IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wynnyk v. Bath,***
2008 BCSC 1759

Date: 20081219
Docket: S76399
Registry: New Westminster

Between:

David Wynnyk

Plaintiff

And

Harjeet Singh Bath, Dalveen Bath,
Jesko Stefan Lindt, GMAC Leaseco Limited (Lessor)
and Ilse Elisabeth Lindt (Lessee)

Defendants

Before: The Honourable Mr. Justice N. Brown

Reasons for Judgment

Counsel for the Plaintiff:	G.A. Smith
Counsel for the Defendant:	T.H. Pettit
Date and Place of Trial/Hearing:	December 12, 2008 New Westminster, B.C.

[1] In this application the defendants Bath and Lindt/GMAC seek Rule 37 pre-offer costs and disbursements for two interlocutory applications.

[2] The action relates two motor November 2000 car accidents occurring within a couple of days of the other. One involved Bath, the other Lindt/GMAC. The plaintiff decided to present one claim for both and so commenced a single action against all the defendants, issued October 18, 2002.

[3] The case never proceeded to trial. The plaintiff made a Rule 37 offer to the defendant Bath in June 2004, accepted by him a year later, in June 2005. In January 2005, the defendants Lindt/GMAC made an offer to the plaintiff, accepted soon after that. Normally, the case would be considered settled at this point, five years after the accidents, leaving only the assessment of disbursements to be settled. (The plaintiff was not entitled to costs because the case fell well within the jurisdiction of Provincial Court.) However, the parties did not close their files because of differences that arose about costs for the two production applications successfully brought by the defendants, costs having been ordered payable to them in any event of the cause. The applications and costs orders were made on September 23, 2003 and January 17, 2004.

[4] The defendants expected to recover costs for those applications when these two claims settled, both pursuant to Rule 37 and Form 64. They say that the plaintiff knew that was the intention of the parties; and say counsel confirmed this understanding by a confirmatory letter after settlement. Defence counsel points here to the fact that when the defendant presented the defendants' bill of costs [that] listed items mostly related to the costs granted them for the production orders, plaintiff's counsel raised only assessment, not entitlement issues. Here is the relevant documentation and timeline the defendant relies on to prove the alleged intention that the defendant would have costs ordered in their favour as part of the settlement:

- June 10, 2004 the plaintiff offered to settle under Rule 37 Form 64. January 10, 2005 the defendant accepted.
- January 26, 2005 the defendant paid the settlement amount due on the Bath settlement and with a covering letter and bill of costs dealing mostly with the pre-offer motions. Defence counsel's letter said,

  > Please find enclosed our Bill of Costs for the two applications which resulted in Orders for costs payable to the Defendants in any event of the cause. Would you please review the Bill of Costs and advise whether the amounts claimed are appropriate or whether you require us to set the matter for assessment.

- January 27, 2005 the defendant Lindt/GMAC made an offer to settle pursuant to Rule 37. The plaintiff accepted that offer on January 31, 2005.
- Then, on February 18, 2005 defence counsel wrote plaintiff's counsel stating:

  > When the first claim settled, you indicated that your disbursements were in the range of $1900.00. We have since prepared a Bill of Costs for the chambers applications in which costs were awarded in any event. Coincidently, the Defendant's claim for costs is about $1900.00. We are going to work on the assumption that the Plaintiff's claim for disbursements will basically off set the Defendant's claim for costs and that, having paid settlement funds on both claims, we are now in a position to close our files.
  >
  > If you take a different view of these matters, we would be pleased to hear from you.

  The defendants provided the $50 settlement money but did not pay the plaintiff's disbursements based on their view these would be set off against their costs.

- On February 24, 2005, plaintiff's counsel wrote:

  > I have attached an Excel document which corrects the errors in the initial draft bill of costs provided by you in your letter of January 26th 2005. […]

  The letter then goes on to set out points of disagreement on the amounts claimed for costs. The letter includes a statement that the "total of costs and disbursements is $967.30. I have also attached the list of disbursements for the plaintiff. Once you have reviewed our list and the above comments, please provide the additional funds".

[5] Defence counsel relies on this as confirmation of the intention on the part of both parties that the defendants were entitled to their pre-offer for costs as part and parcel of the Rule 37 offers and acceptances, pointing out that plaintiff's counsel has never flatly contradicted the defendants' assertion of an understanding that the defendants were entitled to costs of the applications. To prove this, counsel also relied on an affidavit of the ICBC handling adjuster. She deposed that [based on previous dealings with Mr. Smith] 'they both knew that costs ordered in any event of the cause always remained payable after settlement.' That may be so, but this very wide brush stroke falls short of establishing a course of dealings that would justify a finding of an implied contractual term in any contractual dispute.

[6] In all events, the parties were unable to come to terms because following that, the defendant set down for September 22, 2005 an assessment of costs. This was adjourned when the decision of ***Tomkin v. Tingey*** 2000 BCSC 1133 was brought to the fore by plaintiff's counsel. ***Tomkin*** of course stood four square against the

defendant's claim for costs of the production application. The plaintiff relies on it, saying ***Tomkin*** denies the defendant's entitlement to costs of the production applications.

[7] On December 12, 2005 a further attempt at assessment was equally unproductive, this time because the registrar declined to make any assessment of costs without a court order. Between then and May 8, 2008 there were some discussions and correspondence but not anything noteworthy, except confirmation of the obvious fact that the parties were at logger heads. The next attempt to lay this litigation to well deserved rest was on May 8, 2008 when the plaintiff set an appointment to assess costs and disbursements for June 3, 2008. The registrar declined to hear that assessment as the plaintiff had not filed a notice of intention to proceed, and for other reasons.

