

CANADA / JUDGMENT

Roach v. Dutra

2010 BCCA 264

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 264

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Roach v. Dutra,

2010 BCCA 264

Date: 20100525

Dockets: CA036978 & CA037211

Docket: CA036978

Between:

Mary Carmen Roach

Respondent

(Plaintiff)

Appellant on Cross Appeal

And

Eduardo Dutra

Appellant

(Defendant)

Respondent on Cross Appeal

- and -

Docket: CA037211

Between:

Mary Carmen Roach

Respondent

(Plaintiff)

Appellant on Cross Appeal

And

Eduardo Dutra

Appellant

(Defendant)

Respondent on Cross Appeal

Before:

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Frankel

On Appeal from the Supreme Court of British Columbia, February 27, 2009

and May 27, 2009, (Roach v. Dutra, 2009 BCSC 229 and 2009 BCSC 693

Chilliwack Registry, Docket E6622)

Counsel for the Appellant:

D.J. Dykstra

Counsel for the Respondent:

B. Findlay

Place and Date of Hearing:

Vancouver, British Columbia

May 4, 2010

Place and Date of Judgment:

Vancouver, British Columbia

May 25, 2010

Written Reasons by:

The Honourable Madam Justice Prowse

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

- [1] Mr. Dutra is appealing from the order of a trial judge, made February 27, 2009, providing that Mr. Dutra pay lump sum support to Ms. Roach in the amount of \$30,000 on the basis that she was a "spouse" within the meaning of s. 1(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA").
- [2] Both Mr. Dutra and Ms. Roach are appealing the trial judge's order of costs made May 27, 2009.

ISSUES

- [3] Mr. Dutra submits that the trial judge erred in:
- (1) finding that Ms. Roach lived with Mr. Dutra in a marriage-like relationship from 2003 to 2006;
 - (2) finding that Ms. Roach brought her application for support within one year after the parties ceased to live together; and
 - (3) awarding costs of the proceedings to Ms. Roach, or, in the alternative, awarding double costs to Ms. Roach on the basis of an offer to settle which did not strictly comply with Rule 37B of the Rules of Court (the "Rules").
- [4] Ms. Roach submits that the trial judge erred in refusing to award her special costs on the basis of Mr. Dutra's failure to make full, proper and timely financial disclosure. She only seeks special costs if the trial judge's award of double costs is overturned.

BACKGROUND

- [5] Mr. Dutra and Ms. Roach met in 1999 when he was 40 and she was 29 years of age. At that time, Mr. Dutra was a dairy farmer and Ms. Roach was employed as a server and was seeking to qualify as an animal care worker with the B.C.S.P.C.A. Mr. Dutra had two children from a previous relationship who were living with their mother; Ms. Roach also had two children from a previous relationship who were living with her.

- [6] In December 2000, Mr. Dutra gave Ms. Roach an engagement ring and, in the spring of 2001, she and her two children went to live with him and his son in a trailer on his dairy farm. Mr. Dutra then built a house on the property (the "Beharrell Road property") and the parties and their children moved into the home in the summer of 2002.
- [7] Because of a strained relationship between Ms. Roach and Mr. Dutra's daughter, the parties agreed that they would continue their relationship but live in separate residences, at least temporarily. In November 2003, the parties jointly purchased another property five minutes away from the Beharrell Road property and Ms. Roach and her two children moved into that property (the "Page Two property") the same month. This home was registered in their joint names, with Mr. Dutra holding a 9/10 interest and Ms. Roach holding a 1/10 interest, in accordance with their respective contributions to the purchase price.
- [8] In August 2004, Mr. Dutra gave Ms. Roach another engagement ring (Ms. Roach had lost the first ring) and a wedding ring. Thereafter, their relationship continued until mid-September of 2006. Ms. Roach ultimately ended the relationship because she no longer believed that Mr. Dutra was going to marry her.
- [9] In October 2006, Mr. Dutra brought a proceeding for partition and sale of the Page Two property under the Partition of Property Act, R.S.B.C. 1996, c. 347. Thereafter, on March 2, 2007, Ms. Roach commenced an action against Mr. Dutra seeking spousal support, and compensation for unjust enrichment, or a constructive trust, in relation to the Beharrell Road property, the Page Two property and a rental property purchased by Mr. Dutra in November 2002. An order was made on December 17, 2007, that the two actions be heard together.

