COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Romfo v. 1216393 Ontario Inc.,***
2008 BCCA 101

Date: 20080306
Docket: CA035508

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

Appellants
(Plaintiffs)

And

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

Respondents
(Defendants)

Before: The Honourable Madam Justice Rowles
(In Chambers)

F.G. Potts C. Martin	Counsel for the Appellants
J.B. Rotstein	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia 18 January 2008
Place and Date of Judgment:	Vancouver, British Columbia 6 March 2008

Reasons for Judgment of the Honourable Madam Justice Rowles:

[1] The plaintiffs seek directions on whether leave to appeal is required from an order refusing a claim for double costs. To explain how the leave question arises, I must make reference to the proceedings in the trial court and the appeals filed in this Court.

[2] The plaintiffs were successful in an action against 1216393 Ontario Inc. and Tylon Steepe Development Corporation (the "corporate defendants") in which they sought specific performance of agreements for sale of strata lots in a proposed subdivision known as Crystal Waters on Kalamalka Lake, British Columbia. The plaintiffs pleaded in the alternative a claim against the personal defendant, Dennis Kretschmer, for negligent misrepresentation. Mr. Kretschmer was a director of Tylon Steepe Development Corporation and an agent for 1216393 Ontario Inc. in the marketing, developing and selling of the Crystal Waters strata lots. The trial judge's reasons for judgment on the specific performance claim were issued on 14 September 2007 and may be found at 2007 BCSC 1375. The alternative claim against Dennis Kretschmer was not dealt with in those reasons.

[3] On 11 October and 17 October 2007, the parties appeared before the trial judge to settle the terms of the order and to argue costs. The defendants took the position that the trial date on the order should be 14 September

2007. The trial judge did not agree. The formal order shows the date of judgment as 17 October 2007.

[4] On 8 November 2007, the parties were before the trial judge on the issue of costs. Counsel for the defendants asserted that the plaintiffs had abandoned the claim against the personal defendant. The plaintiffs' position was that the claim against Mr. Kretschmer had not been abandoned but, in view of the outcome of the specific performance action against the corporate defendants, the plaintiffs were content to have the claim as against him dismissed.

[5] On 4 December 2007, the trial judge gave reasons for judgment on several issues relating to costs: ***Romfo v. 1216393 Ontario Inc.***, 2007 BCSC 1772, [2007] B.C.J. No. 2616. Among other things, the plaintiffs sought an order for double costs, based on settlement offers made to the corporate defendants and the personal defendant under Rule 37A of the ***Rules of Court***.

[6] Rule 37A provides:

> (1) In any circumstance to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.
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> (2) If an offer of settlement has been delivered under subrule (1) and brought to the attention of the court, the court may
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> > (a) award costs to the offering party in an amount not greater than the costs to which the party would have been entitled had the offer been made under Rule 37, or
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> > (b) deprive the party to whom the offer was made of costs to an extent not greater than that which the court could have ordered had the offer been made under Rule 37.

[7] The trial judge dismissed the application for double costs on the ground that offers to settle may not be made to multiple defendants unless the defendants have been sued jointly. The judge's reasons on this point are set out in full below:

> [14] The plaintiffs made settlement offers under Rule [37A]. They also made offers under Rule [37], but they acknowledge that these offers did not conform to that rule. Their recovery was greater than what was offered. They claim double costs.
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> [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.
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> [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.
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> [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:
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> > [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.

[8] I turn now to the appeals that have been filed. On 12 October 2007, the corporate defendants delivered their notices of appeal from the judgment ordering specific performance. Four notices of appeal were filed, one for each group of plaintiffs referred to in the judgment.

[9] Prompted by the appeals from the order granting specific performance, the plaintiffs brought appeals on 22 October 2007 from the order dismissing the claim as against Mr. Kretschmer. Both the corporate defendants and Mr. Kretschmer were shown as parties to the appeals. The relief sought included the following:

> [...] the Court of Appeal will be moved at the hearing of this appeal for an order that if the Defendants, 1216393 Ontario Inc. and Tylon Steepe Development Corporation, are successful in their appeals, the matter be remitted back to the Honourable Mr. Justice Myers to assess the liability of Mr. Dennis Kretschmer which was not pursued by the Plaintiffs once the corporate defendants were found liable.

