Citation:	Brydges v. B.C. Transit et al 2002 BCSC 808	Date: Docket: Registry:	20020527 S054518 New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARK WILLIAM BRYDGES

PLAINTIFF

AND:

**BRITISH COLUMBIA TRANSIT,
CONSTABLE HEATH NEWTON AND CONSTABLE DARREN RATTAI**

DEFENDANTS

**REASONS FOR JUDGMENT
OF THE
HONOURABLE MR. JUSTICE HARVEY**

Counsel for the Plaintiff:	M.S. Menkes
Counsel for the Defendants:	T.J. Delaney
Date and Place of Hearing:	March 18, 2002 New Westminster, BC

[1] This action and counterclaim arose from an altercation that took place when the two defendant peace officers ticketed the plaintiff for riding on the transit system without a valid receipt. The defendants were each struck once by the plaintiff, and the plaintiff was struck while the defendants were attempting to restrain him. A trial of the matter was conducted in front of a judge and jury from March 18 to 26, 2002. The jury found that the defendants, not the plaintiff, had been unlawfully assaulted. They, however, declined to award the defendants any damages.

[2] Prior to the trial, on February 14, 2002, the defendants made an offer to settle the claim and counterclaim “without prejudice except as to costs”. The offer was attached to a covering letter that stated the following:

> We enclose herewith an Offer to Settle, pursuant to Rule 37.
>
> It may be that strictly speaking this particular Offer cannot be made pursuant to Rule 37. If that is the case, then we reserve the right to bring this Offer to the attention of the Court to seek either special costs, increased costs or double costs, pursuant to the principles enunciated in *Martel v. Peetoom.*

[3] The plaintiffs made an offer to “settle this proceeding on the following terms:”

> 1. The Parties shall endorse a Consent Dismissal Order dismissing the Plaintiff’s

claim, without costs to any party; and

2. The Parties shall endorse a Consent Dismissal Order dismissing the Counterclaim of the Defendants Newton and Rattai, without costs to any party.

[4] The plaintiff states that he rejected a March 15, 2002 “without prejudice” offer from the defendants of $15,000 “in all.”

[5] The plaintiff takes the position that the parties should bear their own costs. The plaintiff argues that Rule 37 is not engaged in these circumstances because the offer relied upon by the defendants was effectively withdrawn by the subsequent offer on March 15. In the alternative, the offer relied upon by the defendants was not in Form 64 and therefore does not comply with Rule 37, which is a complete code. In the further alternative, the plaintiff argues that all parties failed to achieve success in their actions, and it is therefore equitable for the parties to bear their own costs.

[6] The defendants take the position that they should be entitled to double costs after February 14, 2002 pursuant to Rule 37, or to their costs of the action to February 14, 2002 and to increased costs assessed in the amount of double costs thereafter. In the alternative, the defendants seek the costs of the proceedings throughout. In the further alternative, the defendants seek 95% of their costs (5% being allocated to prosecuting the counterclaim). In the further alternative, the defendants seek the costs of defending the action with an award of the costs of defending the counterclaim to the plaintiffs.

1. Does the defendants’ February 14, 2002 offer to settle qualify as an “offer to settle” under Rule 37 thereby entitling the defendants to double costs after the date of the offer?

[7] Since the defendants successfully defended the claim, they are entitled to their costs, subject to the court’s discretion, under Rule 57(9). The issue is whether, by virtue of the offer to settle made on February 14, 2002, they are entitled to double costs from that date.

[8] Rule 37(26) provides as follows:

If the defendant has made an offer to settle a claim for non-monetary relief and the offer has not expired or been withdrawn or accepted,

(a) if the plaintiff obtains a judgment as favourable as, or less favourable than, the terms of the offer to settle, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or

(b) if the plaintiff’s claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[9] The defendants in this case made an offer to settle the plaintiff’s claim for non-monetary relief. Namely, they offered to consent to dismissal of their counterclaim in exchange for the plaintiff’s consent to dismiss the main claim. The offer included the provision that each party should bear their own costs.

[10] The plaintiff’s claim was dismissed. Therefore, the issue is whether the defendants are entitled to benefit from the provisions of Rule 37(26)(b).

