In the Court of Appeal of the Northwest Territories

Citation: Fullowka v. Royal Oak Ventures Inc., 2008 NWTCA 9

Date: 2008 09 02
Docket: A-0001-AP2005000021
Registry: Yellowknife, N.W.T.

Between:

Pinkerton's of Canada Limited, The Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada, Timothy Alexander Bettger

Appellants/Respondents by Cross-Appeal

- and -

Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell, Bonnie Lou Sawler

Respondents/Appellants by Cross-Appeal

- and -

James O'Neil

Respondent/Appellant by Cross-Appeal

- and -

Harry Seeton, Allan Raymond Shearing and Roger Wallace Warren

Respondents/Respondents by Cross-Appeal

- and -

Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

Respondent

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment Regarding Costs

Application for Costs

Memorandum of Judgment Regarding Costs

The Court:

In our reasons allowing these appeals we invited further submissions on costs. These supplemental reasons deal with that issue.

Background

The plaintiffs in the main action (the "Fullowka action") and the plaintiff James O'Neil (in the second "O'Neil action") commenced proceedings against the various defendants arising out of an explosion at the Giant Mine in Yellowknife that killed nine miners. The plaintiffs were successful at trial in obtaining substantial judgments for damages: ***Fullowka v. Royal Oak Ventures Inc.***, 2004 NWTSC 66, [2005] 5 W.W.R. 420, 44 C.C.E.L. (3d) 1. That decision was reversed on appeal, and both actions were dismissed: ***Fullowka v. Royal Oak Ventures Inc.***, 2008 NWTCA 4, 66 C.C.E.L. (3d) 1.

The trial judge granted the plaintiffs costs of the trial after a five-day hearing: ***Fullowka v. Royal Oak Ventures Inc.***, 2005 NWTSC 60, [2006] 3 W.W.R. 636, 45 C.C.E.L. (3d) 235. Given the length and complexity of the case, and the resulting inadequacy of the amounts set out in the columns of the Schedule to the Rules of Court, the trial judge concluded it was appropriate to award a fixed sum of costs. The trial judge noted that counsel for the plaintiffs had to deal with the combined efforts of up to five other sets of counsel, who had the advantage of being able to share the work. He rejected the request that the plaintiffs' costs be based on two-thirds of solicitor-client costs, and instead concluded that the Fullowka plaintiffs' costs should be based on eight times Column 6 of the Schedule, and O'Neil's costs should be based on double Column 6. He awarded enhanced costs against CAW National for the way it had engaged in the discovery process, and the way it dealt with requests for admissions.

After the appeals were filed, the defendant Royal Oak Ventures Inc. entered into a settlement agreement with the Fullowka plaintiffs. Under the settlement, Royal Oak paid certain sums on account of damages and costs, and thereafter only participated in the appeals to the extent of supporting the position of the plaintiffs/respondents against the remaining appellants.

The respondents now argue that, as the successful parties, they are entitled to costs of the trial and the appeal. Some of them seek enhanced costs based on offers that were made. The Fullowka plaintiffs seek a Sanderson or a Bullock Order requiring Royal Oak to pay any costs that the successful defendants are awarded.

Costs Follow the Event

Trial costs are dealt with under Rr. 641-52 and Schedule A of the *Rules of the Supreme Court of the Northwest Territories* (the "Rules" or "R."). Costs of appeals are dealt with under

CARr. 39-47 and Schedule B of the *Rules of the Court of Appeal Respecting Civil Appeals* (the "Civil Appeal Rules" or "CAR").

Rule 643 and CAR 39 confirm the court's general discretion in awarding costs, but Rule 643(2) and CAR 40 state the presumptive rule that the successful party is entitled to costs. There is no factor at play here that would deprive the successful appellants of costs, and the respondents concede the appellants are entitled to costs of the trial and the appeal.

Scale of Costs

Rule 648 provides that the scale of trial costs is set by the amounts in Schedule A unless the court otherwise orders. The Fullowka claim was for $34 million, and the O'Neil claim was for $2 million. Both claims therefore exceeded $150,000, placing these actions in Column 6 of Schedule A.

Rule 650 and CAR 41 provide that costs of an appeal shall be as directed by the court, but in default of direction shall be on the same scale as that ordered by the trial court. Under Schedule B, appeals over $150,000 are covered by Column 5. CAR 46 further provides:

> 46. In any case where the taxed costs of a solicitor are less than 50% of that solicitor's own bill to his or her client, the solicitor may tax his or her reasonable solicitor-and-client costs and, in such case, the costs of the appeal shall be the higher of the costs taxed pursuant to Schedule B or 50% of the taxed solicitor-and-client costs.

