Citation: Pacific Hunter Resources et al. v. Moss Management Inc.
2002 BCSC 396

Date: 20020315
Docket: C940939
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PACIFIC HUNTER RESOURCES INC. AND BRUCE ROME

PLAINTIFFS

AND:

MOSS MANAGEMENT INC.

DEFENDANT

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE MARTINSON

Counsel for the Plaintiffs — A. J. Winstanley

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Date and Place of Hearing/Trial: 17 January 2002 Vancouver, B.C.

INTRODUCTION

[1] This case raises the question of whether the decision of the majority of the Court of Appeal in ***Brown v. Lowe,*** 2002 BCCA 7, relating to the use of Calderbank letters as the basis of an order for costs, is binding on this court in view of the earlier decisions of the Court of Appeal in ***Sandegren v. Hardy*** (1999), 67 B.C.L.R. (3d) 123 and ***Vukelic v. Canada*** (1997), 37 B.C.L.R. (3d) 217. Madam Justice Southin in ***Brown v. Lowe*** said, at para. 154, that "***Calderbank v. Calderbank*** should not be considered law in this Province today". Madam Justice Ryan agreed with the reasons of Madam Justice Southin on costs. Chief Justice Finch dissented.

[2] The defendant in this case was successful in having the plaintiffs' action dismissed on the basis of unreasonable delay in reasons for judgment dated December 10, 2001. The court was about to issue reasons for judgment granting to the defendant an order for increased costs based on a Calderbank letter when the Court of Appeal released its decision in ***Brown v. Lowe***.

[3] I had accepted the arguments advanced on behalf of the defendant that though Rule 37 of the ***Supreme Court Rules***, B.C. Reg. 221/90 covers most aspects of costs applications made as a result of offers to settle, this is one of the exceptional cases referred to by Mr. Justice Fraser at paras. 20 and 21 in ***Martel v. Peetoom*** (1996), 27 B.C.L.R. (3d) 160 (S.C.). That is, a Calderbank letter was appropriate and ought to be enforced because the procedures in Rule 37 were not available to the defendants. I did not accept the arguments advanced on behalf of the plaintiffs that Rule 37 is a complete code.

[4] In the Calderbank letter, dated June 25, 2001, the defendant offered to settle the proceeding on the basis that the plaintiffs would consent to a dismissal of the proceeding without costs to any party. The offer was left open for 14 days. The letter said that if the plaintiffs failed to accept the offer and the claim was ultimately dismissed, the defendant intended to bring the letter to the court to seek either special costs, increased costs or double costs.

[5] In this case the defendant could not make the offer it wished to make using Rule 37.

[6] In reaching this result I concluded that the word "unavailable" should be broadly interpreted to include unavailable to cover the circumstances in which the party finds itself. The offer that the defendant did make was not an offer available under Rule 37. In this case, at the time the Calderbank offer was made, the litigation was "heating up". There were several interlocutory applications before the court and more were pending. The defendant wanted to settle the matter without incurring those costs, in addition to trial costs. In my view, making an offer that the action be dismissed with each party paying its own costs was a reasonable way to attempt to bring the litigation to an end in a timely and cost efficient way. That option was not available under Rule 37.

[7] This approach is consistent with that taken by the learned authors P. Fraser and J.W. Horn in ***The Conduct of Civil Litigation in British Columbia***, loose-leaf (Vancouver: Butterworths, 1978). Mr. Justice Fraser and Master Horn say at 15.14 that where the provisions of Rule 37 do not fit the situation or where they cannot be employed to make the offer the party wishes to make, a Calderbank letter may still be effective as the vehicle for an award of costs, or of augmented costs: ***Martel v. Peetoom***; and ***Delair v. Byrnell*** (1996), 26 B.C.L.R. (3d) 179 (C.A.).

