

CANADA / JUDGMENT

Tri-X Excavating Ltd. v . Morman

2018 BCSC 2241

COURT

Supreme Court of British Columbia

DECIDED

18 December 2018

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2018 BCSC 2241 Tri-X Excavating Ltd. v. Morman IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tri-X Excavating Ltd. v. Morman, 2018 BCSC 2241 Date: 20181218 Docket: 14-1114 Registry: Victoria Between: Tri-X Excavating Ltd. Plaintiff And: David Larry Morman and Christine Marie Morman Defendants Before: The Honourable Mr. Justice Punnett Reasons for Judgment on Costs Counsel for the Plaintiff: J. Forsyth The Defendants in Person: D.L. Morman and C.M. Morman Place and Date of Submissions: Costs Submissions of the Plaintiff: Costs Submissions of the Defendants: Reply Costs Submissions of the Plaintiff: Further Reply Submissions of the Defendants: Victoria, B.C. September 27, 2018 November 9, 2018 November 14, 2018 November 14, 2018 Place and Date of Judgment: Victoria, B.C. December 18, 2018

Introduction

- [1] In reasons for judgment indexed at 2018 BCSC 1493 the plaintiff was granted judgment against the defendants and the defendants' counterclaim was dismissed. The parties requested leave to file written submissions on costs. Those submissions have now been received.
- [2] The defendants were self-represented at trial. In their submissions they criticized the conduct of the plaintiff and its lawyers and the way they conducted the litigation. At trial those criticisms and the defendants' counterclaim were rejected. In my view the defendants misconceived the adversarial nature of litigation.
- [3] At the outset I wish to clarify that no high-handed conduct by the plaintiff's then counsel was established by the defendants and the defendants' criticism of the plaintiff and its counsel was and is unfounded and unwarranted.

Background

- [4] The plaintiff's Builder's Lien claim was for \$26,250 and arose from an agreement to blast and level property behind and below the defendants' home. The defendants filed a counterclaim alleging breach of contract and negligence, and sought damages for remediation, over-blasting, loss of income, damages to some panels, survey costs and aggravated and punitive damages.
- [5] The defendants were represented by four different counsel from the filing of their statement of defence and counterclaim through discoveries. It is also apparent from the affidavit material filed by Mr. Morman that the defendants sought legal advice from at least two other sources.
- [6] They represented themselves at trial and thereafter.
- [7] The plaintiff seeks an order for costs for prosecuting its claim and defending the counterclaim. Because of an offer made on April 19, 2018, the plaintiffs seek double costs from that date.
- [8] The trial proceeded May 28 to June 1, 2018 and concluded on July 3, 2018 for a total of almost six days.
- [9] The formal offer made on April 19, 2018 was on these terms:
- a) Waiver by the plaintiff of its claim for payment under the contract of \$26,250;
 - b) Removal of the builders' lien from the defendants' property;
 - c) Payment to the defendants of \$100,000; and
 - d) A release and consent dismissal order signed by the defendants.
- [10] The formal offer was inclusive of costs and disbursement and was open for acceptance until 4:00 p.m. on May 25, 2018, the Friday before the commencement of the trial.
- [11] The defendants requested more details respecting the basis for the plaintiff's position on liability on April 23, 2018. That same day, plaintiff's counsel provided the defendants with further details along with case law bringing to their attention:
- a) The key issue facing the defendants of establishing causation of their alleged damages;
 - b) The difficulties the defendants would face proving the damage amounts claimed if liability was established, and the fact that even if they established liability, the amount proven would be significantly less than the \$100,000 offered;
 - c) That if they failed to accept the offer and were unsuccessful at trial the plaintiff would seek double costs from April 19, 2018 until the end of the trial.
- [12] The defendants did not accept the offer.

- [13] The defendants submit the plaintiffs are not entitled to double costs or in fact any costs. They raise issues of disclosure and abuse by the plaintiff of its superior financial position, and allege that the plaintiff's then counsel failed to ameliorate the disclosure problems alleged against the plaintiff. Law and Discussion Costs
- [14] Rule 14-1(9) of the Supreme Court Civil Rules provides: Costs to follow event
- (9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.
- [15] A successful party should only be deprived of their costs if they have acted disreputably or reprehensibly. A court cannot refuse to order costs out of a sense of fairness or sympathy or on a comparison of the relative economic strength of the parties (*McKay v. Marx*, 2012 BCSC 484 (Chambers), citing *R.L.L. v. R.L. and J.L.*, 2001 BCCA 386):
- [17] Finally, the defendants rely on *R.L.L. v. R.L. and J.L.*, 2001 BCCA 386, in which Hall J.A. acknowledged the broad discretion of the trial judge in making a disposition of costs. However, Hall J.A. also cited the trial judge's remarks noting at para. 31 that: As to the claim concerning those issues on which she (the plaintiff) was not successful, I note that the Court has a discretion in determining whether costs will follow the event. This discretion must be exercised judicially and be based on grounds connected to the case. It is improper to exercise this discretion out of a sense of fairness, out of sympathy, or by comparing the relevant economic strength of the parties. Exceptions to the rule that costs follow the event include misconduct of the parties. Such misconduct includes dishonest, reprehensible, discreditable, unmeritorious, unwarranted, callous, or reckless conduct. Double Costs
- [16] Regarding double costs, Rules 9-1(5)(b) and (6) provide: 9-1(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 or service 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 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.
- [17] Rule 9-1 encourages early settlement. As Burnyeat J. noted in *Martin v. Lavigne and Neufeld* (Costs), 2010 BCSC 1610:

