IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Romfo v. 1216393 Ontario Inc.,***
2007 BCSC 1772

Date: 20071204
No. S060138
Vancouver Registry

Between:

John Allan Romfo, Mary Dianne Romfo, Murray Fairweather, Doreen Fairweather, Robert A. Cunningham, Josephine M.J. Cunningham, Bruce Adams, Roxana Adams and David Perrella

Plaintiffs

And:

1216393 Ontario Inc., Tylon Steepe Development Corporation and Dennis Kretschmer

Defendants

No. S061941
Vancouver Registry

Between:

Julian Carlson and Carol Carlson

Plaintiffs

And:

1216393 Ontario Inc., Tylon Steepe Development Corporation and Dennis Kretschmer

Defendants

No. S061514
Vancouver Registry

Between:

Gordon Frey and Suzan Shellian-Frey

Plaintiffs

And:

1216393 Ontario Inc., Tylon Steepe Development Corporation and Dennis Kretschmer

Defendants

No. S061513
Vancouver Registry

Between:

Kelly Royer and Maureen Royer

Plaintiffs

And:

1216393 Ontario Inc., Tylon Steepe Development Corporation and Dennis Kretschmer

Defendants

Before: The Honourable Mr. Justice Myers

Oral Reasons for Judgment

In Chambers
December 4, 2007

Counsel for the Plaintiffs:	F.G. Potts C.D. Martin
Counsel for the Defendants:	J.B. Rotstein
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** On September 14th, 2007, I delivered judgment in this action in favour of the plaintiffs against the two corporate defendants. It was not necessary for me, nor was I asked to, determine the personal liability of Mr. Kretschmer, and the entered order dismissed the action against him.

[2] The plaintiffs now apply for special costs, largely on the basis of non-disclosure of documents. Alternatively, they seek costs at Scale C of Appendix B of the ***Supreme Court Rules***, B.C. Reg. 221/90, on the basis that this litigation was of more than ordinary difficulty. In addition, pursuant to Appendix B s. 2(4.1) of the ***Rules***, the plaintiffs submit that because of the conduct of one of the defendants at discovery and the non-disclosure of documents, they are entitled to 1.5 times the value of the units for steps taken in relation to the oral and documentary discovery.

[3] The plaintiffs also ask me to determine that the costs for real-time reporting at the trial and pretrial motions are recoverable as costs from the defendants.

Special Costs

[4] The plaintiffs argue that the defendants' failure to produce some documents at all, the late production of other documents and the selective disclosure of other documents should be sanctioned by special costs.

[5] The plaintiffs also rely on the examination for discovery of Mr. Ho in support of their application for special costs. He was deposed as a representative of the defendant 1216393 Ontario Inc. Mr. Ho was not called as a witness at trial, and I drew an adverse inference from that.

[6] To say that Mr. Ho "gave evidence" at his discovery is an overstatement. Although represented by counsel, Mr. Ho took it upon himself to object to virtually every question. Essentially the discovery of him was a waste of plaintiffs' counsel's time.

[7] The plaintiffs rely on ***Laface v. McWilliams***, 2005 BCSC 1766, in which Kirkpatrick J., as she then was, awarded special costs for non-disclosure of documents.

[8] In that case, documents which were central to the case were not disclosed by the defendant. The plaintiff and the court only became aware of the existence of the documents when one of the witnesses mentioned them in

his evidence at trial. Kirkpatrick J. said that her judgment in favour of the plaintiff would have been different had these documents not been disclosed. She awarded special costs throughout to the plaintiff.

[9] In my reasons in the trial issues, I referred to the difficulties with document production at paras. 182, 183 and 185. As is apparent from those reasons, the document disclosure issues were germane to my credibility findings made against Mr. Kretschmer. Those credibility findings were in turn relevant to the outcome of the case as a whole.

[10] In my view, the conduct of the defendants is worthy of sanction. However, I cannot conclude that the document disclosure problems, the discovery of Mr. Ho or the other matters raised by the plaintiffs, to which I have not specifically referred, were as deliberate and serious as those in ***Laface***. To award special costs for the whole of the proceeding would therefore be disproportionate.

