

CANADA / JUDGMENT

Pousette v. Janssen

2024 BCCA 274

COURT

British Columbia Court of Appeal

DECIDED

23 July 2024

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2024 BCCA 274 Pousette v. Janssen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pousette v. Janssen,

2024 BCCA 274

Date: 20240723

Docket: CA47471

Between:

Paul Patrick Pousette

Appellant

(Claimant)

And

Karen Lynn Janssen

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Justice Skolrood

Supplementary Reasons (Costs) to Pousette v. Janssen, 2023 BCCA 176 and

2023 BCCA 272, Vancouver Docket CA47471.

Counsel for the Appellant:

R.T.-L. Wong

Counsel for the Respondent:

K.J. Heinrichs

Place and Date of Hearing:

Vancouver, British Columbia

December 1, 2022

Place and Date of Judgment:

Vancouver, British Columbia

April 27, 2023

Place and Date of First Supplementary Judgment:

Vancouver, British Columbia

July 7, 2023

Supplementary Submissions on Costs Received:

May 10, 22, 24, and 27, 2024

Place and Date of Supplementary Judgment (Costs):

Vancouver, British Columbia

July 23, 2024

Supplementary Reasons of the Court (Costs)

Summary:

After the Court issued reasons for judgment clarifying how child support arrears were to be assessed, the parties were able to agree on the amount payable. The appellant accepts that the respondent was the substantially successful party on the appeal. The respondent applies to the Court for an order that she receive increased costs, largely on the basis that she made an offer to settle prior to the hearing of the appeal that was more advantageous to the appellant than the result he ultimately obtained. The appellant opposes the application, contending that only ordinary costs should be payable. Held: Application for increased costs dismissed.

Notwithstanding the settlement offer, an award of ordinary costs would not be unjust. The respondent is entitled to ordinary costs of the appeal. In light of the history of this matter, each party will bear their own costs of the application for increased costs.

Reasons for Judgment of the Court:

- [1] In the court below, the respondent applied for an order for retroactive child support. The issue between the parties was whether the appellant, as a resident of the United States, lived in a country that had significantly lower effective rates of income tax than those in Canada. The trial court found for the respondent, applying s. 19(1)(c) of the Federal Child Support Guidelines, SOR/97-175. This Court largely upheld the trial judge's determination, but did find that her analysis contained errors, and also found that the order that was entered was deficient in that it failed to provide an actual calculation of the amounts owing. In its judgment on the appeal, the Court set out the appropriate methodology for determining the amounts owing, and invited the parties to make submissions that would form the basis for a proper final order.
- [2] Unfortunately, the parties remained unable to agree on the appropriate disposition, and their supplementary submissions did not provide a basis upon which this Court could make a final order. Instead, the Court remitted the matter to the trial Court, identifying the deficiencies in the parties' submissions.
- [3] We are advised that after the Court's supplementary reasons were issued, the parties were able to reach agreement as to the amounts of retroactive support owing and did not have to reappear before the trial court. The only issue remaining is that of costs of the appeal.
- [4] The parties agree that Ms. Janssen was substantially successful on the appeal, and that she is entitled to her costs. She contends, however, that assessment of costs under the ordinary cost tariff would create an unjust result and applies for costs to be assessed as increased costs, pursuant to Rule 70 of the current Court of Appeal Rules, B.C. Reg. 120/2022 [Rules]. Mr. Pousette takes the position that assessment of costs under the ordinary tariff would not create an unjust result, and he argues that costs should be assessed under that tariff.
- [5] Ms. Janssen's primary basis for arguing that the award of ordinary costs would be unjust is that she presented a settlement offer to Mr. Pousette prior to the hearing of the appeal that would have been more favourable to him than the result that was achieved after the appeal. She also contends that Mr. Pousette's failure to respond in a timely manner to a draft order and draft bill of costs have hindered the progress of this matter.
- [6] Rule 70 is as follows:
- 70 (1) At any time before the costs for an appeal are assessed, a justice may order costs to be assessed as increased costs if the justice determines that assessment under the ordinary cost tariff would create an unjust result.
- (2) If costs are ordered to be assessed as increased costs, the registrar must
- (a) fix the fees that would have been allowed if an order for special costs had been made under Rule 71 (1), and

- (b) allow as costs
- (i) half of those fees, or
- (ii) a different proportion of those fees, as ordered by the court or a justice.

[7] The rule replaced Rule 60 of the former Court of Appeal Rules, B.C. Reg. 297/2001:

60 (1) If, because an offer to settle is made or for any other reason, the court or a justice determines that there would be an unjust result if costs were assessed under Scales 1 to 3 of section 3 (1) of Appendix B, the court or justice, at any time before the assessment has been completed, may order that costs be assessed as increased costs.

(2) If costs are ordered to be assessed as increased costs, the registrar must fix the fees that would have been allowed if an order for special costs had been made under Rule 61 (1), and must then allow 1/2 of those fees, or a higher or lower proportion as the court or justice may order.