[11] Under Rule 37(1) “offer to settle” means an offer to settle under subrule (2), which provides: “A party to a proceeding may deliver to any other party of record a written offer in Form 64 to settle one or more of the claims in the proceedings in the terms specified in the offer.”

[12] Form 64 requires that the offer be made “in accordance with Rule 37(22) and (37).” Rule

37(22) provides:

> If an offer is accepted,
>
> (a) if the offer was made by the plaintiff, the plaintiff is entitled to costs, or
>
> (b) if the offer was made by the defendant, the plaintiff is entitled to costs assessed to the date the offer was delivered to the plaintiff, and the defendant to costs assessed from that date.

[13] The offer to settle made by the defendants was not in Form 64. As the defendants pointed out, incorporating subrule (22) into the offer would be contrary to the terms of the offer, which included the term that the parties should bear their own costs.

[14] The defendants also failed to incorporate Rule 37(37), which provides:

> Notwithstanding subrule (22), if an offer is accepted for a sum within the jurisdiction of the Provincial Court under the *Small Claims Act*, the plaintiff is not entitled to costs other than disbursements.

[15] As this offer was for non-monetary relief, it can not be said whether the offer was "for a sum" that was within the jurisdiction of the ***Small Claims Act,*** R.S.B.C. 1996, c. 430. It does not seem obvious how one would quantify such an offer without knowing the result of the proceeding. In my view, Rule 37(37) is not applicable to an offer of this type.

[16] The question is whether the failure of the defendants to make the offer subject to subrules (22) and (37) is a fatal defect as to form such that the offer is not an "offer to settle" under Rule 37. The plaintiff argues that it is and relies on ***Lennart's Grader Service Ltd. v. John Deere Ltd***. [1988] B.C.J. No. 541 (C.A.), a case which concerned an irregularity in the form of notice of monies paid into court under then Rule 37(1). In 1988, Rule 37(1) provided:

> At any time before the commencement of the trial a defendant may pay into court a sum of money in satisfaction of the whole or part of a claim for which the plaintiff sues.

[17] In 1988, Rule 37 had not yet been modified to encompass offers to settle; thus it dealt only with the issue of the assessment of costs subsequent to a payment of money into court.

[18] In ***Lennart's***, the Court of Appeal dealt with a notice of payment into court in satisfaction of the plaintiff's claims for damages, interest and costs. Following the earlier authority of ***Friedrich v. Chisan***, [1983] B.C.J. No. 411 (C.A.), the court concluded:

> In my opinion, in this case the notice of payment in was irregular. That conclusion follows from the unchallenged judgement of this court in ***Friedrich v. Chisan*** case where it was held that the word "claim" as it is used in Rule 37 does not include costs. The payment in here was irregular; it was irregular because it did not conform with the Rules and it was irregular because the form used to pay the money in did not conform with the form set out in the Rules. The result of that irregularity, in my opinion, is that the defendants can gain no benefit from the payment in.

[19] Although ***Lennert's*** concerns payment into court, it stands for the proposition that Rule 37 will not be used to the benefit of a party unless the terms of the rule are clearly complied with. Indeed, there has been much litigation about whether the court has the discretion to award augmented costs in respect of offers that do not fully comply with s. 37, (See ***Brown v. Lowe***, *infra*, especially the dissent of Chief Justice Finch). In my view, the remarks in ***Lennert's*** are applicable to this circumstance, and an offer that is not in form 64 is not an "offer to settle" under Rule 37. In the result, Rule 37 does not apply to the offer of February 14, 2002.

2. If Rule 37 does not apply, should the court give effect to the offer to settle as a Calderbank letter under the principles in Martel v. Peetoom?

(a) Does the court have the discretion to apply the principles of Rule 37 to Calderbank letters?