DISCUSSION

1) Section 1(1) of the FRA

- [10] The first issue on this appeal is whether the trial judge erred in finding that the parties were "spouses" within the meaning of s. 1(1) of the FRA during the period from November 2003, when the parties began living in separate residences, until their relationship ended in September 2006. This question encompasses the second issue of whether Ms. Roach brought her application for spousal support within the time set out in s. 1(1). Mr. Dutra does not challenge the trial judge's finding that he and Ms. Roach were living in a marriage-like relationship from December 2000 to November 2003.

- [11] Section 1(1) provides, in part:

1.(1) In this Act:

"spouse" means a person who

- (a) ...

- (b) ... lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together, and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,

...

- [12] In addressing the issue of whether the parties were spouses within the meaning of s. 1(1), the trial judge engaged in a detailed analysis of all aspects of the parties' relationship. He canvassed numerous authorities, including *Gostlin v. Kergin* (1986), 1 R.F.L. (3d) 448, 3 B.C.L.R. (2d) 264 (C.A.); *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623, 48 B.C.L.R. (3d) 265 (C.A.), leave to appeal dismissed, [1998] S.C.C.A. No. 238; and *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). He also considered authorities which dealt with situations in which the parties were found to have lived in a marriage-like relationship despite having lived separately for extended periods, including *McColl v. Scott*, 2001 BCSC 1109, and *Roch v. Payne*, [1999] B.C.J. No. 2739 (S.C.).
- [13] As earlier stated, Mr. Dutra does not now dispute that he and Ms. Roach lived together in a marriage-like relationship for approximately three years from December 2000 to November 2003. The question is whether the nature of their relationship changed in November 2003 when the parties decided to live in separate residences, albeit five minutes apart. Mr. Dutra submits that when this move occurred, the relationship ceased being marriage-like. In the alternative, he submits that, even if the parties' relationship could in other respects be regarded as marriage-like, Ms. Roach no longer qualified as a spouse within the meaning of s. 1(1) since the parties were no longer living together. In short, Mr. Dutra submits that, in order to qualify as a "spouse" within the meaning of s. 1(1), not only does the parties' relationship have to be marriage-like, but the parties also have to be living together, or, at the very least, intending to live together.
- [14] It is clear from the trial judge's reasons that he did not accept that the mere fact that the parties began to live in separate residences in these circumstances changed the fundamental nature of their relationship from marriage-like to non-marriage-like. In that regard, he referred to Ms. Roach's evidence that the intention of the parties in making this change was to strengthen their relationship, not to end it, or transform it into something fundamentally different than it was before.
- [15] The trial judge set out many, but not all, of the factors upon which he relied in concluding that the parties were spouses after November 2003 at paras. 91-94 of his decision:

... The evidence of their continuing emotional commitment to each other [after they began living in separate houses in November 2003], their continuing mutual expectations of fidelity, their continuing presentation to friends and family as a couple, and their joint vacations all militate in favour of finding that the parties intended to continue their marriage-like relationship.

Between the fall of 2003 and September 2006, Mr. Dutra continued to provide economic support to Ms. Roach. He gave her cash from time to time and paid her telephone and hydro bills for the Page Two property. Throughout their relationship, Mr. Dutra permitted Ms. Roach to use his bank card to make purchases for herself, for her own children, and to purchase groceries and household items.

Before and after the plaintiff moved to the Page Two property, Ms. Roach and Mr. Dutra provided care to each other's children. Mr. Dutra developed a close relationship with the plaintiff's daughter, and became a father figure to her. Mr. Dutra's children went camping with the plaintiff and her children.

Until September 2006, when they separated, the plaintiff and the defendant continued their marriage-like relationship. They saw themselves, and were seen by others, to be a couple who were engaged to be married. Mr. Dutra willingly provided financial support for Ms. Roach and she, with his consent, continued to be economically dependent upon him during the time they maintained separate residences. Their mutual expectations of fidelity continued after the acquisition of the Page Two property. They continued to share their lives, and intended to live in a marriage-like relationship. The plaintiff and the defendant were "spouses" within the meaning of subsection (b) of the definition of that term in s. 1(1) of the FRA until they separated in mid-September 2006.