[8] The object of the ***Supreme Court Rules*** is to secure the just, speedy and inexpensive determination of every proceeding on its merits: Rule 1(5). I was of the view that this object can best be achieved by encouraging litigants to consider settlement at an early stage so as to avoid delay and cost. Litigants who unreasonably refuse to settle should be discouraged from doing so by adverse cost awards. Enforcing settlement offers outside the ***Rules*** in appropriate cases advances the object of the ***Rules***. I concluded that this approach is supported by the decisions of the Court of Appeal in ***Sandegren v. Hardy*** and ***Vukelic v. Canada***. The Court in these cases expressly approved of the comments of Mr. Justice Fraser in ***Martel v. Peetoom.***

[9] I also did not accept the arguments raised by the plaintiffs that the letter was not a valid Calderbank offer and that there was no evidence that the letter was delivered. Nor did I agree that the fact that double costs cannot be awarded except by statute affects the result in this case. Rather, I concluded that this was really an application for increased costs. The plaintiffs also argued that a Calderbank letter offer must be outstanding at the date of trial. I concluded the authority they relied upon related to offers under the Rule, not an offer by way of a Calderbank letter.

[10] I, therefore, concluded that the defendant is entitled to costs at Scale 3 up to June 25, 2001 and double costs by way of increased costs from June 25, 2001.

ISSUE

[11] Is the conclusion that the defendant is entitled to costs at Scale 3 up to June 25, 2001 and double costs by way of increased costs from June 25, 2001 still available to the court in view of the decision of the Court of Appeal in ***Brown v. Lowe***?

THE DECISION OF THE COURT OF APPEAL IN *BROWN V. LOWE*

[12] In ***Brown v. Lowe***, the trial judge awarded double costs to one defendant who made a Calderbank letter offer independent of the other defendants. The trial judge did not accept the proposition that false evidence offered at discovery could be a foundation for a denial of costs. Madam Justice Southin found that the trial judge took too narrow a view of the authorities on this point, and said that to the extent that the cases referred to may inferentially suggest that the narrow view is right, they are wrong. She allowed the appeal on that basis. She however, went on to say, at paras. 152 and 154:

> On that footing, the "double costs" issue does not arise. I address it because, in my opinion, the learned judge erred in making that award and I fear a perpetuation of what I see as the error of founding orders as to costs in this Province since the 1993 wholesale revision of Rule 37 on ***Calderbank v. Calderbank***, [1975] 3 All E.R. 333 (C.A.)
>
> ...
>
> The 1993 revision to our Rule 37 is of such an order that we have had 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. As to the construction of Rule 37, see ***Jamieson v. Duteil*** (2001), 92 B.C.L.R. (3d) 208 (C.A.), 2001 BCCA 516.

[13] Madam Justice Ryan said, at para. 168, on the issue of costs: "I agree with the reasons for judgment of Madam Justice Southin with respect to the issues of costs."

[14] Chief Justice Finch, in dissenting reasons, agreed with the often followed decision of Mr. Justice Fraser of this court in ***Martel v. Peetoom***. That is, the Chief Justice concluded, at para. 107, that in cases where Rule 37 is not available, Calderbank letters can be used:

> Rule 37(2), which authorizes the use of a written offer to settle, is the rule on which all other subrules are based. Rule 37(2) says that a party may deliver an offer; it is permissive in nature. If a party chooses to operate within the Rule 37 regime, all of its provisions must apply. Although the rule is apparently intended to cover the foreseeable circumstances in which orders for costs will be made, the rule does not forbid the conduct of settlement negotiations outside its ambit. The underlying policy of the rules is to encourage settlement. It has never been thought that settlement negotiations were limited by the rules.

[15] The Chief Justice noted, at para. 120, that:

> ...The court's discretion with respect to costs is an important means of controlling the conduct of parties in court, and in the pre-trial process. It can be used to reward responsible and reasonable behaviour that is conducive to the better administration of justice, inducing good faith efforts to achieve amicable settlements, and to punish irresponsible and unreasonable conduct that has the opposite effect....

THE DEFENDANT'S POSITION ON *BROWN V. LOWE*

[16] The defendant makes three arguments. The first is that the decision is distinguishable from this case. Second, it must be (and can be) reconciled with the two earlier decisions of the Court of Appeal, ***Sandegren v. Hardy*** and ***Vukelic v. Canada,*** which allow increased costs in response to Calderbank letters. Third, if it cannot be reconciled with the earlier decisions of the Court of Appeal, then the comments made by Madam Justice Southin are *obiter*, and therefore not binding, and should not be followed in this case.