[20] In ***Martel v. Peetoom***, (1996) 27 B.C.L.R. (3d) 160 (S.C.) Mr. Justice Fraser dealt with a Calderbank letter that involved an offer to settle two separate tort claims. Such an offer to settle could not be made under Rule 37. Fraser J. reviewed the origin history of the "Calderbank letter", as follows (at 164):

> It was in a legislative vacuum that the English Court of Appeal made its ruling in *Calderbank*. Mrs. Calderbank was seeking a declaration under the *Married Women's Property Act*, 1882, not recovery of debt or damages. Before trial, she swore an affidavit declaring herself willing to accept a certain result in the litigation going on between herself and Mr. Calderbank. Mr. Calderbank did not agree and the case went to trial. The judgment was less favourable to him than what Mrs. Calderbank had been willing to give him. It was held that Mrs. Calderbank was entitled to her costs, as from the date on which she made her willingness to settle known. The Court also suggested that a letter like the one used in this case by the plaintiff should sound in costs. What has become known as a Calderbank letter developed into a recognized procedure to set up an award of costs based on a willingness to settle.

[21] In 1993, Rules 37 was amended so that certain pre-trial offers had cost consequences under the rules. This had the effect of codifying at least some of the situations involving Calderbank letters. It has since become an issue to what extent the amended Rule 37 has ousted the court's discretion to award augmented costs in situations outside of the ambit of Rule 37.

[22] After canvassing the jurisprudence, Fraser J. concluded at 167:

> … where for some reason the procedures of Rule 37 are not available to a party, a Calderbank letter may still be effective as the vehicle for an award of costs, or of augmented costs.

[23] Since "double costs" is a creature of statute, Fraser J. went on to award an assessment of increased costs in the amount that would equal party and party costs plus double costs from the date of the receipt of the Calderbank letter. As Madam Justice Martinson noted in ***Pacific Hunter Resources Inc.*** v. ***Moss Management Inc.***, [2002] B.C.J. No. 556 at para. 29, "[t]he reasoning in ***Martel*** v. ***Peetoom*** was adopted by the Court of Appeal in ***Sandegren*** v. ***Hardy*** and ***Vukelic*** v. ***Canada***." [Reported at [1999] B.C.J. No. 762 and [1997] B.C.J. No. 1326 respectively.]

[24] Recently, in ***Brown v. Lowe,*** [2002] B.C.J. No. 76 (B.C.C.A.), Madam Justice Southin, writing also for Ryan J.A., stated in obiter that Rule 37 is a complete code which fully ousts the discretion of the court to consider Calderbank letters. She stated at para. 153:

> The 1993 revision to our Rule 37 is of such an order that we have no gap since then. It is a complete code and there is no room for any judicial discretion save that given by it. *Calderbank* v. *Calderbank* should not be considered law in this Province today.

[25] These obiter remarks were followed by Stewart J. in his oral judgment in ***Dragan*** v***. Kim et al.*** (22 January 2002). Vancouver Registry, B990732 (S.C.). They were also followed by Lysyk J. in ***Antonio*** v. ***Federici***, [2002] B.C.J. No. 733 (S.C.).

[26] However, in ***Pacific Hunter***, *supra*, Martinson J. declined to follow the obiter remarks in ***Brown*** on the basis that there was binding Court of Appeal authority (***Sandegren*** and ***Vukelic***, both *supra*) supporting the proposition that the court still possesses the discretion to apply the principles of Rule 37 to situations not captured by the Rules. She preferred the dissenting comments of Chief Justice Finch in ***Brown***, stating at para. 31 that his comments are:

> …consistent with the earlier Court of Appeal and Supreme Court jurisprudence and with

> the conclusion I had reached before *Brown* v. *Lowe* was decided. The approach is also consistent with the overall object of the Supreme Court Rules, including Rule 37, of securing the just, speedy and inexpensive determination of every proceeding on its merits. Giving effect to the obiter comments would, in the circumstances of this case, circumvent that object.

[27] Martinson J. also declined to follow ***Dragan***, *supra*, citing ***Re: Hansard Spruce Mills***, [1954] 4 D.L.R. 590 (B.C.S.C.), because ***Dragan*** was decided extemporaneously with ***Brown*** and does not refer to the binding Court of Appeal authorities.