[16] In my view, there is no basis for interfering with the trial judge's conclusion that the parties were spouses within the meaning of s. 1(1) of the FRA. The question of whether parties are living in a marriage-like relationship is largely fact-driven and depends on the individual circumstances of each case. Here, I am satisfied that the trial judge properly applied the legal test set out in s. 1(1) of the FRA in relation to the unique facts before him. His findings of fact turned, in part, on findings of credibility. In that regard, the trial judge found that Mr. Dutra tended to minimize the extent of his commitment to the relationship. At para. 51 of his decision, the trial judge stated:

The defendant [Mr. Dutra] also asserted that the relationship only lasted for another three or four months after he gave Ms. Roach the two rings in the summer of 2004. I reject Mr. Dutra's evidence on this point. I accept the testimony of the plaintiff that the parties continued their relationship after they purchased the Page Two property, and remained a couple, despite strains in the relationship from time to time, until September 2006. ...

[17] I am not persuaded that the wording of s. 1(1) precludes a finding that these parties, who had been living in a marriage-like relationship for three years, cannot be found to be spouses within the meaning of that section simply because they began living in separate residences with a view to preserving their relationship. In adopting the trial judge's conclusion in that respect, I agree with the following passage at paras. 18-19 of the reasons for judgment of Master Groves (as he then was) in *McColl*, where, in dealing with a similar argument, he stated:

... Clearly the words, "live together" must be read in the context of the entire section where it talks earlier about living with another person in a marriage-like relationship for a period of two years. To suggest that if parties are by reasons of, say, health, hospitalization, overseas attendance in the military or for general work purposes, as is the case here, temporarily separate that the "spousal definition clock", for lack of a better term, then starts running, would result in numerous couples essentially ceasing to be spouses as a result of this temporary separation. The legislature in my view would have to make that intention clear.

If for all purposes mere physical separation ends a "marriage-like" relationship, clear wording to that effect would be required. The general purpose of the Family Relations Act is to recognize spouses who make a commitment to one another and to apportion support consequences of that commitment between them upon relationship breakdown. The legislation requires that they live in a marriage-like relationship of at least two years. To say that all marriage-like relationships involve continuous cohabitation, that a temporary interruption for health or work reasons in that continuous cohabitation ends a spousal relationship, is not in my view what the legislature intended.

- [18] In that case, Master Groves found that the parties continued to view themselves as spouses and expected their relationship to continue as such despite their physical separation.
- [19] In this case, however, Mr. Dutra says that there is no evidence that the parties separated with the intention of resuming cohabitation and that their choice to live in separate residences was not imposed by external circumstances such as illness or work-related demands.
- [20] It is apparent, however, that the trial judge accepted that the parties decided to live in separate residences as a temporary measure to alleviate the tensions between Ms. Roach and Mr. Dutra's teen-age daughter. It is implicit in his reasons that he accepted Ms. Roach's evidence that the purpose of the move was to maintain the relationship, not to change its essential nature. In effect, it could be said that the parties continued to live together in a marriage-like relationship, but in two homes, rather than one. The trial judge found that they continued to relate to one another in much the same way as before; that is, as spouses.
- [21] In effect, Mr. Dutra is asking this Court to retry the issue of whether the parties were spouses within the meaning of s. 1(1). In the absence of significant and identifiable error on the part of the trial judge, and I find none, there is no basis for doing so. There is no doubt that the facts of this case were unusual given the period that the parties lived under separate roofs before their relationship ended, but there were numerous indicia which supported the trial judge's conclusion that they were, nonetheless, spouses within the meaning of s. 1(1) and that they regarded themselves as such until their relationship ended in September 2006. As Mr. Justice Frankel stated, in speaking for the Court in *Austin v. Goerz*, 2007 BCCA 586, at para. 58, "there is no checklist of characteristics that will invariably be found in all marriages."

[22] Since I have concluded that the trial judge was correct in finding that the parties lived together in a marriage-like relationship within the meaning of s.1(1) of the FRA until September 2006, it follows that Ms. Roach brought her application for spousal support within the one year limitation period set forth in that section.

[23] I now turn to the trial judge's disposition of costs, which is challenged by both Ms. Roach and Mr. Dutra.

2) Costs

[24] The trial judge found that Ms. Roach had enjoyed substantial success in the litigation and awarded her costs against Mr. Dutra. His award of costs included an award of double costs for the final three days of trial based on a written offer to settle made by Ms. Roach on July 10, 2008 (four days prior to trial). He denied Ms. Roach's claim for special costs which she had sought on the basis of Mr. Dutra's failure to make timely and complete financial disclosure. He was satisfied that Mr. Dutra's conduct in that regard had increased the costs of the litigation for Ms. Roach, and took that into account in awarding her double costs, but he was not persuaded that this conduct justified an order of special costs.