[10] The corporate defendants subsequently applied to strike the plaintiffs' appeals from the order dismissing the alternative claim against Mr. Kretschmer on the ground that no relief was or could be sought against them on the appeal. Mr. Kretschmer argued that the plaintiffs' appeal from the order dismissing the alternative claim against him ought to be struck as being out of time. As a precaution, the plaintiffs bought a cross-motion seeking an extension of time within which to bring an appeal from that part of the judge's order which dismissed their alternative claim against Mr. Kretschmer, in the event an extension was needed.

[11] In reasons for judgment issued on 18 January 2008, which may be found at 2008 BCCA 45, I granted the application of the corporate defendants to strike out the plaintiffs' appeal as against them. Mr. Kretschmer's application to strike the plaintiffs' appeals as being out of time was unsuccessful. Without objection, an order was also made that the corporate defendants' appeals against the order for specific performance and the plaintiffs' appeals against the order dismissing the claim as against Mr. Kretschmer be heard at the same time.

[12] With that background, I turn now to the plaintiffs' motion for directions as to whether leave is required to appeal the dismissal of the plaintiffs' claim for double costs and, if leave is required, for leave to appeal.

[13] In the appeals filed by the corporate defendants against the order for specific performance, the plaintiffs have not filed a cross-appeal from the order dismissing their claim for double costs. I assume the plaintiffs did not do so because any relief on the cross-appeal could only be granted against the corporate defendants but the offer was made to all of the defendants.

[14] On 20 December 2007, the corporate defendants' application to strike them as parties in the appeal the plaintiffs had filed against the order dismissing the action against Mr. Kretschmer was heard. The plaintiffs filed their application for directions concerning the matter of double costs after the application to strike was heard but before the reasons for judgment were delivered.

[15] As a result of my order dated 18 January 2008, made in the appeals brought by the plaintiffs against the order dismissing the claim against Mr. Kretschmer, the corporate defendants are no longer parties in those appeals and relief cannot be sought against them in relation to the issue of double costs.

[16] For the plaintiffs to be able to bring the issue of whether the trial judge erred in not granting them double costs, based on the global offer, the plaintiffs would have to bring further appeals directed to the question of whether such costs ought to have been granted, with both the corporate defendants and Mr. Kretschmer as respondents.

[17] Sections 6 and 7 of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, are relevant to the question of whether leave is required. Section 6(1) provides that an appeal lies to the court from an order of the Supreme Court or an

order of a judge of that court but section 7(2) provides that despite section 6(1), an appeal does not lie to the court from an order respecting costs only without leave of a justice.

[18] I am of the view that if the plaintiffs brought a further set of appeals, limited to the double costs question, the plaintiffs would require leave, based on s. 7(2) of the ***Court of Appeal Act***.

[19] In deference to counsel and the arguments they put forward on the question of whether leave ought to be granted, should leave be required, I will also consider that question.

[20] An award of costs generally involves the exercise of discretion and, as a result, the award is subject to limited appellate review. Generally, leave is not granted unless a question of principle is involved: ***Raffele v. Janzen***, [1989] B.C.J. No. 1733 (C.A. – Ch.). In this case, the plaintiffs submit that the point they wish to argue raises a question of principle as it turns on the proper interpretation of Rule 37A. The plaintiffs further argue that the point is one which would be of significance to the practice and, given the length of the trial, the point is also one of significance to the parties because of the amount of the costs that would be involved.

[21] The defendants contend that the point the plaintiffs wish to take forward to appeal is without merit as the point has already been decided against them in this Court.

[22] In my opinion, the plaintiffs have not identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court. The point the plaintiffs wish to argue concerning Rule 37A, which by reference brings in Rule 37, has already been considered and rejected by this Court in ***Cao (Guardian ad litem of) v. Schroeder***, 2005 BCCA 351. I would therefore refuse leave to appeal the question of whether the trial judge, based on the offer that was made to the three defendants, erred in not awarding double costs.

[23] In summary, assuming properly constituted appeals had been brought limited to the question of costs and in which all the defendants were respondents, the direction I would give is that leave to appeal is required and, on a leave application, that leave to appeal is refused.

"The Honourable Madam Justice Rowles"