[28] Martinson J. does not seem to have had the benefit of Lysyk J.'s reasoning in ***Antonio***, supra, which was delivered orally on March 14, 2002, the day before Martinson J. released her judgment in ***Pacific Hunter***. In ***Antonio***, Lysyk J. held that the plaintiff must prevail on either of two bases. Either Rule 37 was a complete code as per the majority in ***Brown***, or, according to a line of authority leading from ***Starling*** v. ***Martin*** (1996), 45 C.P.C. (4th) 227, an offer to settle multiple actions ordered to be heard together can be made pursuant to Rule 37. Strictly speaking, the court's decision to follow the obiter in ***Brown*** is not necessary to the result.

[29] In my view, then, it is open to me to follow Martinson J.'s reasoning and conclusion in ***Pacific Hunter,*** which is consistent with the binding authorities as canvassed by Chief Justice Finch in his dissent in ***Brown***. Such a result is also consistent with a regime under which the court can award costs in a manner that promotes the expeditious use of court time. On that basis, I agree that the court still has the discretion to award augmented costs in situations where there is a Calderbank letter that does not meet all of the requirements of Rule 37.

(b) Does the offer in question qualify for consideration as a Calderbank letter?

[30] The offer in question could not have been made under Rule 37 because it is inclusive of costs (an "all-in" offer). In ***Helm v. Pattie*** [1998] B.C.J. No. 1290 (C.A.), Madam Justice Southin stated at para. 47 that the following principle can be deduced from Rule 37: "An offer of a monetary amount may include pre-judgement interest, but can not be a single sum inclusive of costs." Southin J.A. reasoned that, because the decision in ***Calderbank*** was an attempt of the English Court of Appeal to provide for an application of the principles embodied in the rules to situations not strictly covered by the rules, the principles deducible from our Rule 37 should be applied to Calderbank letters. In the context of so applying the principle above, she held that all-in offers are not properly considered to be Calderbank letters because, "the judge cannot determine what amount of offer is in discharge of the offeree's cause of action and, therefore, cannot ascertain whether the offeree recovered more or less at trial than the amount offered."

[31] However, this particular problem of quantification does not arise on the facts in this case. Since the plaintiff's claim was dismissed, Rule 37 does not require that the offer be evaluated to determine whether it is equal or better than the judgment. Instead, Rule 37(26)(b) provides simply that that the defendants should get costs to the date the offer was made and double costs thereafter.

[32] In his dissent in ***Brown***, *supra*, Chief Justice Finch considered the issue of whether an offer inclusive of costs could be the basis for the court's exercise of its residual discretion to augment costs. At para. 123 His Lordship stated:

> The final point is that the "Calderbank letter", written by counsel for Bryson, was said to be defective because it was inclusive of costs and thereby unclear as to the amount offered for damages. I would not give effect to this objection, because the point is completley academic. The plaintiff failed to recover judgment for any amount. There is no need to speculate about the amount of costs to which the plaintiff would have been entitled at the time the offer was made, what amount would remain from the total offer of $400,000 to apply to damages, and hence whether that sum would have exceeded the judgment which the plaintiff ultimately obtained. The questions addressed in such cases as *Helm* v. *Patti* and *Sandgren* v. *Hardy* (supra) do not arise.

[33] Similarly, those questions do not arise on these facts and do not function as a bar to augmenting costs on the basis of the offer made to the plaintiff. The reasoning of Southin J.A. in ***Helm*** is thus distinguishable from the instant case. Accordingly, in my view the offer in question qualifies for consideration as a Calderbank letter.

(c) Was the Calderbank letter revoked by the subsequent "without prejudice" offer of $15,000 "all-in"?

[34] It is my view that the subsequent offer does not affect the consequences of the Calderbank letter. A Calderbank letter is an offer to settle made without prejudice, except as to costs. The second offer was not a Calderbank letter, but was made completely "without prejudice." It is therefore privileged in its entirety and ought not to be brought to the court's attention with respect to costs or for any other purpose.

> Except in those limited cases in which a Calderbank letter applies, the informal [negotiation] process operates on a "without prejudice" basis. Unlike the formal process under Rule 37, none of the offers or counter-offers arising during this informal process may be raised before the trial judge in relation to costs, or otherwise. [***MacKenzie v. Brooks***, [1999] B.C.J. No. 2411 (C.A.), para. 24]

[35] It would seem then, that regardless of the principles of contract, the only offer that is properly before the court is the earlier offer which took the form of a Calderbank letter.