THE PLAINTIFFS' POSITION ON *BROWN V. LOWE*

[17] The plaintiffs say that the court must follow the majority decision in ***Brown v. Lowe***. No authorities were cited. Alternatively, it should follow it as it is correctly decided. The purpose of the revisions to Rule 37 in 1993 was to codify the jurisprudence that had developed under the English decision of ***Calderbank v. Calderbank***, [1975] 3 All E.R. 333 (C.A.). They point to these comments by F.M. Irvine in "**The Cost Consequences of Calderbank Letters in Litigation in the Supreme Court of British Columbia**" Case Comment on *Eddy v. Eddy* (1992), 15 C.P.C. (3d) 327 at 329:

> The changes to the *Rules of Court* were extensive and eliminated procedural gaps in the provisions governing offers to settle (or, formerly, payment into court) that left room for Calderbank letters where the claim sought to be settled was not monetary.

[18] The plaintiffs say that the decision of the majority in ***Brown v. Lowe*** is not an anomaly. Rather, Madam Justice Southin was a member of the court in three of the four most recent decisions on Rule 37, including ***Brown v. Lowe***. The other two cases in which Madam Justice Southin was a member of the court are ***Helm v. Pattie*** (1998), 52 B.C.L.R. (3d) 81 (C.A.) and ***Jamieson v. Duteil*** (2001), 92 B.C.L.R. (3d) 208 (C.A.).

[19] The plaintiffs argue that the changes in 1993 went beyond "extensive" and represented a concerted effort to eliminate all procedural gaps in Rule 37 that would give rise to a need to employ Calderbank letters. Madam Justice Southin, writing for a unanimous Court of Appeal in ***Helm v. Pattie,*** distinctly raised the possibility, at para. 43, that the Rules Revision Committee had succeeded in doing just that:

> Upon the assumption that the decision in *Calderbank v. Calderbank,* [1975] 3 All E.R. 333 (Eng.C.A.), still has a place in British Columbia in light of the present Rule 37 which was enacted in 1993, the question is upon what principles a judge should determine costs when a letter said to attract the principle of *Calderbank v. Calderbank* is brought forward at the conclusion of a trial.

[20] The plaintiffs agree that while the drafters of the Rule in 1993 may have intended a code, the drafting in fact left gaps which led to the gradual creation of an area of exception where an offer to settle in a Calderbank letter would still be considered because the provision of Rule 37 did not apply to the circumstances at hand. The plaintiffs say that they were not numerous and the minority judgment in ***Brown v. Lowe*** lists the important ones: ***Sandegren v. Hardy, Martel v. Peetoom;*** and ***Cook v. Bhanwath*** (1999), 73 B.C.L.R. (3d) 305 (S.C.).

[21] However, the plaintiffs say that shortly after ***Sandegren v. Hardy*** was decided, Rule 37(24) was amended to remedy the apparent deficiencies referred to in all three of these cases. The cases are moot. None of them would be decided the same way now because none of them would come within the area of exception that would allow the Calderbank letter to be considered.

[22] The gap referred to by the Chief Justice in ***Brown v. Lowe*** was one not found to exist by

Madam Justice Southin. The gap was that the defendant in that case was precluded by the provisions of 37(31) from presenting an offer to settle unless such an offer was made jointly with all the other defendants. Madam Justice Southin concluded that the defendant and his co-defendants were not "sued jointly".

[23] The plaintiffs say that all Madam Justice Southin was doing in ***Brown v. Lowe*** was answering the question she and the rest of the court left open in ***Helm v. Pattie***. They suggest that her reference to ***Jamieson v. Duteil*** in ***Brown v. Lowe*** is significant. That decision, which pre-dates ***Brown v. Lowe*** by only four months, stands essentially for the proposition that if a plaintiff or defendant falls squarely within subrules 23 to 26 of Rule 37, then double costs follow as a matter of course with no discretion available to the trial judge.

[24] They say that read together ***Brown***, ***Helm*** *and* ***Jamieson*** reflect a clear policy concern. That concern, they argue, is that too much scarce court time is being "squandered on interminable disputes over double costs." These disputes, coming as they do at the end of a trial, can involve significant sums of money. For that reason, the only way to prevent them is not to take away the incentive, but to create predictable outcomes. It is argued that treating Rule 37 as a complete code and compelling not only the parties but also the trial judge to "stick to" its provisions accomplishes that goal.

