Jama v. Bobolo, 2002 ABQB 216

Date: 20020322
Action No. 9801-03292

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

ABDIASIS KALIF JAMA and ABDIRISHID DHIMBAL

Plaintiffs

- and -

GREGORY BOBOLO, DOUGLAS ROY BOBOLO and MAZDA CANADA CREDIT INC.

Defendants

[Note: An Erratum has been filed on June 7, 2002; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE P.M. CLARK

APPEARANCES:

Greg Rodin, Rodin Law Firm
for the Plaintiffs

Walter W. Kubitz, Everard &Kubitz
for the Defendants

[1] Abdiasis Kalif Jama (“Jama”) and Abdirishid Dhimbal (“Dhimbal”) initiated proceedings

against Gregory Bobolo, Douglas Roy Bobolo and Mazda Canada Credit Inc. with respect to personal injuries arising out of a traffic accident that occurred on or about 12:00 p.m. on March 13, 1997. The Plaintiffs allege that they were proceeding in a westerly direction on 12th Avenue S.W. when they were involved in a collision with the Defendants' vehicle.

[2] A Statement of Claim was filed on behalf of the Plaintiffs on March 9, 1998. A Statement of Defence on behalf of Gregory Bobolo and Douglas Roy Bobolo was filed on April 30, 1998. The action was discontinued against Mazda Canada Credit Inc. on September 11, 1998.

[3] The Defendants sought and received permission to have the matter heard before a civil jury. A civil jury was impaneled and the hearing commenced on Monday, May 14, 2001.

[4] On May 16, 2001, the jury returned a verdict in favour of the Defendants. The jury determined that Jama was not a passenger in the Dhimbal vehicle at the time of the accident and that Dhimbal was not injured in the accident.

[5] The action was, thus, dismissed with costs in favour of the Defendants.

[6] The Defendants filed an Offer of Judgment pursuant to Rule 169 of the Alberta Rules of Court, Alta. Reg. 390/68 ("the Rules"), on September 5, 2001. The offer was:

> $1.00, inclusive of all heads of damages, pre-judgment interest, and costs.

ISSUES

[7] The Plaintiffs dispute the propriety of a double costs award in the circumstances. In that regard I have been asked to consider four specific questions:

1. Is a $1.00 offer considered to be a "bona fide" offer of settlement as provided by the Alberta Rules of Court?

2. Is it appropriate to award double costs if the double costs calculation exceeds the solicitor-client or full indemnity costs incurred by the defendant?

3. Would awarding double costs create a chilling effect on the willingness of injured plaintiffs, with valid complaints, to initiate proceedings?

4. Are there any limitations on the discretion of a judge in awarding costs for a civil jury trial?

DECISION

[8] The Defendants' offer of settlement in this case is a *bona fide* offer. It was a genuine offer and was not made solely for the purpose of gaining a costs advantage.

[9] For the reasons that follow, I have reached this conclusion notwithstanding that there is a possibility that over-indemnification may occur. Rule 174 is designed to promote settlement. If a party fails to accept a reasonable offer, they are liable for the consequences.

[10] Where Rule 174 applies, it can give rise to an exception to the normal rule that costs are for the judge to determine, not the jury.

LAW

[11] Section 19 of the *Court of Queen's Bench Act*, R.S.A. 1980, c. C-29 and Rule 601 provide the Court with broad discretion in relation to costs awards. However, those provisions are subject to rule 174.

[12] Rule 174(1) sets out that, where an offer of judgement is made by a defendant under Rule 169 and the plaintiff fails to recover a judgement greater than the offer at trial, the Court:

> shall, unless for special reason, award costs to the defendant for all steps in relation to that claim after the service of notice.

[13] Rule 174 (1.1) states further:

> (1.1) When costs are payable to the defendant under subrule (1) and the action is dismissed entirely, those costs shall, unless for special reason, be double the amount of costs (excluding disbursements) the defendant would otherwise have recovered for all steps in relation to the defence after the service of the notice of payment or the offer.

DISCUSSION

Issue #1: Is a $1.00 offer considered to be a "bona fide" offer of settlement as provided by the Alberta Rules of Court?

[14] The case law suggests that if an offer is genuine, then it is possible for a $1.00 settlement offer to be treated as a "bona fide" offer under the Rules.