[8] In *Cepuran v. Carlton*, 2022 BCCA 376, the Court discussed the considerations that are relevant under Rule 70 in determining whether an award of ordinary costs would be unjust:

[38] The test set out under this rule is the same as that set out in former Rule 60(1). The Court discussed the relevant considerations under that rule in *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176:

[10] Rule 60(1) provides that, "at any time before the assessment has been completed", the court may order that "costs be assessed as increased costs" if costs assessed under Scales 1 to 3 of Appendix B would be an unjust result. The threshold issue for awarding increased costs is whether ordinary costs, at Scales 1, 2 or 3, would be unjust in the circumstances. Relevant considerations include substantive and procedural complexity and a significant disparity between actual and recoverable costs under the relevant tariff. They do not include a consideration of reprehensible conduct, but rather, are grounded in indemnity: *Bronson v. Hewitt*, 2014 BCCA 514 at paras. 11 and 54; and *Salt Spring Island Local Trust Committee v. B. & B Ganges Marina Ltd.*, 2009 BCCA 48 at para. 9. The onus is on the applicant requesting an order of increased costs to demonstrate that this extraordinary award is merited. Generally, a claim for increased costs should be included in the relief sought, however failure to do so is not determinative: *Dawson v. Dawson*, 2013 BCCA 344 at para. 8; *Doig v. Laurant Holdings Ltd.*, 2003 BCCA 487 at para. 10; *Okanagan Exteriors Inc. v. Perth Developments Inc.*, 2002 BCCA 115 at paras. 3 and 4; and *JJM Construction Ltd. v. Sandspit Harbour Society*, 2000 BCCA 93 at para. 4.

[11] Increased costs have been awarded where the issues raised in the appeal were complex; the issues extended beyond the immediate interests of the parties; the conduct of the parties unnecessarily lengthened the proceeding by, for example, raising spurious issues; where there was significant disparity between actual costs and recoverable costs, although this alone is not determinative; and any other factor that, together with these factors, would have

resulted in an injustice to the successful parties: *Asselstine v. Manufactures Life Insurance Co.*, 2005 BCCA 465 at paras. 5 and 6; *Vukelich v. Mission Institution*, 2005 BCCA 75 at para. 62; *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 252 at paras. 39–40, and 42; and *Graham v. Moore Estate*, 2003 BCCA 601 at para. 6(3).

- [9] Former Rule 60(1) specifically recognized a settlement offer as a factor that might lead to an award of increased costs. Rule 70 does not do so. When *Cepuran* referred to Rule 70 as setting out the same test as was applicable under former Rule 60(1), it was referring to the general requirement that "assessment under the ordinary cost tariff would create an unjust result". *Cepuran* was not specifically directed to the question of whether settlement offers occupy the same place under the new rule as they did under the old one.
- [10] Under former Rule 60(1), the Court, in considering whether a settlement offer rendered assessment under the ordinary cost tariff unjust, suggested that considerations included the reasonableness of the offer, whether it ought to have been accepted, and whether the appeal was based on tenuous grounds (see *Doig v. Laurand Holdings Ltd.*, 2003 BCCA 487). In subsequent cases involving settlement offers, increased costs awards have generally been made only where the grounds of appeal were similarly tenuous, or where a party's conduct of the appeal manifestly wasted resources (e.g., *Grape Expectations Wine Emporium Inc. v. Haslam*, 2013 BCCA 377; *Baran v. Pioneer Steel Manufacturers Limited*, 2022 BCCA 126).
- [11] Even under the former Rule, the Court emphasized that the applicant for increased costs had to establish that a costs assessment under the ordinary cost tariff would be unjust (see *Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd.*, 2012 BCCA 204). In *567893 B.C. Ltd. v. Aasen*, 2008 BCCA 303, Justice Hall, speaking for the Court, expressed reluctance to extend the reasoning in *Doig* to a case in which the appeal was arguable rather than tenuous:
- [23] The respondents *Rayner* and *Doucet* seek an award of increased costs in this Court. The case of *Doig v. Laurand Holdings Ltd.*, 2003 BCCA 487, 186 B.C.A.C. 239, was cited and relied upon. In effect these respondents submit the appeal taken in their case lacked any substance. In the present case, while the appeal against these respondents was not successful in the result, I consider that the grounds advanced were arguable. This Court is effectively the court of last resort for most appeals and I am always hesitant to deter access by litigants to this Court except in clear cases. I base my refusal to order an award of increased costs to the respondents in this case on the circumstance that, in my view, this case is not factually the sort of case that should attract such an award. It is at a considerable remove from the factual situation extant in *Doig*. I would not therefore accede to the request of these respondents concerning an order for increased costs.