[25] On appeal, Mr. Dutra submits that success in the litigation was evenly divided. He emphasizes that the amount of money Ms. Roach was ultimately awarded for her claims in relation to various properties in issue, including the Page Two property which was the subject of his partition proceeding, was substantially less than she had been seeking. He submits that the trial judge placed undue weight on the fact that Ms. Roach was successful in her claim for spousal support, and insufficient weight on Mr. Dutra's success in defending against Ms. Roach's unjust enrichment claims. In his view, the appropriate order with respect to costs should have been an order that each party bear his or her own costs.

[26] In his reasons on costs, the trial judge identified the issues before him as: (1) whether the parties were "spouses" within the meaning of s. 1 of the FRA; (2) if so, whether Ms. Roach was entitled to spousal support; (3) if so, in what amount; (4) whether Mr. Dutra was unjustly enriched by Ms. Roach's contributions to the properties in dispute, (5) if so, what was the appropriate remedy, and (6) how the proceeds of sale of the Page Two property should be divided. He observed that, in addition to establishing that she was a "spouse" under the FRA, Ms. Roach had established that Mr. Dutra's income for the purposes of spousal support was considerably higher than Mr. Dutra had indicated on his Form 89 Financial Statement (\$108,000 as compared with \$17,000), and she succeeded in obtaining compensation in relation to the Page Two property which exceeded the value of her registered interest. On the other hand, she was unsuccessful with respect to her claim for compensation in relation to Mr. Dutra's farm and rental properties. In summary, the trial judge found that Ms. Roach had enjoyed substantial success with respect to issues (1), (2), (3) and, to a lesser but significant extent, issue (6).

[27] In the result, after referring to relevant authorities on costs, the trial judge expressed his conclusion on costs at para. 27 of his reasons, as follows:

Taking into account all of the matters in dispute, and weighing the mixed results, I find that the plaintiff was substantially successful in both the family law proceeding and the partition action. The plaintiff succeeded on the critical issue of whether she and the defendant had a marriage-like relationship and were spouses within the meaning of the Family Relations Act. She obtained an award for spousal support and a share of the net proceeds of sale of the Page Two property substantially in excess of her registered one tenth interest in that property.

[28] The standard of review of a trial judge's order as to costs is highly deferential. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at paras. 42-43, Lebel J., speaking for the majority, stated:

The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and the need to act judicially on the facts of the case [citation omitted]. [The trial judge's] decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

As I observed in *R v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

[29] The trial judge was in the best position to determine the degree of success enjoyed by each party in light of all the issues and the evidence. He found that the issue which dominated the proceedings was Ms. Roach's claim to be a spouse within the meaning of s. 1(1) of the FRA. She succeeded on that issue and in her claim for an increased share of the proceeds of sale of the Page Two property, which was the subject of Mr. Dutra's partition proceeding.

[30] In all the circumstances, I am not persuaded that the trial judge erred in fact or in law in exercising his discretion to award costs to Ms. Roach. For that reason, I would not give effect to this ground of appeal.

[31] The next question is whether the trial judge erred in awarding double costs of three days of trial to Ms. Roach on the basis of her written offer to settle for an amount less than the amount ultimately awarded to her. Mr. Dutra took the position at trial, and on appeal, that Ms. Roach could not succeed in her claim for double costs because her offer did not comply with Rule 37B(1)(c) of the Rules, which had come into effect just eight days before the offer was made. He also submits that the trial judge erred in finding that Mr. Dutra's failure to make full and timely financial disclosure was a relevant factor in awarding double costs. (I

note that Mr. Dutra did not argue that the offer was defective under Rule 37B because it was a global offer to settle the two proceedings before the court. It is unnecessary, therefore, to consider that point.)

[32] Ms. Roach's offer to settle, made in a letter dated July 10, 2008, from her counsel to counsel for Mr. Dutra, was in the following terms:

Further to our discussions, we have instructions from our client to accept \$70,000 from your client as full and final settlement of all claims in the two above noted actions.

We reserve the right to bring this letter to the attention of the judge as a matter of costs in accordance with Rules 37 and 37A.

[33] As noted by the trial judge, Rules 37 and 37A were repealed and replaced by Rule 37B which came into force on July 2, 2008, B.C. Reg. 130/2008, as amended July 1, 2009, B.C. Reg. 165/2009.

