Federal Court  Cour fédérale

Date: 20191028

Dockets: T-473-06
T-474-06

Citation: 2019 FC 1348

Ottawa, Ontario, October 28, 2019

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-473-06

BETWEEN:

ALLAN JAY GORDON

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-474-06

AND BETWEEN:

JAMES A. DEACUR AND ASSOCIATES LTD.
AND JAMES ALLAN DEACUR

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

SUPPLEMENTARY JUDGMENT AND REASONS

[1] In my Judgment and Reasons issued on June 25, 2019 dismissing these actions, I left on reserve the issue of costs. I invited the parties to submit their arguments in writing and they have done so. Although these matters were not consolidated, they were tried together and this single set of reasons will apply to both actions.

[2] As with almost everything else about this litigation, the parties are far apart on the issue of costs. The Plaintiffs – who have now retained counsel – argue that each of the parties should bear their own costs. They base this argument on their asserted status as public-interest litigants who, despite losing their cases, raised and succeeded on a serious legal issue of public importance. That issue was the resolution of the question of the standard of care applicable to the conduct of Canada Revenue Agency [CRA] criminal investigations. I accept the point that this issue had not been definitively resolved in the jurisprudence, and it was decided in favour of the Plaintiffs. However, it can also be said that it was unnecessary to have decided this point because, by whatever standard the Court applied (eg. negligence, bad faith, malice, etc.), the Plaintiffs abjectly failed to meet their requisite burden of proof.

[3] More importantly, the Plaintiffs' cases do not meet the conditions required for public-interest costs relief. In *Mcewing v Canada (Attorney General)*, 2013 FC 953, [2013] FCJ No 976 [*Mcewing*], my colleague Justice Richard Mosley identified the conditions that are

required for an award of special costs in the context of public interest litigation. Those conditions, found at para 13 of *Mcewing*, are:

a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.

b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically.

c) The issues have not been previously determined by a court in a proceeding against the same defendant.

d) The defendant has a clearly superior capacity to bear the costs of the proceeding.

e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

In contrast to the above-noted requirements, the focus of these cases concerned the recovery of substantial damages from the Crown. These cases were decidedly not motivated by altruism. The benefit of achieving some additional clarity on a non-determinative point of law does not, in these circumstances, transcend the Plaintiffs' substantial personal pecuniary interests.

[4] Having regard to the history of this litigation both before and during the trial, I am also unable to positively characterize the Plaintiffs' conduct. In a number of instances, their questioning of CRA witnesses was excessively harsh, and many of their arguments were frivolous, if not vexatious. They also presented no credible evidence in proof of their very serious accusations of deceit, malice and dishonesty against the Defendant, Defendant's counsel, witnesses, and CRA officials. Indeed, a stronger case for some costs relief would have been present if the Plaintiffs had simply pleaded their cases in negligence.

[5] Having lost their cases, the Plaintiffs must assume some level of responsibility for the substantial costs that were borne by the Defendant and, ultimately, by Canadian taxpayers.

[6] The Plaintiffs argue, in the alternative, that costs should be limited to a recovery under Column I of Tariff B. They assert that the Defendant was remiss by refusing to pursue a reasonable settlement or to meaningfully participate in a proposed mediation.

[7] There is no doubt that the Defendant adopted a hardline settlement position, which effectively blocked a scheduled mediation. That position, as I understand it, was to propose that these actions be discontinued on consent without costs. I am told that the Defendant declined to negotiate from this position. There was, however, a basis for that strategy. As the outcome of the cases established, the Plaintiffs would have been prudent to seriously consider the Defendant's proposal. Furthermore, nothing has been provided to me to establish that the Plaintiffs advanced any settlement offers to the Defendant. In these circumstances, the risks and benefits of pursuing a settlement do not all lie at the feet of the Defendant.

[8] The Plaintiffs' additional complaint, that the Defendant refused to cooperate with an Agreed Statement of Facts and thereby unnecessarily lengthened the trial, has no merit. I agree that the trial of these actions could have been completed in much less time than it took; however, that was mostly a function of the Plaintiffs' lengthy, repetitive and largely unhelpful cross-examinations of defence witnesses. Much time was also wasted by prolonged and unnecessary commentary and criticism – mainly by Mr. Gordon – directed at the Defendant's counsel and CRA witnesses. I accept that the Plaintiffs have no legal training, and more latitude was

extended to them for that reason; however it does not lie well in their mouths to criticize the Defendant when they chose not to retain counsel for most of the trial, and then adopted methods that unduly prolonged the trial.

[9] The Defendant seeks substantial indemnity for its costs in the form of a lump sum of $2 million. This amount represents 57% of the value of professional time expended in the defence of these actions over the past 13 years and claimed disbursements of $226,471.06.