[8] On June 1, 2008 Rule 37B came into effect and the old Rule 37 and 37(a) repealed. The defendant did not ask me to apply Rule 37B. Instead, he advanced an argument built on a foundation he attempted to lay down in order to show that I should not follow or apply ***Tomkin*** or ***Icecorp v. Nicolaus*** 2006 BCSC 25. He argued that ***Tomkin*** is distinguishable because Calderbank orders were available to the defendant at that time, so there were alternatives to Rule 37 available to the defendant. He suggests this point was never brought to the courts attention in ***Icecorp***. Accordingly, this led to a decision that was wrong because the learned judge purported to find evidence of an intention on the part of the parties that 'in any event costs' could not be recoverable when parties made and accepted Rule 37 offers. Counsel argued that it was unreasonable to find any intention on the part of the parties based on the mere fact that they had made their offer under a rule that required strict compliance with the requisite Form 64: If a party attempted to express an intention that deviated an iota from the strictures of the form, their offer would be nullified. See ***Brydges v. B.C. Transit*** 2002 BCSC 808 and others. He argued,

> In other words, it is neither just nor even rational for the courts to remove all methods by which a litigant may express an offer so as to preserve pre-offer costs and then, when the party utilizes the last remaining method of making a formal offer, interpret the parties' action as an intentional waiver of pre-offer costs.
>
> This is like saying "You have no choice but to use this form. Now that you have used this form, I conclude you used this form intentionally rather than some other form."

[9] Defence counsel argues that since neither the plaintiff nor the defendants were permitted to insert express terms addressing disposition of costs of the motions, the absence of express terms in either the plaintiff's offer or the Lindt/GMAC offer is not of any significance.

[10] Defence counsel further argues that the interpretive approach in ***Tomkin***, adopted as it was within the context of the availability of a Calderbank offer, was reasonable. However, "in the post-Calderbank judicial world of 2005, such an interpretive approach could no longer in all fairness be taken", and accordingly ***Icecorp*** should not have followed ***Tomkin***; and neither should I.

[11] Counsel's final point was that the precedent value of both ***Tomkin*** and ***Icecorp*** has been fatally undermined by the repeal of Rule 37, upon which the decisions were grounded. Therefore, I should not apply the reasoning of either decision to the facts in this case.

[12] From that foundation, counsel submits that I am left with an ambiguous settlement term in respect to disposition of costs, submitting that in such circumstances, extrinsic evidence may be admitted to resolve ambiguity.

[13] I am not going to recount Mr. Pettit's argument past this point or Mr. Smith's argument in reply [in a nutshell: ICBC knew the law; there is no ambiguity; the defendants did have other options] because I find that the arguments of both counsel start and end on the wrong footing. I have recounted the most salient points of Mr. Pettit's argument here in part to acknowledge I have heard it, and also to underline the fact that it is no longer necessary to cut through the dense thickets that grew up around the old 37 Rule, which was found wanting and replaced by Rule 37B.

[14] As I said earlier, Mr. Pettit argued against the applicability of the new Rule here. I do not agree. Rule 37B does apply. Defence counsel devoted a good portion of his argument to convince otherwise. He referred me to Rule 37B 6(a) and the use of the words "final judgment". He submitted, based on this, a final judgment had to be in

place before Rule 37 orders could be considered under Rule 37B.

[15] Section 37B states:

> (1) In this rule, "offer to settle" means
>
> (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
>
> (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
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> (c) an offer to settle, made after July 1, 2008, that
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> (i) is made in writing by a party to a proceeding,
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> (ii) has been delivered to all parties of record, and
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> (iii) contains the following sentence: "The ….*[name of party making the offer]*…. reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding."
>
> (3) An offer to settle is not an admission.
>
> (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.
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> (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
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> (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.
>
> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[16] A plain reading of Rule 37B compels no reason to conclude that the applicability of Rule 37B depends on a rendering of final judgment. And see: ***Radke v. Parry*** [2008] B.C.J. No. 1991 and ***Goertz v Calin*** 2008 BCSC 1716.

[17] In this case I will exercise discretion under Rule 37B 6(d).

[18] Given the protracted course of this litigation and the amounts involved, I will also exercise my discretion in the form of a lump sum order, in order to cut through any further entanglements or expenditures. I declare that the defendant is entitled to $1,100 lump sum costs and disbursements on account of the two applications for production ordered payable in any event of the cause. This may be set off against assessable disbursements payable to the plaintiff.

[19] I am satisfied that there was an understanding between the parties, sufficiently demonstrated in the

correspondence, [that] the defendant would have their application costs in any event of the cause, irrespective of the fact that offers and acceptances were expressed using Rule 37 and Form 64. In so doing, I am not confirming acceptance of defence counsel's intricately woven able argument, but rather the fact that Rule 37B can be applied here. It is not necessary to unravel authorities that trussed up the old Rule.

[20] I hasten to add that in some cases it will be right to consider the fact (where offers made under Rule 37 are before the court for consideration) that the parties expected and intended the certain consequences that flowed under the old Rule.

[21] Apart from the foregoing, each party shall bear their own costs.

[22] In summary,

1. Rule 37B applies to Rule 37 offers made and delivered before July 2, 2008 under Rule 37 as that rule read on the date of the offer to settle, whether or not there has been final judgment.
2. Instances will be few where the parties have settled [under Rule 37 using Form 64] and an exercise of judicial discretion under Rule 37B (6)(d) can be justified.
3. Here I am satisfied that that both parties intended that the defendants would be entitled on settlement to receive costs awarded them in any event of the cause. I consider this an "appropriate factor" to consider under Rule 37B(6)(d).

"The Honourable Mr. Justice N. Brown"