[34] Rule 37B provides, in part:

37B(1) In this rule, "offer to settle" means

(c) an offer to settle made after July 1, 2008, that

(i) is made in writing by a party to a proceeding,

(ii) has been delivered to all parties of record, and

(iii) contains the following sentence: "The [name of party making the offer] reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding."

...

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

(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

...

(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;

...

(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 the 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. [Emphasis added.]

[35] It is not disputed that the terms of Ms. Roach's offer substantially complied with the requirements of an offer under Rule 37B(1)(c): it was made in writing; it was delivered to Mr. Dutra (through his counsel); and it contained a sentence in terms similar to those set forth in subrule (1)(c)(iii). Nor is there any suggestion that Mr. Dutra was misled by the offer in any way, or that he believed that he could disregard the offer with impunity with respect to costs because it did not track subrule (1)(c)(iii) word-for-word. Rather, Mr. Dutra takes what appears to be the highly technical point that if an offer does not contain the exact wording set out in subrule (1)(c)(iii), it does not come within the definition of an "offer to settle" within the meaning of Rule 37B(1) and, therefore, cannot attract an award of double costs.

[36] The trial judge did not accept Mr. Dutra's submission on this point. At para. 34 of his reasons for judgment, he stated:

The reference to "our client" in the first paragraph of the letter of July 8 [sic], 2008 clearly indicated that plaintiff's counsel was communicating an offer to settle on behalf of the plaintiff, Carmen Roach. Here, the plaintiff made her offer to settle shortly after Rule 37B came into force. Although it would have been preferable to frame that offer in the precise terms set out in Rule 37B(1)(c)(iii), the plaintiff's failure to do so is not fatal in this case. On a fair reading of the plaintiff's offer, it is clear that she was reserving the right to bring her offer to the attention of the court for consideration in relation to costs after the court had rendered judgment on all other issues in these proceedings. I find that the plaintiff's offer of July 10, 2008 was an offer to settle for the purposes of Rule 37B(1).

[37] The question, therefore, is whether the trial judge erred in finding that the offer to settle made by Ms. Roach constituted an offer to settle within the meaning of Rule 37B(1). Is any deviation from the precise wording of subrule (1)(c)(iii), no matter how slight, fatal to a successful claim for double costs?

[38] The main points in favour of a strict approach to the interpretation of subrule (1)(c)(iii) are: (1) the wording of the subrule, which defines an "offer to settle" to mean an offer which contains the sentence set out therein; and (2) the fact that, if an offer complies precisely with the Rule, there can be no doubt that it is an offer within the meaning of the Rule such that the party receiving the offer will know, with certainty, that failure to accept the offer may result in an order of double costs. In other words, as is usually the case, a strict interpretation of the Rule leads to greater certainty in terms of result than a more flexible interpretation.

- [39] The arguments against a strict interpretation of the subrule include: (1) the history of Rule 37B, which indicates that it was intended to be applied more flexibly than its predecessors (Rules 37 and 37A), and (2) the perceived injustice of applying an overly formulaic or technical approach where the offer is worded in terms effectively the same as those in the subrule, and where there is no reasonable prospect that the party receiving the offer was misled in any way by the fact that it did not comply strictly with the wording of subrule (1)(c) (iii).
- [40] In determining whether the trial judge erred in applying a flexible approach to the interpretation of this subrule, it is useful to recall that the object of the rules is "to secure the just, speedy and inexpensive determination of every proceeding on its merits" (Rule 1(5)), and that non-compliance with the Rules will often be treated as an irregularity, rather than a nullity (Rule 2).
- [41] In examining this question concerning the interpretation of Rule 37B, it is also useful to briefly review some of the history giving rise to its enactment.
- [42] In 1993, written offers to settle which sounded in double costs were introduced into the Rules. Prior to that time, then Rule 37 provided for payments into court by defendants and third parties, and Rule 57(13) provided for settlement offers by plaintiffs, with costs consequences, in certain circumstances. Written settlement offers in the form of "Calderbank letters" (named after the English matrimonial case, *Calderbank v. Calderbank*, [1975] 3 All E.R. 333 (C.A.)) were also in use in British Columbia to some extent as a means of encouraging settlement by providing costs penalties in the discretion of the court. These "without prejudice" letters provided that the person making the offer reserved the right to bring the letter containing the offer to the attention of the trial judge in relation to costs following judgment.
- [43] In 2002, however, the majority in *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246, held, in obiter dicta, that Rule 37 constituted a complete code with respect to costs. The effect of this decision was to oust Calderbank letters as a settlement tool and to preclude the Court from exercising any discretion with respect to offers to settle under Rule 37, except as expressly provided for in the Rule. (There was a limited provision for the exercise of discretion in subrule 37(27) where the offer had not been made in a timely fashion.)
- [44] The view of the majority in *Brown* was adopted in *Cridge v. Harper Grey Easton*, 2005 BCCA 33, where the Court stated (at paras. 20, 23 and 24):