(d) Should the court exercise its discretion to award double costs by way of increased costs to the defendants from the date of the settlement offer?

[36] Although, in my view the court has the discretion to award double costs by way of increased costs to the defendants by virtue of the settlement offer made by the defendants, I do not think it would be appropriate to do so under these circumstances. The offer in question was effectively an offer to withdraw the counterclaim in exchange for a withdrawal of the main claim. In some circumstances, that may very well be an offer of the type appropriate to invoke the court's discretion. In this case, the counterclaim for assault resulted in a finding of liability but no award of damages, a jury award with which I am in complete agreement. The tort complained of involved two blows given to the defendants by the plaintiff. It would attract, at most, nominal damages and borders on frivolous use of court time. I do not think it is relevant that the claim itself was even weaker than the counterclaim. In this case, to reward the defendants for offering to withdraw the counterclaim would effectively reward the defendants for making the counterclaim in the first place. That does not seem in keeping with proper use of the court's discretion with respect to costs, which is "…to reward responsible and reasonable behavior that is conducive to the better administration of justice…" (***Brown*** per Finch C.J.A. in dissent at para. 120). For those reasons I decline to award augmented costs on the basis of the Calderbank offer.

3. Should the defendants receive party and party costs pursuant to Rule 57(9)?

[37] Rule 57(9) provides:

> Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

[38] In the instant case, the defendants successfully defended the main claim and are therefore entitled to costs following the event with respect to the main claim. There is no basis for the court to invoke its discretion to deny the costs of the main claim to the defendants.

[39] With respect to the counterclaim, the defendants were successful on the issue of liability, but received no damages. The question is whether this ought to be considered an "event" for the purposes of rule 57(9).

[40] In ***McElroy v. Embelton***, [1996] B.C.J. No. 819, Madam Justice Southin, in considering an advance payment of damages that exceeded the eventual award after trial, stated at para. 9-10:

> …it is not conceivable that one can enter a judgment in any sort of action for zero. When there is nothing to be recovered, an action ought to be dismissed. Had the learned judge appreciated that, his view on the question of costs might have been different.
>
> . . .
>
> …I hope this judgment will solve at least the problem of what the judgment as to damages should be. It should be that the action is dismissed.

[41] In ***Baxter*** v. ***Brown***,[1997] B.C.J. No. 551 (B.C.C.A.),again considering the issue of a plaintiff who had already recovered more than the award at trial, the Court of Appeal followed ***McElroy***, stating at para. 9 that:

> …the judgment should not have been entered for zero dollars but rather the action should have been dismissed … there is no basis upon which the plaintiff should recover any costs and there is no reason why in my view the defendant should not recover costs of the action. I would so order.

[42] Based on those authorities, an award of no damages amounts to a dismissal of the claim for costs purposes. It follows that an award of no damages can not be considered an "event" under Rule 57(9).

[43] Where a defendant fails on a counterclaim, typically, the plaintiff is awarded the costs of defending the counterclaim.

> As a general rule an action should be treated as if it stood by itself and the counterclaim should only bear the amounts by which the costs of the proceedings are increased by it. See *Shillelagh Cabarets Ltd. v. Celona* (1980), 15 C.P.C. 230 at 234 citing *Saner v. Bilton* (1879), 11 Ch.D. 416 at 418. -- [per Brenner J., as he then was, in ***Trihn v. Chan***, [1998] B.C.J. No. 720.]

[44] There is, however, a further question of whether, in the particular circumstances of this case, the court ought to exercise discretion to award the costs of the counterclaim to the defendants because of their success on the issue of liability.

[45] Rule 57(15) provides that the court may award costs that relate to some particular issue or part of the proceeding.

[46] The counterclaim took a very small amount of court time, and, because the defendants were successful on the issue of liability, in my view, it is appropriate that the defendants have the costs of the entire proceeding at scale 3.

"R.B. Harvey, J."
The Honourable Mr. Justice R.B. Harvey