to be determined are:
 - (a) entitlement to costs;
 - (b) the scale upon which the costs shall be calculated;
 - (c) whether double costs should be awarded based upon an offer to settle; and
 - (d) whether the Court should assess costs or have costs assessed by a registrar. Costs The Usual Rule
- [11] The usual rule is that the costs of a proceeding must be awarded to the successful party: Rule 14-1(9). That is the defendant in the case at bar. The onus of demonstrating that the court should depart from this rule rests on the unsuccessful party; here, the plaintiff.
Financial Circumstances
- [12] The plaintiff asks the Court to depart from the usual rule and decline to award costs due to the financial hardship that the plaintiff has experienced in this matter. With the greenhouse complex destroyed, it is submitted that the plaintiff has no revenue and is relying on the benevolence of its shareholders to pay taxes and operating expenses.
- [13] Putting aside the lack of evidence regarding the plaintiff's financial circumstances, financial hardship in itself is not a basis for departing from the usual rule: *Robinson v. Lakner* (1998), 159 D.L.R. (4th) 191 (B.C.C.A.). To conclude otherwise would undermine the rationale underlying Rule 14-1(9) and "result in the unacceptable proposition that costs in each case would be measured not by a party's success but by the personal financial circumstances of

the litigants": *Chen v. Beltran*, 2011 BCSC 41 at para. 15. While costs are generally a matter of discretion, that discretion must be exercised judicially, rather than capriciously: *Morris v. Doe*, 2011 BCSC 1053 at para. 30.

- [14] Accordingly, the defendant, as the successful party, will have its costs. Scale
- [15] When costs are awarded they are to be assessed in accordance with the scales in Appendix B to the Rules. Scale A is for matters of less than ordinary difficulty; Scale B is for matters of ordinary difficulty; and Scale C is for matters of more than ordinary difficulty.
- [16] In determining which scale of costs is appropriate for a given case, the court may take into account the list of considerations from Appendix B, s. 2(3), including (a) whether a difficult issue of law, fact or construction is involved. Additional relevant factors to consider in assessing the difficulty of the proceeding include:
- (a) the length of the trial;
 - (b) the complexity of the issues involved;
 - (c) the number and complexity of pre-trial applications;
 - (d) whether or not the action was hard fought with little or nothing being conceded along the way;
 - (e) the number and length of Examinations for Discovery;
 - (f) the number and complexity of Experts' Reports; and
 - (g) the extent of the effort required in the collection and proof of facts *Mort v. Board of School Trustees of School Board No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6.
- [17] The trial of the present case was short; just two days. Neither the issues nor the pre-trial procedures were overly complex. However, the defendant was required to obtain expert reports and respond to last minute adjournment applications due to the plaintiff's inability to produce its own expert report on the applicable standard of care.
- [18] Overall, I consider this case a matter of ordinary difficulty for which costs at Scale B are appropriate. Double Costs
- [19] When exercising its discretion in relation to costs, the court may consider an offer to settle: Rule 9-1(4). Where such an offer has been made, the court has discretion to award double costs for all or a portion of the subsequent steps taken in a proceeding: Rule 9-1(5)(b).
- [20] In deciding whether to award double costs based on an offer to settle, the court may consider the following factors listed under Rule 9-1(6):
- (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.
- [21] Double cost awards are a punitive measure designed to punish a party for failure to accept an offer that should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25. The Rules are meant to encourage parties to settle litigation and avoid the expense and delay, both private and public, resulting from unnecessary court proceedings: *Riley v. Riley*, 2010 BCSC 822 at para. 8. As noted in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16: It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.
- [22] Beginning with the first factor, whether the offer ought reasonably to have been accepted, it is to be assessed with reference to such factors as "the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided": *Hartshorne* at para. 27. This list of considerations is not meant to be exhaustive.
- [23] Here, the offer was made on February 17, 2016 and expired five days later, on February 22, 2016 at 5:00 p.m. It did not contain a monetary amount compensating the plaintiff for damages. Rather, the defendant agreed to waive their costs in exchange for a consent dismissal of the claim.
- [24] Neither of these features disentitles the offer from being considered by the Court in awarding costs in this case. An offer by a party to waive or forego costs if the other party abandons pursuit of its claim is an appropriate offer to settle, as is an offer that is withdrawn prior to the commencement of trial; the question is whether the offer should have been accepted while it remained open: *P.H. v. Canada (Attorney General)*, 2016 BCSC 173 at paras. 34-35.
- [25] The offer came at a time when serious doubt had been cast on the plaintiff's claim due to the lack of an expert report on the applicable standard of care. By the time of the Trial Management Conference, the plaintiff was already within the 84-day window within which the Rules specify that an expert report must be served. There had already been multiple prior adjournments granted for the explicit purpose of allowing the plaintiff to retain an expert. In these circumstances, it should have been apparent to the plaintiff that any expert