[11] In my view, the defendants should be required to pay special costs for all of the document production motions, the motions to compel further examinations for discovery and the preparation for and conduct of the examination of Mr. Ho.

Scale of Costs

[12] The plaintiffs argue that costs should be awarded at Scale C because this was a case of more than ordinary difficulty.

[13] While the action involved complex legal issues and multiple plaintiffs, I cannot say it was a case of more than ordinary difficulty. I note that the only expert evidence tendered was that of appraisers and that they were not called as witnesses. I also note that the difficulties with respect to document production have been dealt with by way of my order for special costs.

Double Costs Pursuant to 57A

[14] The plaintiffs made settlement offers under Rule 57A. They also made offers under Rule 57, but they acknowledge that these offers did not conform to that rule. Their recovery was greater than what was offered. They claim double costs. [1]

[15] The substance of the offers was that (with some variations between them) the defendants would convey the lots for the purchase price set out in the offers OR the defendants would pay the plaintiffs the difference between the appraised value of the lots and the purchase price. The offers further provided that the defendants would discontinue their counterclaim without costs.

[16] The issue with respect to these offers was that they were global offers, namely offers to all of the defendants, yet the defendants were not sued jointly. Furthermore, only the two corporate defendants own the land and only they had the ability to convey it.

[17] The courts have recognized that offers to settle may not be made to multiple defendants unless they were sued jointly. Most recently, Sinclair-Prowse J. was faced with the same issue in ***Cleeve v. Gregerson et al.***, 2007 BCSC 1470. She stated:

> [3] Though the Defendants contend that there are a number of grounds on which the Plaintiff's application should be dismissed, I only found it necessary to address one of those grounds. Specifically I am satisfied that neither Rule 37(A) nor Rule 37 recognize global offers to settle against two or more Defendants who are not jointly liable: *Cao (Guardian ad litem of) v. Schroeder*, 2005 BCCA 351, 42 B.C.L.R. (4th) 222; and *Kerpan v. Insurance Corporation of British Columbia*, 2007 BCSC 203, 47 C.C.L.I. (4th) 72.

[18] I am sympathetic to the plaintiffs' submission that this leaves a gap in the rules; nevertheless, I am bound by the clear authority on this point.

Mr. Kretschmer's Costs

[19] As I mentioned above, the action against Mr. Kretschmer was dismissed. He is therefore entitled to recover costs. However, since all of the defendants were represented by one counsel, he is only entitled to recover costs – if any – that are attributable to his defence over and above those of the other defendants. Further, in view of my ruling with respect to special costs, he is not entitled to recover any costs relating to any of the document production processes, the motions to compel examination for discovery responses or the preparation for and conduct of the examination of Mr. Ho. I am cognizant of the fact that this might result in Mr. Kretschmer not being able to recover any costs at all.

Real-Time Reporting Costs

[20] The plaintiffs arranged for real-time reporting for the trial and pretrial motions. They ask for a determination that these costs are recoverable as a necessary or proper expense.

[21] This issue is an appropriate one for me to consider rather than leave it to the registrar. That is so because I am in the best position to consider the utility of the real-time reporting to the trial process.

[22] While real-time reporting has in some cases been regarded as a luxury for the benefit of counsel, I do not think that can be said in this case.

[23] The case at bar hinged on representations made to numerous plaintiffs. The plaintiffs gave their evidence in rapid sequence. It was a legitimate benefit to plaintiffs' counsel – and to the court – to have a transcript available as the trial progressed to compare the various versions of the evidence. It was also invaluable to have the transcripts for the purpose of having the evidence referred to verbatim in the parties' arguments.

[24] I cannot, however, reach the same conclusion with respect to the real-time reporting of the pretrial motions. That may have been of benefit to plaintiffs' counsel in terms of being able to send the transcripts to his multiple clients who resided in different parts of British Columbia and Alberta; however, that was not argued nor demonstrated to me.

[25] For similar reasons, I would not allow the costs of real-time reporting for the final argument at trial.

[26] Accordingly, I would allow the costs of real-time reporting for the trial but not for the pretrial motions and final argument.

Myers J.

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[1] This argument is made in the alternative to the plaintiffs' argument for special costs. They recognize that special costs cannot be doubled.