[15] In ***Budget Rent-A-Car of Edmonton Ltd.* v. *Security National Insurance Co.*** (2001), 277 A.R. 305 at 308, the Court of Appeal stated that in order to attract double costs, an offer of compromise must be genuine. (Also see: ***Loyer* v. *Capital Jeep Eagle Ltd.*** (1996), 40 Alta. L.R. (3d) 186 (C.A.); ***Labbee et al.* v. *Peters*** (2000), 261 A.R. 141 (C.A.)). In determining that the $1.00 settlement offer was genuine, the Court in ***Budget Rent-A-Car***, *supra*, examined the $1.00 settlement amount in the context of the entire settlement offer. The Court noted that, in addition to the $1.00 settlement offer, the respondent offered to abandon its cross-appeal. At para. 10, the Court stated that "as the cross-appeal was far from frivolous, an offer to abandon it was a valuable concession". The appellant could also potentially have recovered its trial costs in addition to its appeal costs. Given the Court's contextual analysis of the $1.00 settlement offer, it is doubtful that the $1.00 offer would have been sufficient, on its own, to trigger the consequences of Rule 174.

[16] The question of whether a $1.00 offer of settlement constituted a genuine offer of settlement also arose in ***Holt* v. *Gorsline***, [2001] A.J. No. 1021 (Q.B.). In ***Holt***, the defendant's $1.00 settlement offer also included a waiver of costs to the date of the offer. At para. 13, McMahon J. determined that the waiver of costs was "a real and serious offer sufficient to trigger the consequences of Rule 174". Based on the wording used by McMahon J., it is doubtful that the $1.00 offer would have been sufficient, on its own, to trigger the consequences of Rule 174.

[17] In ***Kerr* v. *Kerr***, [2001] A.J. No. 802 (C.A.), the Court considered whether an offer to reduce a spousal support award by $1.00 constituted a genuine offer of settlement. After dismissing the appeal, the Court determined that the $1.00 reduction did not constitute a genuine offer. At para. 5, the Court concluded "that the offer was issued without any expectation that it might be accepted and for the sole purpose of invoking the doubling of costs provisions."

[18] On the basis of the above decisions, it appears that if the $1.00 settlement offer represents a genuine offer to settle, it may be considered a "bona fide" offer for the purposes of Rule 174. If the offer is made for the purpose of gaining a costs advantage or without a reasonable expectation that it will be accepted, then it may not be a "bona fide" offer of settlement.

[19] In the present case, I find that the Defendants' $1.00 settlement offer also included a waiver of costs to the date of the offer and, as in ***Holt***, the waiver of costs was a real and serious offer sufficient to trigger the consequences of Rule 174.

Issue #2: Is it appropriate to award double costs if the double costs calculation exceeds the solicitor-client or full indemnity costs incurred by the defendant?

[20] The short answer to the question is a qualified "yes". Despite the possibility that over-indemnification may occur, it may indeed be appropriate to award double costs.

[21] In ***Greep* v. *Josephson***, [2001] A.J. No. 388 (Q.B.), Romaine J. awarded double costs, as set out in Rule 174, in favour of one of the defendants. However, she capped the double costs at a maximum recovery "equal to solicitor and his own client costs and disbursements". At para. 38 she stated:

> Although Mr. Pittman should be fully indemnified for his legal costs, it is not appropriate in these circumstances that he receive a windfall under the guise of costs.

[22] After first referring to ***Shillingford***, *infra*, Romaine, J. noted that there were "special reasons" present which caused her to exercise discretion in making a costs award under Rule 174. She noted that the first verdict of the jury directed that all parties should bear their own costs. At para. 23, she noted that, absent "special reasons", where there has been a formal offer of settlement under the Rules, costs awarded to a successful party should not, in the normal case, be restricted to provide for mere indemnification.

[23] In ***Foothills Decorating Ltd.* v. *Amigo Construction Ltd.*** (2000), 7 C.L.R. (3d) 217 (Q.B.), Hutchinson J. considered a situation where a double costs award had the potential to exceed solicitor-client costs. At para 30, he stated:

> It can be argued here that an award of double costs may exceed the plaintiff's actual costs payable to its own counsel, that is, solicitor and client costs. There is no evidence from the unsuccessful defendants that a double costs award will exceed the plaintiff's actual costs.

[24] Hutchinson J. went on to state, at para. 30:

> The plaintiff was quite justified in pursuing the claim and should not be required to now compromise its legitimate entitlement to double costs after having made its previous offer of settlement. The defendants bear the consequences. These are the rules under which litigation is conducted.

[25] Thus, the rule appears to be that if a party wants to continue to advance its claim, following an offer of settlement, it does so at its own peril.