[10] The Defendant seeks a substantial contribution to its solicitor-client costs based, in part, on its "informal" attempts to settle the cases in 2009. The Defendant's settlement position was, at that time, expressed in a Mediation Brief in the following way:

> At this stage of the proceedings, counsel for the Defendant would recommend accepting a discontinuance of the actions without costs or a reasonable basis for narrowing the issues regarding how the evidence will be presented at trial.

[11] The above statement does not conform to the requirements regarding offers to settle found in Rule 420 of the *Federal Courts Rules*, SOR/98-106. To give effect to the double costs consequences of that Rule, an offer must meet the conditions identified by the Federal Court of Appeal in *Venngo v Concierge Connection Inc*, 2017 FCA 96 at paras 87-90, 146 CPR (4th) 182. The offer must be unequivocal in the sense that it will bind the offeror upon acceptance by the offeree. It cannot be a mere offer to treat or to obtain further instructions.

[12] I accept that the Defendant's suggested settlement is a factor the Court can still consider. However, in these circumstances, I give it little weight because it provided little incentive to the

Plaintiffs who, it must be remembered, had been subjected to the substantial costs and stress associated with the Crown's aborted criminal prosecution. This case was unlikely to settle in the absence of at least a modest compromise payment from the Defendant in recognition of the Plaintiffs' earlier hardships.

[13] An award of enhanced costs does, however, merit consideration in this case because of the Plaintiffs' repeated accusations of dishonesty, malice and bad faith levelled against the Defendant, its counsel and many of its officials (in particular Patricia Northey). As I said in my decision on the merits, those allegations were entirely baseless and should never have been pleaded, let alone asserted, on a regular basis throughout the trial. The Plaintiffs were made aware of the potential cost consequences of making and continuing those allegations but they persisted, as demonstrated in their repetition in the Plaintiffs' Post-Trial Brief.

[14] Moreover, not all of the Plaintiffs' litigation conduct can be excused by their lack of legal training. These cases were under active case-management for several years, and on more than one occasion Prothonotary Kevin Aalto was required to admonish the Plaintiffs for inappropriate behaviour and incivility. The clearest example of this can be found in his Order dated May 5, 2017, found at 2017 FC 454. I have extracted just a few of the relevant passages from that document that best reflect his concerns, found at para 6:

> It is my view that the Plaintiffs, in particular, do not have the right to use a proceeding in a Court to attack others, either the Court or counsel. It is not their personal place. It is a public institution and those that seek to make use of the courts to right a perceived or legitimate wrong do not have carte blanche to act inappropriately, speak offensively of others, or pursue personal agendas.
>
> Notwithstanding my best efforts, this has not been happening and so we're going to have to change the way this case is conducted.

…

This week has seen Mr. Gordon engaging in what I can only describe as a petulant writing campaign. He may disagree with decisions of this Court. If he does so, he has a right of appeal, not to engage in attacking others. It is not appropriate to write incendiary, verging on contemptuous correspondence, not of the Court, but also of counsel for the Crown, who is simply doing her job. Mr. Gordon may not appreciate that, but that's what happens in this Court.

…

In the course of it, of course, I made some observations regarding the frustrations that I have with this case and the frustration that I have with the Plaintiffs from time to time, and I invited Ms. Linden to bring a motion to dismiss the case if she was so instructed. What I did not say, of course, is that if such a motion were brought, I'm not going to hear it. I think somebody else should hear it and offer views on the Plaintiffs conduct in this piece. I may come back to that in a moment.

…

A number of observations: Number one, as I said at the outset, this is a Court proceeding, not a sandbox proceeding. In future we will conduct meetings between the parties, case conferences in a courtroom and we will observe all of the process of a Court. That will include such matters as parties standing to address the Court, not speaking over each other, not making accusations about the opposite side. I simply will not tolerate interruptions that I have witnessed in the past again.

…

[7] Some additional observations need to be made. First, before issuing this Order I required a full copy of the transcribed transcript of the hearing which only recently became available. Second, none of the allegations against Ms. Linden or her alleged conduct are accepted by this Court. Third, the omitted portion of the transcript deals with exchanges between the Court, the Plaintiffs and Ms. Linden concerning the ongoing examinations for discovery which are being held in the courthouse so that I am able to attend to deal with issues as they arise. Fourth, the parties are to conduct themselves in accordance with my observations in Court and the Plaintiffs are to answer questions put to them in a

> forthright factual basis without opinion, editorializing or accusations…

[15] In the course of a case management conference presided over by Prothonotary Aalto on March 6, 2017, he also had occasion to address the Plaintiffs' litigation conduct in the following way:

> I must say, my level of frustration with this case never seems to decline. I think things are moving, and all of a sudden we have these issues. You would have known…and not would have, you did know, Mr. Deacur, Mr. Gordon, from the last case conference, exactly what was going to happen, that you were going to get a letter and that you were going…or, Mr. Gordon, you were going to get a letter, and you would have to respond to it.
>
> MS. LINDEN: And even the dates.
>
> PROTHONOTARY AALTO: This is your case, Mr. Gordon. I can tell you right now, if Ms. Linden brought a motion to dismiss this action for failure to cooperate and provide documents, I would be inclined to grant it, and just dismiss this entire charade, because that is what it is becoming. You two are offside.
>
> I cannot tell you how angry I am about the lack of responsiveness of the both of you to what the Crown is trying to accomplish in its case. You have had ample opportunity to do everything you need to do in this case, and yet you stymie the process at every possible opportunity. I am beside myself.
>
> Quite frankly, I want to dismiss this case, because your conduct is absolutely dreadful. You don't get this, you don't get that. It seems to be a level of convenience with your approach to the case. It is your case, not their case. Take some responsibility for it.

[16] I would add that the kind of behaviour that concerned Prothonotary Aalto continued during the trial in the form of *ad hominem* attacks against counsel for the Defendant, Ms. Northey and other witnesses.

[17] The authorities indicate quite clearly that unmeritorious accusations of dishonesty, malice and bad faith that are pleaded and maintained in the course of litigation may be met with an award of enhanced costs, often on a substantial indemnity basis: see *Hamilton v Open Window Bakery Ltd*, 2004 SCC 9, [2004] 1 SCR 303; *DiBattista v Wawanesa Mutual Insurance Co*, 2005 Carswell Ont 6604, aff'd 2016 Carswell Ont 6011 (CA), [2005] OJ No 4865; *Jazz Air LP v Toronto Port Authority*, 2007 Carswell Ont 1268, [2007] OJ No 809 and *De Cruz Lee v Lee*, 2015 ONSC 2012, [2015] WDFL 2006.

[18] I am satisfied that this is a case where the Plaintiffs' litigation conduct justifies the payment of enhanced costs to the Defendant. However, I am also of the view that the above referenced principles can be vindicated by resorting to a recovery at the high end of Column V of Tariff B.

[19] This was also not an overly complex case in legal or evidentiary terms. Ordinarily an award of party-and-party costs at the mid-point of Column III would be justified. In this situation, I will award costs at the upper level of Column V. The Defendant has submitted a Bill of Costs calculated at the upper level of both Columns III and V in the respective amounts of $328,125.00 and $549,975.00. Having regard to the fact that in a number of instances costs for interlocutory matters were not awarded, I will adjust the amount payable to the Defendant downward to $525,000.00.

[20] Disbursements in the amount of $220,000.00 are also claimed. Approximately $125,000.00 of the claimed disbursements are for payments the Defendant made to third parties

for document management and copying. While this may have been the best practical approach for the Defendant, I am not prepared to provide full indemnity for work that could have been done in-house at less cost. In the result, disbursements are allowed in the amount of $150,000.00. The Plaintiffs' obligation for costs and disbursements is accordingly fixed in the amount of $675,000.00. This amount is payable jointly and severally by the three Plaintiffs. Joint liability is appropriate in this situation because the Plaintiffs jointly prosecuted their common causes of action and participated fully in the trial. No apparent unfairness arises by making each of the Plaintiffs responsible for the payment of the full costs award in the event of default by any of the others: see *Meady v Greyhound Canada Transportation Corp*, 2013 ONSC 4568, 107 WCB (2d) 784.

JUDGMENT IN T-473-06 and T-474-06

THIS COURT'S JUDGMENT is that costs and disbursements in the amount of $675,000.00 are payable jointly and severally by the Plaintiffs to the Defendant.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-473-06
STYLE OF CAUSE:	ALLAN JAY GORDON v HER MAJESTY THE QUEEN
AND DOCKET:	T-474-06
STYLE OF CAUSE:	JAMES A. DEACUR AND ASSOCIATES LTD. AND JAMES ALLAN DEACUR v HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 15 TO 18, 2018 OCTOBER 22 to 25, 2018 OCTOBER 29 to NOVEMBER 1, 2018 NOVEMBER 5 TO 8, 2018 NOVEMBER 13 TO 16, 2018 NOVEMBER 19 TO 22, 2018 NOVEMBER 26 TO 29, 2018 DECEMBER 3 TO 6, 2018 DECEMBER 10 TO 13, 2018 DECEMBER 17 TO 18, 2018 FEBRUARY 4 AND 6, 2019
SUPPLEMENTARY JUDGMENT AND REASONS:	BARNES J.
DATED:	OCTOBER 28, 2019

APPEARANCES:

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