In *Brown v. Lowe* (2002), 97 B.C.L.R. (3d) 246 [paragraph] 153, 2002 BCCA 7 [paragraph] 154, Southin J.A., with whom Ryan J.A. concurred, expressed the view, albeit in obiter, that Rule 37 precludes the exercise of any judicial discretion in its application save for the discretion it specifically affords (see sub-rule 27). Southin J.A. also endorsed the interpretation of Rule 37 in *Jamieson v. Duteil* (2001), 92 B.C.L.R. (3d) 208, 2001 BCCA 516, where, also in obiter, it was said, at para. 34, that if a plaintiff falls within sub-rules (23) to (26) costs follow those sub-rules leaving no discretion to the trial judge.

...

While, subject to abiding by established principles, a Supreme Court judge has a broad discretion in awarding costs, it remains open to the Lieutenant Governor in Council in promulgating the Rules of Court to restrict the exercise of that discretion as may be appropriate where it is thought that to do so will achieve a desired objective. The purpose of Rule 37 is to encourage the settlement of litigation through prescribed consequences in costs as in sub-rule (24). Given that the sub-rule provides for the litigants' entitlement to costs while affording no discretionary alternative, I consider it clear that there is no room for judicial discretion where sub-rule (24) applies.

Rule 37 is, as stated in *Brown v. Lowe*, a complete code. ... It is important that the Rule be uniformly applied to give effect to its purpose. Litigants must be able to make offers of settlement under the Rule with confidence that the Rule will be applied when costs are awarded.

[45] The Court in *Cridge* went on to emphasize that, if an offer to settle was valid, the court had no discretion to do anything other than award costs in accordance with the Rule. (See, also, *Jawanda v. Jawanda*, 2007 BCCA 93, and *Kurylo v. Rai*, 2006 BCCA 176, where this Court held that there was no discretion in Rule 37 to relieve against double costs triggered by unreasonable offers involving monetary claims which had no prospect of being accepted.)

[46] On July 1, 2003, Rule 37A was enacted to address offers to settle in all circumstances not governed by Rule 37. It appears to have been enacted to meet some of the criticisms made in relation to the rigid application of Rule 37, by effectively reinstating the *Calderbank* letter as a settlement option in circumstances in which Rule 37 did not apply.

[47] Rule 37A provided, in part, as follows:

37A(1) In any circumstances to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.

(2) If an offer of settlement has been delivered under subrule (1) and brought to the attention of the court, the court may

(a) award costs to the offering party in an amount not greater than the costs to which the party would have been entitled had the offer been made under Rule 37.

[48] Subrule 37A(2)(a) provided the court with a discretion to award up to double costs if the offer were not accepted and the judgment exceeded the offer. Although it provided for the exercise of a relatively broad discretion, Rule 37A was limited in its application, since it only applied where Rule 37 did not. There were also cases in which it was not clear which Rule applied.