- [12] The omission of any mention of offers to settle in Rule 70 does not mean that such offers are irrelevant to a determination of whether assessment of costs under the ordinary tariff would be unjust. It is, however, a recognition that an offer of settlement, alone, will not normally be enough to engage the Rule. Ordinarily, such an offer will be relevant on an application for increased costs only where the appeal was a tenuous one, or other factors show unequivocally that the offer ought to have been accepted.
- [13] In the case before us, the appeal was far from frivolous, and, while ultimately rejected, was not "tenuous". Indeed, the respondent acknowledged, and the Court found, that the judge made errors in her reasons, though they ultimately did not affect the result.
- [14] On an application for increased costs based on the rejection of an offer of settlement, the nature and circumstances of the offer must be considered carefully. In this case, the offer was tendered only after the appellant had filed his factum. The respondent acknowledged some errors in the trial judge's approach, and (as the order had not yet been entered) suggested that the parties agree to re-appear in front of the trial judge and have her rehear the matter. In the alternative, the respondent offered to accept a payment of \$70,000, inclusive of arrears of child support and s. 7 expenses and costs of the appeal.
- [15] It is not at all clear that returning to the trial court at that stage would have resulted in an expeditious and final resolution of the dispute. It is doubtful that it would have been more efficient than an appeal, given that the appeal was nearly ready for hearing.
- [16] The amount of the offer -- \$70,000 -- compares with an amount owing for arrears ultimately agreed to be \$64,106.77. When the costs recoverable by the appellant in respect of the appeal are added to the arrears, the amount owed by the appellant exceeds the \$70,000 offer, but not by a wide margin.
- [17] The parties do not agree on the amount that would be assessed as costs of the appeal. In her original submissions, the respondent suggested her draft bill of costs was for \$21,198.03, but later acknowledged that that amount was in error (it referred to the draft bill of costs in the trial court, not the draft bill of costs in this Court). She revised the amount to \$13,081.09, based on Scale A of the current tariff. The appellant argues that the draft bill of costs, when assessed on the proper tariff, amounts to only \$7,481.09.
- [18] The appeal was commenced prior to the coming into force of the 2022 Rules. The applicable transitional provision of those Rules provides that, for pre-existing appeals, Rule 69 does not apply to the assessment of ordinary costs. The respondent's figures, which were based on Rule 69 and the new tariff, therefore, are incorrect. Instead, Rule 59 of the former rules (B.C. Reg. 297/2001) applies. That rule incorporated Appendix B of the former rules. Section 2 of Appendix B was as follows:

2 (1) If a party is entitled to costs, the costs must be assessed under Scale 1 unless the court or a justice otherwise orders.

- (2) In fixing the scale of costs, the court or a justice must have regard to the following principles:
- (a) Scale 1 is for matters of ordinary difficulty;
 - (b) Scale 2 is for matters of more than ordinary difficulty or importance;
 - (c) Scale 3 is for matters of unusual difficulty or importance.
- (3) In fixing the appropriate scale under which costs will be assessed, the court or a justice may take into account the following:
- (a) whether a difficult issue of law, fact or construction is involved;
 - (b) whether an issue is of importance to a class or body of persons, or is of general interest;
 - (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- [19] Having considered those matters, we are not convinced that the issues in this case would result in an award of costs other than on Scale 1 of the old tariff. Accordingly, the appellant's figure of \$7,481.09 for assessable costs appears to be close to the mark. In the result, the respondent will be entitled to a total of approximately \$71,587.80 inclusive of all arrears and the appeal costs. While this amount still exceeds the \$70,000 offer, the difference is fairly small.
- [20] In our view, this Court should exercise caution in awarding increased costs in a case such as this one. While there is a public interest served by encouraging parties to settle litigation amicably, there is also a public interest in clarifying the law where it has been wrongly stated or applied.
- [21] We are cognizant of the fact that, had the amount of \$70,000 been accepted, it is likely that the errors in the trial judgment would have remained uncorrected, and may have led future litigants and judges astray.
- [22] We are not convinced that, under the circumstances, the offer can be said to have been one that "ought to have been accepted". As we have indicated, we are also not of the view that the appeal was so lacking in merit as to be comparable to *Doig*.
- [23] The respondent raises other concerns with the litigation, pointing out that the appellant failed to respond to draft orders and her draft bill of costs in a timely manner. While there were some difficulties in that regard, we are not convinced that they were such as to justify an award of increased costs. As this Court has recognized many times, including under the current Rule, increased costs are not usual in this Court: see *Petrowest Corporation v. Peace River Hydro Partners*, 2023 BCCA 240 at para. 8; *Esteghamat-Ardakani v. Taherkhani*, 2024 BCCA 131 at para. 10.

- [24] We would observe that applications for increased costs appear to be more frequent in recent years than previously. Orders for increased costs are exceptional, and counsel should not make such applications without a clear rationale that explains why an assessment of ordinary costs would be unjust.
- [25] We are not convinced that assessment of costs under the ordinary tariff would be unjust and are prepared to award the respondent only ordinary costs of the appeal.
- [26] We are satisfied that the respondent's application for increased costs was, in part, a manifestation of her frustration with the appellant's lack of response to her draft order and draft bill of costs. We are prepared to recognize that such frustration, in this case, was caused, in large part, by the appellant's failure to communicate in the expected manner. While that failure was not so egregious as to justify an award of special or increased costs, we would give some recognition to it by ordering that each party bear their own costs of this costs application. The respondent is awarded her ordinary costs of the appeal. Each party will bear their own costs of the application for increased costs.

"The Honourable Mr. Justice Groberman"

"The Honourable Madam Justice Fenlon"

"The Honourable Justice Skolrood"

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