The four successful appellants each argue that, in accordance with CAR 41, they should receive the same award of costs for the trial as was originally awarded to the respondents, namely eight times Column 6 for the Fullowka claim and double Column 6 for the O'Neil claim. The respondents point out that this would require them to pay 40 times Column 6. The respondents argue that the appellants should collectively receive only one set of costs to divide amongst themselves. In any event, the respondents argue that no appellant should receive party and party costs that will actually exceed solicitor and client costs.

In these actions it was reasonable, and indeed essential, that the appellants be separately represented. As such they are entitled to separate sets of costs. Some recognition must, however, be given to the fact that appellants' counsel responsibly attempted to share the work required to defend the actions. Further, the amounts that the respondents must pay must be reasonable.

Setting the scale of costs is complicated by the length and complexity of these proceedings. Each side accused the other of litigating in an overly aggressive manner, and it is clear the litigation was hard fought. The setting of costs is also complicated by the fact that two actions (the Fullowka claim and the O'Neil claim) were tried together, and there was a considerable amount of overlap between the two. Since the Workers' Compensation Board is

subrogated to both claims, and will bear the eventual burden of this costs award, it is possible to provide for one set of costs for each appellant, to be allocated between the Fullowka plaintiffs and O'Neil: *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6, s. 13(1)(c).

Schedule A has not been adjusted for inflation since 1996, during which time the cost of living in Canada has increased by approximately 30%.

Having regard to all these factors, each appellant should be entitled to costs of the trial (including the costs hearing) taxed at three times Column 6 of Schedule A, provided that no appellant may tax fees in excess of 75% of the solicitor-client costs charged to and actually payable by its respective client.

The Civil Appeal Rules have a built-in mechanism for dealing with complexity and inflation. Accordingly each appellant is entitled to costs of the appeal taxed on Column 5 of Schedule B, or 50% of solicitor-client costs charged to and actually payable by their respective client, whichever is the greater.

The Fullowka respondents are jointly responsible for 90%, and O'Neil is severally responsible for the remaining 10% of the fees of the trial and the appeal.

A letter (with a reasonable amount of detail) signed by senior counsel for an appellant confirming that the taxed costs are 50% of, or do not exceed 75% of solicitor-client costs charged to and actually payable by their respective client (as the case may be) will be sufficient proof of that fact, unless the taxing officer permits further inquiries or directs further proof.

The trial judge awarded the respondents an extra $150,000 of costs to be paid by CAW because of its failure to discharge its responsibilities under the Rules. The finding of misconduct by the trial judge is entitled to deference. The trial judge did not indicate how he calculated the amount of the costs penalty, but it undoubtedly bore a relationship to the fixed costs award he made. The penalty was in fact 24% of CAW's costs liability (22% x $2,826,560). Since CAW is no longer required to pay costs to the respondents, to reflect this factor a deduction of 24% should be made from the trial costs that the respondents are otherwise required to pay to CAW under these reasons.

Offers of Settlement

The Rules of Court provide as follows:

> 201(2) Where a defendant makes an offer to settle at least 10 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if

(a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the plaintiff; and

(b) the plaintiff obtains a judgment on terms as favorable as or less favorable than the terms of the offer to settle.

. . .

203 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, *the costs consequences set out in rule 201 do not apply to the offer to settle unless,*

(a) in the case of an offer made by the plaintiff, the offer is made to all the defendants and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) *the offer is an offer to settle the plaintiff's claim against all the defendants* and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is *made by all the defendants* and is an offer to settle the plaintiff's claim against all the defendants and, by the terms of the offer, the defendants are made jointly and severally liable to the plaintiff for the whole amount of the offer.

The following offers were made by the successful appellants:

(a) On November 8, 1999 the GNWT offered the Fullowka plaintiffs the sum of $215, reflecting some taxable costs incurred to that point.

(b) On August 28, 2003, CAW offered the Fullowka plaintiffs the sum of $9, being one dollar for each of the nine plaintiffs.

(c) On September 16, 2003, Bettger offered the Fullowka plaintiffs the sum of $90,000, and O'Neil the sum of $15,000.

The latter two offers also contemplated the costs of nearly 10 years of litigation to that point.

The offerors concede that none of the offers complied with the Rules, as none of them were offers to settle respecting "all of the defendants". The GNWT points out that compliance with the Rules would have required that the offer be made on behalf of Roger Warren as well, something that probably made use of the Rules impossible in this case. The defects in the offers are more than mere technicalities or errors in form, which counters any argument that such deficiencies can be overlooked. The offerors are therefore not entitled to solicitor-client costs after the date of the offers as provided in the Rules.