- [7] The legislative purpose of Rule 9-1 is to encourage the early settlement of disputes by rewarding the party who made a reasonable settlement offer and penalizing the party who declines to accept such an offer: *Mackenzie v. Brooks et Alumni*, [1999] B.C.J. No. 2411 (C.A.), at para. 21; and *Bailey v. Jang* (2008), 90 B.C.L.R. (4th) 125 (S.C.) at paras. 15-17. The underlying reason for the rules relating to costs is to discourage the prosecution of doubtful cases. I am satisfied that any refusal to award double costs ignores the important deterrent function of the Rules: *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association*, [2009] B.C.J. No. 351 (S.C.) at paras. 49, 50 and 53; and *Bailey*, supra, at para. 39.
- [8] The overriding consideration in awarding double costs under Rule 9-1 is whether the acceptance of an offer would have resulted in any significant saving for a party or the Court: *LeFler v. Anderson*, [2008] B.C.J. No. 2206 (S.C.) at para. 18. Here, it is clear that an offer accepted in October 2009 would have saved the costs for both parties of attending on the number of motions that were before the Court in 2010, as well as the considerable costs associated with a seven-day trial.
- (a) Is the Offer to Settle One that Ought Reasonably to Have Been Accepted?
- [18] The plaintiffs submit the offer ought reasonably to have been accepted. They note that at the time the offer was made, plaintiff's counsel correctly informed the defendants that the defendants' counterclaim lacked evidence on the issues of causation and quantum. At trial I found that to be the case. The offer was made within the 84-day deadline for expert evidence, after examinations for discovery were complete, and after a Judicial Settlement Conference that reviewed the issues. (I emphasize that I have no information respecting any comments that may have been made at the judicial settlement conference, and refer to it only for the purpose of establishing that one was held). The plaintiffs note the offer was a significant compromise, and that at trial the defendants' produced insufficient evidence to prove their counterclaim.
- [19] The defendants submit that the conduct of the plaintiff and its counsel, the lack of disclosure, the defendants' financial situation and the plaintiff's "scorched-earth" litigation strategy disentitles the plaintiff to double costs.
- [20] In *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, the Court of Appeal addressed the matter of double costs:
- [97] Whether an offer to settle is one that ought reasonably [to] have been accepted, is assessed not by reference to the award that was ultimately made, but under the circumstances existing when an offer was open for acceptance: *Bailey v. Jane*, 2008 BCSC 1372 at para. 24 and *Hartshorne v. Hartshorne*, 2011 BCCA 29] at para. 27. This factor is considered from the perspective of the person receiving the offer. It has both a subjective and objective component. The court is entitled to take into account the reasons why a party declined to accept an offer to settle. The court must consider whether those reasons are objectively reasonable.

- [21] Despite having the weaknesses of their case brought to their attention along with supporting case authorities, the defendants persisted in their counterclaim. As noted above they had already had four different lawyers during the course of the litigation. In addition, they were given ample time to receive and consider the offer and to obtain such legal advice as they chose.
- [22] In *Zhao v. Yu*, 2015 BCSC 2342 at para. 13, the Court addressed consideration of an offer regarding costs:
- [13] While in hindsight the Defendant's Offer was indeed reasonable, that is not the test. Rule 9-1(5) and 9-1(6) were not intended, in my view, to punish parties merely because the party's assessment of the value of the claim proves incorrect, unless that assessment was based on irrelevant considerations; a clearly inadequate review of the available evidence and applicable authorities, or was, in view of the facts known at the time, unreasonable.
- [23] The offer was clearly reasonable under the circumstances existing when an offer was open for acceptance. The defendants were made aware of the weaknesses in their defence and counterclaim. Those weaknesses were found to be well founded at trial. Even if they subjectively believed the offer was "little more than a break-even proposition" in part because of the legal fees they had incurred, rejecting it was not objectively reasonable in the circumstances. In view of the facts known at the time, an objective analysis by the defendants should have resulted in them concluding they should accept the offer. This is a consideration that favours the plaintiffs.
- (b) The Relationship Between the Terms of Settlement Offered and the Final Judgment of the Court
- [24] The defendants were unsuccessful in their defence and in their counterclaim. The offer to settle was substantial and, had it been accepted, the defendants would not have had to pay the plaintiff's claim and would have recovered a significant amount on their counterclaim.
- [25] In *Martin*, Burnyeat J. noted that unrealistic expectations do not exempt an unsuccessful party from an order for double costs:
- [15] In this regard, it is submitted on behalf of the Plaintiffs: "The Plaintiffs have fought and lost, we submit they should not be penalized for simply believing they were correct." This submission is based on the assumption that expectations which are further apart should not attract an order for double costs. However, I am satisfied that \$125,000 was a totally unrealistic expectation on behalf of the Plaintiffs and, in any event, the purpose of Rule 9-1 would not be achieved if reasonable offers were not accepted because unrealistic expectations of damages were pursued. I consider that the comparison of the offer to what was eventually ordered is a factor that supports the position of the Defendants.
- [26] The defendants' counterclaims were unrealistic. Given the outcome at trial and the offer, this is a consideration that favours the plaintiff.

