COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Doig v. Laurand Holdings Ltd., 2003 BCCA 487

Date: 20030911

Docket: CA025515

Between:

Arthur Doig and Arma Holdings Ltd.

Respondents (Plaintiffs)

And

Laurand Holdings Ltd. and Harrison Doig

Appellants (Defendants)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Thackray

R.R. Sugden, Q.C.
C.P. Dennis — Counsel for the Appellants

T.J. Delaney
C. Martin — Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
April 7, 2003

Written Submissions Received

Place and Date of Judgment: Vancouver, British Columbia
September 11, 2003

Supplementary Reasons on Costs by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Ryan:

[1] The appeal in this case was dismissed by this court from the bench on April 7, 2003 with reasons to follow. Those reasons were issued May 7, 2003. The respondents now apply, under Rule 60 of the Court of Appeal Rules, for increased costs.

[2] Rule 60 provides:

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

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

[3] In this case an offer to settle was made by the respondents on January 30, 2002, 26 days after the appellants' first factum was filed.

[4] The offer to settle was set out in a letter (marked "WITHOUT PREJUDICE, except as to costs") to counsel for the appellants. It said:

> As you know, the judgment granted to our client [at trial] was in the sum of $41,426.00. The costs have been assessed at $58,441.74. We have previously provided you with interest calculations under cover of our letter of January 22, 2002. With interest, the amount owing on the judgment as of January 30, 2002 is $50,023.02. The amount owing, with interest, on the costs as of January 30, 2002 is $60,751.35. In total, the amount owing exceeds $110,000.00.
>
> We are writing to advise you that our client would accept in complete settlement of these matters the sum of $75,000.00. In return, our client would consent to a discontinuance or dismissal of the appeal (or filing a Notice of Abandonment), without costs to any party. Any outstanding claim for costs by your client in the Supreme Court would also have to be waived. Payment would be in complete and final settlement of all outstanding claims as between the parties in respect of this matter. . . .
>
> We are putting you on notice that, if your client fails to accept this offer and the appeal proceeds and the judgment is either affirmed or after any reductions the amount awarded to our client exceeds $75,000.00, then we intend to bring this letter to the attention of the court in accordance with the principles in Vukelic v. Canada (1997), 37 B.C.L.R. (3d) 217, to seek increased costs of this appeal.

[5] The respondents submit that given the offer to settle and the frivolous nature of the ground of appeal advanced in this court, there would be an unjust result if costs were assessed on the usual basis.

[6] The respondents say that increased costs would give effect to the principles outlined in Vukelic v. Canada (1997), 37 B.C.L.R. (3d) 217. In that case this court recognized, before the creation of the present Rule 60, that the purpose of augmenting the costs award of a party who proposes a settlement which ought to be accepted is to "discourage frivolous litigation and to encourage the parties to make reasonable offers . . . to settle litigation, with the attendant judicial economy in cost and in time". (para. 13.)

[7] The appellants submit that the application for increased costs should be dismissed for three reasons. First, the ground of appeal advanced in this case was not frivolous. Second, the claim for increased costs was not specifically requested in the respondents' factum. And third, this court should be careful to not impose barriers to parties seeking to utilize the appeal process.

[8] To deal with the first question I do not intend to revisit the reasons for judgment dismissing the appeal. In the end the focus of the appeal was on what turned out to be imprecise language used on the part of the respondents' expert and by the trial judge. In dismissing the appeal Mr. Justice Thackray characterized the difficulty as "one of semantics rather than one of

substance". Thus, while it might be said that the appeal in this case was not frivolous, the ground of appeal advanced was, at best, tenuous.

[9] The appellants submit that the application for increased costs should have been set out in the respondents' factum. Rule 22(1)(a) of the Court of Appeal Rules requires that each factum be in Form 10. Form 10 stipulates that Part 4 of the factum "must consist of a concise statement of the nature of the order that is sought by the party preparing the factum and it must include any special disposition that is desired with respect to costs." In JJM Construction Ltd. v. Sandspit Harbour Society, 2000 BCCA 93, this court said this:

> [1] Sandspit Harbour Society ("SHS"), a successful respondent, applies now for increased costs of the appeal against the unsuccessful appellant.
>
> [2] Such costs were not requested in its factum. The order sought, in part, was: "The Sandspit Harbour Society seeks an order that the appeal from the judgment of the Learned Trial Judge be dismissed, with costs."
>
> [3] The form for a factum in the Rules of this Court contains these words: "[The order sought] shall include any special disposition that is desired with respect to costs."
>
> [4] As the respondent's factum does not seek a special order with respect to costs, no such order will be pronounced by this Court.

[10] Rule 21(2) however, provides that, "Unless a justice otherwise orders, within 30 days after being served with the appellant's factum a respondent must (a) prepare a factum in accordance with Rule 22." I am of the view that this Rule permits us to dispense with the requirements of Form 10 if it is in the interests of justice to do so. In this case the appellants were put on notice on January 30, 2002 that the respondents would seek increased costs should they succeed in this appeal. The purpose of the Form 10 requirement was therefore fulfilled. I would not accede to this part of the appellants' submission.

[11] Finally, the appellants say that to award increased costs in this case is to impose an unwarranted hurdle to legitimate litigants who want to take their issues to this court. I agree that this is an area where caution must be exercised, but I am of the view that in this case the order should be made.

[12] The offer in this case was reasonable and ought to have been accepted, the grounds of appeal were tenuous at best. To encourage the acceptance of reasonable offers of settlement and to discourage the expenditure of judicial resources in circumstances such as these I am of the view that increased costs ought to be awarded.

[13] In accordance with Rule 60 I would order, as requested by the respondents, that the appellants pay the respondents' increased costs at 90% of the respondents' special costs. This would have the effect of doubling the costs after January 30, 2002, the date that the settlement offer was made.

[14] Finally, I would order that the sum of $110,000 paid into court as a condition of granting a stay of execution be paid out to the respondents' solicitor.

"The Honourable Madam Justice Ryan"

I Agree:

“The Honourable Mr. Justice Mackenzie”

I Agree:

“The Honourable Mr. Justice Thackray”