Even informal offers are, however, relevant to costs. Modern litigation is focused on dispute resolution, and all parties are encouraged to act reasonably and settle actions where possible. As Rooke, J. said in ***McAteer v. Devoncroft Developments Ltd.***, 2003 ABQB 425, 21 Alta. L.R. (4th) 116, 340 A.R. 1 at para. 41:

> . . . it is my view that the Court should be slow to restrict the ways in which parties may try to settle cases with cost consequences, as those consequences encourage parties to settle litigation where a reasonable offer is made and penalizes others for proceeding with unnecessary trials.

Significant court resources are now allocated to assisting the parties in reaching settlement. The Rules provide for a very narrow type of formal offer, and give such offers dramatic costs consequences: solicitor-client costs. The Rules do not intend that all other offers are irrelevant. Therefore, even offers that do not comply with the Rules on formal offers can be taken into consideration in setting costs, although informal or non-compliant offers will often have a lesser impact on costs that formal and compliant offers.

The leading case is ***Calderbank v. Calderbank***, [1975] 3 W.L.R. 586, [1975] 3 All E.R. 333 (C.A.), which was specifically referred to in the offer made by GNWT. In ***Calderbank*** the Court gave effect to an informal offer contained in what has since become known as a "Calderbank letter", that is a letter containing an offer that is without prejudice except as to costs. Other courts have since given effect to similar offers: ***Mosher v. Reimer***, 2004 ABQB 496; ***Envirodrive Inc. v. 836442 Alberta Ltd.***, 2005 ABQB 807, 12 B.L.R. (4th) 257.

In this case the trial judge considered non-compliant offers that had been made by the Fullowka plaintiffs stating:

> 93. Jurisprudence from Ontario, whose rules are similar in this regard, suggests that even those offers which do not fall within the Rules may warrant similar costs treatment. The Ontario Court of Appeal dealt with this in *Bifolchi v. Sherar (Litigation Administrator)* (1998), 38 O.R. (3d) 772 at 778-779:
>
> > Given the specific language used in the various offers, we agree that none of them fell within the provisions of rule 49.10, thereby giving Bifolchi and Lisgar a *prima facie* entitlement to solicitor and client costs from the

> date of the offer. We think, however, that the trial judge fell into serious error in failing to consider the substance of those offers and a further offer made by Bifolchi and Lisgar shortly after the commencement of the trial when deciding the appropriate order as to costs.
>
> Liability was never a serious issue. The various offers made by Bifolchi and Lisgar demonstrate a genuine and continuing effort by them to settle this case.... These offers should have figured prominently in the trial judge's determination of the appropriate order as to costs: see rule 57.01(1).

The trial judge concluded, however, that the Fullowka plaintiffs' proposals were too vague, and were "not offers to settle but rather invitations to negotiate further agreements", and gave no effect to them in setting costs.

The appellants GNWT, CAW and Bettger each made a genuine offer of settlement. Given the position of the defendant Warren, who was serving nine life sentences for murder, it was impossible in practical terms for them to make a formal offer that complied with the Rules. At the time the offers were made there had been extensive discovery of records and examinations for discovery; the respondents should have been in a good position to assess their position. As a result, there should be some costs consequences of the failure of the respondents to accept the offers made, but since the offers were non-compliant, the remedy of solicitor-client costs that attaches to compliant offers is inappropriate. In the circumstances, the taxed costs of the three offerors accruing after the offers were made, up to the end of trial, should be increased by 25%. That costs penalty will not be subject to the cap of 75% of solicitor-client costs imposed *supra*, para. 14. Since the offers were not renewed after the trial judgment, they have no affect on the costs of the appeal.

Costs Payable to Other Parties

In some circumstances the unsuccessful defendants can be ordered to pay the costs of any successful defendants. Under a Sanderson Order, the unsuccessful defendants pay those costs directly to the successful defendants: ***Sanderson v. Blyth Theatre Co.***, [1903] 2 K.B. 533 (C.A.). Under a Bullock Order the plaintiffs must pay the costs of the successful defendants, but are entitled to recover them from the unsuccessful defendants: ***Bullock v. London General Omnibus Co.***, [1907] 1 K.B. 264 (C.A.). Under this latter type of order, the risk of insolvency of the unsuccessful defendants falls on the plaintiffs.

Both a Sanderson Order and a Bullock Order presuppose an "unsuccessful defendant". The Fullowka respondents argue that Royal Oak Ventures Inc. is such a defendant, because it paid a settlement amount after the trial judge had found it liable. Those respondents seek a Sanderson Order directing that Royal Oak pay the costs of the successful appellants directly.