[25] They submit that while there may be cases where the provisions of Rule 37 may not apply and a court may find itself unable to reward a party who has made a *bona fide* offer to settle, those cases will be rare. When the benefit of keeping open that remote possibility is tallied against the cost of the judicial resources now "being squandered on Rule 37 applications", the choice is self-evident.

[26] The plaintiffs say that the prospect raised by the court in ***Martel v. Peetoom*** of escaping the confines of Rule 37 by awarding not "double costs" but "increased costs" pursuant to Appendix B, clause 7 of the ***Rules*** runs counter to not only these general policy concerns, but also the approach adopted by the Court of Appeal in ***Jamieson v. Duteil***.

DISCUSSION

[27] The majority decision in ***Brown v. Lowe*** is *obiter.* Madam Justice Southin expressly noted that the issue of "double costs" did not arise in the case before she considered the Calderbank letter question.

[28] *Obiter* remarks of the Court of Appeal carry significant weight and should be treated with great respect. This court is not, however, bound by *obiter* remarks: ***R. v. Brydon*** (1995), 2 B.C.L.R. (3d) 243 (C.A.), rev'd on other grounds [1995] 4 S.C.R. 253; ***F.(N.) v. S. (H.L.)*** (1998), 60 B.C.L.R. (3d) 283 (S.C.), aff'd on other grounds (1999), 69 B.C.L.R. (3d) 136; ***Pacific Press v. British Columbia (Attorney General)*** (2000), 73 B.C.L.R. (3d) 264; ***Estphanous v. McLeod*** (2001), 88 B.C.L.R. (3d) 192 (S.C.); and ***Gandham v. Dhillon***, 2001 BCSC 1456. In this case I have not, with respect, followed the *obiter* remarks for the following reasons.

[29] ***Brown v. Lowe*** dealt with an application for double costs and in this case the defendant asks, strictly speaking, for "increased costs", though in an amount tantamount to double costs. The *obiter* decision is contrary to previous decisions of the Court of Appeal. The reasoning in ***Martel v. Peetoom*** was adopted by the Court of Appeal in ***Sandegren v. Hardy*** and ***Vukelic v. Canada***. The majority did not refer to those decisions.

[30] Both of those cases considered Rule 37 after the 1993 Rule revisions and the court in both said that Calderbank letters may be used in British Columbia in certain circumstances. In such circumstances the court may award the successful party increased or augmented costs if the Calderbank letter offer was not accepted and the result was less favourable to the party who did not accept the offer. The Court of Appeal will ordinarily follow its own previous decisions unless a five person division of the court is empanelled to reconsider its decisions: ***Bell v. Klein (No. 1)***, [1954] 4 D.L.R. 273 (B.C.C.A.), rev'd on other grounds [1955] S.C.R. 309; and ***Bell v. Cessna Aircraft Co***. (1983), 46 B.C.L.R. 145 (C.A.).

[31] The approach taken by Chief Justice Finch in ***Brown v. Lowe*** is 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.

[32] I have not overlooked the oral decision of this court in ***Dragan v. Kim et al.***, (22 January 2002), Vancouver Registry, B990732 (S.C.). However, that decision is said, at para. 1, to be made extemporaneously. It was decided only four days after ***Brown v. Lowe*** and does not refer to ***Sandegren v. Hardy*** and ***Vukelic v. Canada.*** I am therefore not bound to follow it: ***Re Hansard Spruce Mills***, [1954] 4 D.L.R. 590 (B.C.S.C.).

CONCLUSION

[33] In exercising my discretion I conclude that the defendant is entitled to costs at Scale 3 up to June 25, 2001 and double costs by way of increased costs from June 25, 2001. The defendant is entitled to costs of this application at Scale 3.

"D.J. Martinson, J."
The Honourable Madam Justice D.J. Martinson

April 17, 2002 - ***Corrigendum to the Reasons for Judgment*** issued by Madam Justice Martinson advising that the names of counsel on the first page should read as follows:

Counsel for the Plaintiffs	A. J. Winstanley
Counsel for Defendant	T. J. Delaney