(c) The Relative Financial Circumstances of the Parties

- [27] The plaintiff had insurance coverage for the defence of the counterclaim. Its policy of insurance had been produced during the litigation. The plaintiff submits it did not use its resulting financial strength in an untoward manner. It further submits this was not a case where the defendants were unable to prosecute their counterclaim effectively due to financial circumstances.
- [28] In *C.P. v. RBC*, the Court of Appeal commented on the relevance of insurance coverage as follows:
- [100] In the early cases decided under R. 37B, most judges concluded the fact that an insurer was involved should not be taken into account: *Bailey* at paras. 32-34; and *Arnold v. Cartwright Estates*, 2008 BCSC 1575 at para. 23. In *Smith v. Tedford*, 2010 BCCA 302, this Court held otherwise. In that decision, the Court recognized that in certain circumstances the existence of an insurer can be taken into account.
- [101] Subsequent to *Tedford*, there has been some debate in the trial court as to how this factor should be applied. In that regard, I follow the course charted by *Humphries J. in Mazur v. Lucas*, 2011 BCSC 1685, in which she held that "while insurance coverage is not automatically a factor to be considered against the insured party, the facts of the particular case will govern whether it should be considered, and if so, what weight should be given to it" (para. 53).
- [102] In this case, RBC is undoubtedly a company of financial substance. However, there is no evidence that it used its financial strength in an untoward manner. In my view, the parties' financial discrepancy in this case is not relevant to the proper cost award.
- [29] Despite the assertions and complaints of the defendants, there is no evidence that the plaintiff or its insurer used their financial strength in an untoward manner. The defendants' complaints regarding such conduct are unfounded and indicate a misunderstanding of the litigation process.
- [30] The defendants' complaints of impecuniosity and the fact that they had four lawyers and spent \$70,000 before they acted on their own do not protect them from the risk of costs being awarded against them. As *Macintosh J.* recently noted in *Greenway-Brown v. Kyung*, 2018 BCSC 846 at para. 20 (Chambers),
- [22] [A] party's financial hardship standing by itself is not enough to overcome the normal costs analysis by which costs follow the outcome and by which, I would add, an offer to settle can raise the risk of a double costs award eventually being made impecuniosity by itself does not protect [a party] against the costs risks faced by all litigants who embark on litigation and proceed to trial.

- [31] Nor does self-representation exempt a self-represented party from the Rules of Court. On its own, self-representation is not a reason to deny a successful party double costs (Meade v. Armstrong (City), 2018 BCSC 528 at para. 48).
- [32] This is a neutral consideration.
- (d) Any Other Factor the Court Considers Appropriate
- [33] The defendants' submissions predominantly relate to issues of document production and allegedly unanswered questions on discovery, as do the vast majority of the case authorities they cited. The headings used by them include "[f]ailure to make proper disclosure " and "[t]he role of counsel in non-disclosure."
- [34] This is not the time to complain about disclosure matter. The defendants could have brought an application for further disclosure of the alleged non-disclosed information and documents they considered relevant to their case prior to trial. They did not do so.
- [35] The defendants' submissions also include commentary regarding the plaintiff's supposed "abuse" of its superior financial position, the "ambush" of the defendants at trial, and "conduct worthy of censure." However, the defendants' assertion that the plaintiff engaged in a "scorched-earth strategy aimed at overwhelming the defendants" is not established. It is belied by the plaintiff's conduct in this proceeding as well as the reasonable settlement offer made by the plaintiff.
- [36] None of these or similar additional factors favour the defendants.
- [37] For these reasons I conclude the plaintiff is entitled to its costs throughout with double costs from April 19, 2018 to the end of the trial. "The Honourable Mr. Justice Punnett"

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