[26] This is confirmed by the Court of Appeal's decision in ***Forster* v. *MacDonald*** (1995), 35 Alta. L.R. (3d) 319 at 320-21, where it stated that Rule 174(2) (which applies to a plaintiff's formal offer of settlement):

> ...is not to be frittered away, for its whole purpose is to encourage settlement. The last thing that our crowded courts need is uneconomical litigation, such as trials or appeals where the difference between the parties' positions is small, even negative.

[27] The above quotation was cited with approval by Perras J. in ***Shillingford* v. *Dalbridge Group Inc.*** (2000), 76 Alta. L.R. (3d) 361 (Q.B.). In ***Shillingford***, *supra*, Perras J. conducted a detailed analysis of cost awards and the potential for full or over-indemnification. At 367, he concluded that:

> Costs which are awarded to a successful party where there has been a formal offer of settlement under the Rules of Court should not be restricted to provide for mere indemnification. This follows a recent trend in the law of costs and accords with the purpose and intention of the Rules of Court.

[28] As there are no special reasons that would dictate in favour of restricting costs to indemnification in the present case, double costs are appropriate.

Issue #3 Would the awarding of double costs create a chilling effect on the willingness of injured plaintiffs, with valid complaints, to initiate proceedings?

[29] In ***Shillingford***, *supra*, at 365, Perras J. referred to ***Mobil Oil Canada Ltd.* v. *Canadian Superior Oil Ltd. et al.***, [1980] 1 W.W.R. 453 at 456 (Alta.Q.B.), wherein the Court adopted the reasoning from ***Vanderclay Development Co. Ltd.* v. *Inducon Engineering Ltd.***, [1969] 1 O.R. 41 (H.C.):

> [O]ne must be extremely cautious in departing from the general rule that costs awarded to successful litigants are to be taxed as between party and party on the basis of an authoritative and well recognized tariff. If this principle were departed from, other than in exceptional cases, it is not difficult to visualize the indirect harm that could well be done by inhibiting prospective litigants from bringing to the attention of the Courts matters which they have every right to have put into litigation. At the same time the existence of the jurisdiction which I have already described does afford a real deterrent to persons who may be disposed to make wanton, scandalous and vicious charges against persons with whom they are in conflict.

[30] At 368, Perras J. stated that "the purpose of Rule 174 is to promote settlement and to punish those who refuse a reasonable offer of settlement".

[31] Thus, although it is possible that prospective litigants could be inhibited from bringing forward matters for litigation, given the purpose of Rule 174, this may not be completely undesirable. In other words, Rule 174 forces litigants to seriously consider offers of settlement. If a party rejects what turns out to be a reasonable offer, then it must face the consequences. Rather than having a chilling effect on legitimate litigation, Rule 174 is intended to have a chilling effect on frivolous or otherwise unnecessary litigation.

Issue #4 Are there any limitations on the discretion of a judge in awarding costs for a civil jury trial?

[32] It appears that, in Alberta, this issue has not been extensively considered.

[33] In ***Greep***, *supra*, Romaine J. found, in the context of a civil jury trial, that there were "special reasons" present which allowed her to exercise discretion under Rule 174.

[34] Absent "special reasons", however, there does not appear to be any discretion under Rule 174, even without a civil jury.

[35] For example, in ***Whittle* v. *Davies***, [1987] A.J. No. 1003 (C.A.), the Court determined that if Rule 174 applies then, absent the existence of "special reasons", costs are not in the discretion of the court, but are awarded to the party that made the valid formal offer of settlement.

[36] Also, in ***Laube* v. *Juchli*** (1998), 67 Alta. L.R. (3d) 269 at 271, the Court of Appeal addressed whether a judge has discretion to award costs when a formal settlement offer is extant, and stated that:

> Rule 174 applies in those circumstances, and is very clear. It removes the trial judge's usual discretion, and dictates that costs will reverse from the date of service of the offer, unless "special reason" exists...

[37] Outside of Alberta the proposition that trial judges in a jury trial generally enjoy the discretion to make awards for costs is supported by several decisions: ***Illingworth* v. *Elford***, [1996] O.J. No. 2893 (Gen. Div.); ***Khangura* v. *Khangura***, [2001] B.C.J. No. 1848 at para. 11 (S.C.), ("[but] that caution must be exercised in interpreting what findings a jury has made"); ***GWE Consulting Group Ltd.* v. *Kant***, [1993] B.C.J. No. 1282 (S.C.); ***Ter Neuzen* v. *Korn***, [1991] B.C.J. No. 3849 (S.C.); ***Ferguson* v. *Henshaw***, [1989] B.C.J. No. 1199 (S.C.).