- [49] What many regarded as an unsatisfactory and overly rigid regime under Rules 37 and 37A resulted in the repeal of those Rules and the enactment of Rule 37B. Rule 37B(1)(c)(iii) incorporated language which was very similar to the language of Rule 37A(1) which, in turn, conformed to the general language contained in a Calderbank letter. The principal difference was that Rule 37B(1) defined an offer as one including the statement set forth in (1)(c)(iii), whereas Rule 37A simply required the statement to be contained in the offer, as was the case with Calderbank letters. I consider it unlikely that the difference in wording between Rule 37A and Rule 37B(1) was intended to have any practical significance. There is nothing in the history leading up to the promulgation of Rule 37B of which I am aware that indicates it was intended to alter the Calderbank approach to settlement offers reflected in Rule 37A.
- [50] It is notable that Rule 37B provides for the exercise of a broad discretion by trial judges and provides guiding principles to apply in the exercise of that discretion. In that respect, Rule 37B is a clear movement away from the narrowly formulated, rigidly applied approach to double costs which had applied under Rule 37, in particular. (I note as a matter of interest that the anticipated Supreme Court Civil Rules, B.C. Reg. 168/2009, which take effect July 1, 2010, contain a costs rule (Rule 9-1) in essentially the same terms as Rule 37B.)
- [51] The interpretation of Rule 37B(1)(c) has met with mixed results in the B.C. Supreme Court. (See, for example, *Stanger v. Dehen*, 2010 BCSC 484, which follows the trial decision in this case, as contrasted with *Lau v. Rai*, 2009 BCSC 696, and *Hall v. Mougan*, 2009 BCSC 1667, which have adopted a more strict interpretation of this provision.)
- [52] As is evident from this discussion, it is my view that Rule 37B was intended to ameliorate the effects of the rigid application of Rule 37 adopted by this Court in its earlier decisions. It was also intended to apply to those offers not covered by Rule 37 which fell within the purview of Rule 37A. The emphasis on the court's discretion under subrules 37B(4), (5) and (6) would be undermined if subrule 37B(1)(c)(iii) was interpreted as requiring word-for-word compliance before what is obviously an offer to settle could be found to be an offer to settle under the Rule. In other words, it is difficult to accept that the flexibility built into subrules 37B(4), (5) and (6) was intended to be married to an inflexible definition under subrule (1) which permitted no deviation whatsoever from the language of subrule (1)(c)(iii). For example, surely it could not have been intended that the omission of the words, "for the consideration of the Court", or the substitution of the words, "for consideration by the Court", or some other proximate expression, would prove fatal to an offer under the Rule. That said, I am also of the view that the wording of the offer must be substantially compliant with the wording of subrule 1(c)(iii) such that no reasonable person could be misled as to the intent of the offer or the fact that it was an offer within the meaning of Rule 37B. In other words, the offer must be in writing, the wording must make it clear what party is making the offer and to whom it is made, and it must include the fact that the party making the offer is reserving the right to bring the offer to the attention of the court in relation to costs after judgment on all other issues in the proceeding.

- [53] In my view, this offer satisfies all of these criteria. It is clearly made on behalf of Ms. Roach to Mr. Dutra, it is in writing, and it expressly reserves the right to bring the offer to the attention of the court on the issue of costs, which is done, in practice, once judgment has been rendered. (Again, I express no opinion on the issue of whether the offer may have been found to be non-compliant on the basis that it was a global offer to settle both proceedings. That issue is for another day.)
- [54] I endorse the trial judge's admonition that counsel would be well advised to ensure that the language of their offers complies precisely with subrule 1(c)(iii) (and, in future, Rule 9-1) to avoid any possibility of their offers being found deficient. In this case, the offer was made just days after the new rule came into effect. It may be that the same measure of flexibility will not be accorded to offers in the future which are non-compliant. That is especially so if it proves that flexibility in the application of the Rule undermines its purpose of encouraging settlement of disputes in a fair, timely and cost-efficient manner, in accordance with the object and spirit of the Rules as a whole.
- [55] In summary on this point, I am not persuaded that the trial judge erred in finding that this offer met the requirements of Rule 37B such that he was entitled to award Ms. Roach double costs for the final three days of trial. Nor am I persuaded that the trial judge was precluded from taking into account Mr. Dutra's failure to make timely and complete financial disclosure as a factor relevant to costs under Rule 37B(6)(d), namely, "any other factor the court considers appropriate" in determining that double costs was an appropriate disposition. While the trial judge did not find that Mr. Dutra's conduct was so egregious or reprehensible as to found an order for special costs, he did find that this conduct unreasonably prolonged the proceedings to the financial detriment of Ms. Roach.
- [56] As earlier noted, Ms. Roach is not pursuing her cross-appeal seeking special costs if this Court upholds her award of double costs.
- [57] In the result, I would not give effect to Mr. Dutra's appeal with respect to costs. For that reason, it is unnecessary to address Ms. Roach's cross-appeal other than to dismiss it.

DISPOSITION

- [58] I would dismiss Mr. Dutra's appeal and Ms. Roach's cross-appeal. Ms. Roach is entitled to her costs of the appeal. I would make no order as to costs of the cross-appeal.

"The Honourable Madam Justice Prowse"

I Agree:

"The Honourable Mr. Justice Lowry"

I Agree:

"The Honourable Mr. Justice Frankel"

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