The respondents are not entitled to a Sanderson or Bullock Order for two reasons. Firstly, it was an express term of the settlement agreement that "the terms of this Agreement shall not be construed as constituting an admission by Our Clients [the respondents] or Your Clients [Royal Oak]". Since there was no admission of liability, Royal Oak cannot be characterized as being "unsuccessful". Secondly, the settlement agreement provided that "Our Clients will not seek to recover from Your Clients any amounts in excess of the Settlement Payment". By virtue of the terms of the settlement, the Fullowka respondents are not entitled to recover any further sums from Royal Oak.

The trial judge granted a Sanderson Order, requiring the appellants and other unsuccessful defendants to pay the costs of the successful defendants Witte and Sheridan. There is no longer any basis for that award as against the successful appellants, and it is set aside. The residual relief that the respondents may be entitled to against the remaining unsuccessful defendants is a matter for the trial court.

The GNWT issued a third-party notice against the Government of Canada seeking indemnity, in the event of liability being found, on the basis that Canada was responsible for labour relations at the Giant Mine. The third-party claim was dismissed on a non-suit motion, and the GNWT was required to pay costs of $115,242.82. The GNWT seeks reimbursement of those costs from the respondents. The usual rule is that the unsuccessful plaintiff is not responsible for the costs of the third party unless adding the third party was necessary or inevitable: ***McAteer v. Devoncroft Developments Ltd.***, 2001 ABQB 917, 99 Alta. L.R. (3d) 6 at paras. 751-2; ***Sorrel 1985 Limited Partnership v. Sorrel Resources Ltd.,*** 2000 ABCA 256, 85 Alta. L.R. (3d) 27, 277 A.R. 1 at para. 105; ***Bank of America National Trust & Savings Assn. Canada v. Jean Co.,*** [2006] O.J. No. 4680. Adding Canada was not necessary or inevitable in these cases, and the request for an indemnity of the costs incurred is dismissed.

Disbursements

The appellants claim the fees of expert witnesses, including some witnesses who prepared reports but did not actually testify, under R. 641(b) and (f). The respondents have failed to demonstrate that the retention of any of these experts was unreasonable, and the appellants are entitled to claim a disbursement for all the reasonable charges incurred.

A disbursement is allowed for faxing, photocopying, and printing in the amounts set by the trial judge. Disbursements for IT services, computer and other research, and access to computer data bases are not allowed for the reasons given by the trial judge.

CAW retained Professor L. Klar to provide a legal opinion on the file, and claims his charges as a disbursement. Legal research needed on a file is subsumed in the taxable fees that are awarded to the successful party, and payments for legal opinions are not a proper disbursement.

The parties jointly retained Kevin Short Consulting to prepare all of the appeal books, factums, and case authorities in electronic format. The expenses incurred are a proper disbursement.

Conclusion

Each of Pinkerton's, GNWT, Bettger and CAW are entitled to one set of taxed costs of the trial calculated on triple Column 6, but not to exceed 75% of solicitor-client costs, plus all reasonable disbursements and GST. The base costs of CAW must be reduced by 24% to reflect its conduct of the litigation. To those base costs, CAW, GNWT and Bettger are entitled to add 25% of the costs incurred after their respective offers were made.

Each of the four successful appellants is entitled to costs of the appeal taxed on Column 5 of Schedule B, or 50% of solicitor-client costs charged to and actually payable by its respective client, whichever is the greater.

A fee for second counsel is allowed when they were present in court at trial or on appeal, as are travel expenses under Rule 648(4). Any residual issues about taxable fees or disbursements will be settled by the taxing officer.

The Fullowka respondents are jointly responsible for 90% of the fees, and O'Neil is severally responsible for the remaining 10% of the fees. Common disbursements will be apportioned on a like basis, but disbursements specific to one action or the other will be paid by the appropriate plaintiffs. Where any step was taken in common (e.g., preparation of a joint factum), the fees should be allocated equitably between the parties based on the amount of work done.

Since success is divided, no party other than Royal Oak will receive costs of the application to set costs. Royal Oak will neither receive nor pay costs of the appeal, but it is entitled to costs from the Fullowka respondents of $7,500 plus reasonable disbursements and GST related to this application to fix costs.

Any costs previously awarded at any case management meeting, or on any interlocutory proceeding or motion, are undisturbed by this ruling on costs. There will be a general right of set off.

The respondents have brought an application for a stay, which is to be heard by the case management judge on September 19, 2008. We accordingly grant an interim stay of this costs ruling until September 19, 2008, or such other time as the case management judge may direct.

Written Submissions filed on June 19, 2008, June 24, 2008, June 26, 2008 and July 21, 2008

Memorandum filed at Yellowknife, N.W.T.
this day of August, 2008

Costigan J.A.