[38] Nonetheless, it remains questionable whether this general discretion applies in instances where a formal offer of settlement has been made.

[39] In ***Venn* v. *McAllister***, [1986] O.J. No. 2562 (Dist. Ct.), Kurisko D.C.J. exercised judicial discretion in refusing to allow the defendant party and party costs. The defendant had earlier made an offer of settlement under Rule 49 of the Ontario Rules of Practice and Procedure [a similar, but not identical, provision to Rule 174 in the Rules]. At para. 8, Kurisko D.C.J. stated:

> The purpose of R. 49 is to encourage litigants to make reasonable offers of settlement. A plaintiff who fails to do so cannot claim entitlement to solicitor and client costs. By not

> accepting a reasonable offer not only are party and party costs forfeited from the date of such offer but in addition the plaintiff will be required to pay such costs. Conversely, a defendant who fails to make a reasonable offer loses the party and party costs advantage of r. 49.10(2) and, by not accepting a reasonable offer of settlement stands to pay solicitor-and-client costs.

[40] Further, at para. 9**,** in refusing to allow the party and party costs to the defendant, he stated:

> To allow the defendant party and party costs in the present case would sanction the inadequate and unreasonably low offer made by the defendant thereby negating the integrity and underlying purpose of R. 49. Indeed, even "rewarding" the defendant by depriving the plaintiff of party and party costs from the date such offer was made would have the same adverse effect.

[41] A unanimous Ontario Supreme Court (High Court of Ontario) subsequently determined that Kurisko D.C.J. did not have the discretion to make the costs award that he did. (See: ***Venn* v. *McAllister***, [1988] O.J. No. 2905.) In arriving at this decision, the Court referred to ***Baboi***, *infra*.

[42] In ***Baboi* v. *Gregory*** (1986), 56 O.R. (2d) 175 (Dist. Ct.), Costello D.C.J. addressed a situation were the defendant had made a formal offer that was higher than the jury award. In the circumstances, it was unclear how the jury arrived at a loss of income award of $2,000 when practically the only evidence on the point fixed the loss of income at $6,000. The plaintiff complained that the jury award was “perverse”. Costello D.C.J. did not exercise any discretion in awarding costs. He refused to interfere with the jury’s findings. Instead, he stated:

> ...I hold that as trial judge, no matter how obvious it may be, I cannot declare the verdict to be perverse because this is a function of the appellate court. I can only enter judgment in accordance with the jury’s answers to questions put to it...

[43] In ***Skye* v. *Matthews***, [1996] O.J. No. 44 (C.A.), the Court considered whether the trial judge appropriately exercised discretion in awarding costs at the conclusion of a jury trial. Despite the existence of a formal offer of settlement from the plaintiff, which was lower than the actual jury award, the trial judge made a distributive costs order. The Court determined that the discretion exercised in making a distributive costs order was not appropriate in the circumstances. The Court noted that once the appellant secured a judgment that was greater than the offer to settle, the appellant was entitled to party and party costs of the trial (as per Rule 49).

[44] At para. 16, the Court noted that:

> The [Ontario] Rules of Practice and Procedure have established a clear connection between offers to settle and costs. ... the offer to settle rules are result, not issue, oriented. This makes sense in light of the objectives of the offer to settle rules. Two can be readily identified. First, the offer to settle rules are intended to encourage early settlement. Second, the rules provide a framework for the eventual disposition of costs in a proceeding.

[45] Thus, with the exception of instances where there has been a formal offer of settlement, the responsibility and discretion to award costs is that of the trial judge, not the jury. Where there is a formal offer of settlement, and the offeree fails to better the offer of the offeror, the case law suggests that there is no general discretion to award costs. Rather, the costs flow from the result determined by the jury.

DATED at , Alberta this 22nd day of March, 2002.

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J.C.Q.B.A.

ERRATA OF THE REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE PETER M. CLARK

Counsel:

Greg Rodin, Rodin Law Firm
for the Plaintiffs

Walter W. Kubitz, Everard & Kubitz
for the Defendants

On page 2, paragraph [7], the first sentence should read:

[7] The Plaintiffs dispute the propriety of a double costs award in the circumstances.

Please replace this page in your copy of the judgment.