report they did obtain would be ruled inadmissible and further, that no additional adjournments would be granted for this purpose. Without an admissible expert report, the plaintiff's claim had no hope of success.

- [26] The offer referred to the fact that Silverman J. had suggested at the Trial Management Conference that there were "very significant problems" with the plaintiff's case, which created a "serious risk" that the claim would be dismissed at trial. It also contained an estimation of the amount of legal fees the defendant had already accumulated and provided an indication of the type of costs award the plaintiff would be exposed to if the claim proceeded to trial in the face of these deficiencies. This rationale explained the lack of compensation being offered and would have allowed the plaintiff to evaluate the quality of the offer.
- [27] Based on the foregoing, in my view the offer to settle was one that the plaintiff ought reasonably to have accepted.
- [28] Turning to the second factor, the relationship between the offer and the outcome of the trial, it is clear that the former was more favourable to the plaintiff than the latter: see *Mohamed v. Intransit BC Limited Partnership*, 2016 BCSC 321 at para. 41. The plaintiff's claim was dismissed at trial following a no evidence motion. As the unsuccessful party, the plaintiff is now subject to a costs claim, which could have been avoided if the offer had been accepted.
- [29] As for the third factor, no evidence was tendered concerning the financial circumstances of either party. It is therefore difficult to discern whether the plaintiff is as destitute as the submissions suggest. Nonetheless, the plaintiff's revenue will undoubtedly be impacted by the destruction of the greenhouses, although it still retains the land where those greenhouses once stood. Further, I consider that a municipal district will likely have superior financial resources than a greenhouse corporation. Accordingly, I find that this factor weighs against awarding double costs in this case.
- [30] When all the factors and circumstances are considered together, however, they lead this Court to conclude that it is appropriate to award the defendant double costs for all of the steps taken in this proceeding after February 17, 2016, when the offer to settle was made.
- Assessment
- [31] The defendant also requests that the Court conduct a summary assessment of the costs of the defendant without reference to a registrar.
- [32] Rule 14-1(4) provides: Assessment officer
- (4) The officer before whom costs are assessed is a registrar.

- [33] A judge has discretion to award costs and to fix the amount of costs, including the amount of disbursements: Rule 14-1(15). That discretion should be exercised sparingly, as noted in *Gichuru v Smith*, 2014 BCCA 414 at para. 154. Generally, the registrar is the court officer that is in the best position to determine costs based on their extensive "knowledge and experience in assessing legal bills": *Gichuru* at para. 154.
- [34] An exception may arise where the judge is intimately familiar with the litigation or when the time and expense of a registrar's hearing cannot be justified; for example, when there is a concern that the payor party will prolong the assessment of costs by insisting on a microscopic review of the bill: *Gichuru* at paras 107-109.
- [35] Neither of those circumstances exists in the present case. I was not involved with this case until the trial, which lasted a mere two days, and there is no reason to think that the time and expense of a proper assessment of costs cannot be justified. The plaintiff has not conducted this proceeding in a manner that would raise concerns about a hearing before the registrar and should have an opportunity to test the reasonableness of the defendant's fees.
- [36] Just because a judge has heard the trial does not mean that they should embark on an assessment of costs. The time they spend on this task is time that cannot be spent on other matters: *Gichuru* at para. 108.
- [37] The submissions of the defendant on costs include an extensive summary of disbursements attached to the bill of costs submitted. Attached thereto are 115 pages of receipts, which would be difficult for a judge to assess in any fair or conclusive manner.
- [38] The bill of costs of the defendant as submitted is therefore referred to a registrar sitting in Fort St. John, BC for assessment at an early date. The defendant shall include the costs and disbursements related to their submissions concerning costs within its bill of costs for the aforesaid assessment. "Ball J."

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