

In the Court of Appeal of Alberta

Citation: Mostafa Altalibi Professional Corporation v Lorne S. Kamelchuk Professional Corporation, 2022 ABCA 364

Date: 20221115
Docket: 2101-0329AC
Registry: Calgary

Between:

Mostafa Altalibi Professional Corporation and Dr. Mostafa Altalibi

Respondents

- and -

Lorne S. Kamelchuk Professional Corporation and Dr. Lorne S. Kamelchuk

Appellants

The Court:

**The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Thomas W. Wakeling
The Honourable Justice Frederica Schutz**

Memorandum of Judgment Regarding Costs

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Introduction

[1] In *Mostafa Altalibi Professional Corporation v Lorne S Kamelchuk Professional Corporation*, 2022 ABCA 239, this Court dismissed the appellants' appeal of a decision of a chamber's judge, who had upheld a master's order which permitted questioning to be conducted by video conferencing.

[2] Prior to the hearing for that appeal, the respondents had made a formal offer to the appellants, offering that if the appellants discontinued the appeal, each party would bear its own costs of the appeal. The appellants did not accept that offer.

[3] Now, the respondents seek double costs, according to rr 4.29 and 14.59 of the *Alberta Rules of Court*, Alta Reg 124/2010. The appellants oppose an order for double costs, arguing that r 14.88 of the *Alberta Rules of Court* is the only rule that applies.

[4] For the reasons which follow, the respondents' request is granted.

Double Costs Awards

[5] Rule 14.88 is the default rule for costs following an appeal. It states:

(1) Unless otherwise ordered, the successful party in an appeal or an application is entitled to a costs award against the unsuccessful party.

(2) The provisions of Part 10, Division 2 and Schedule C apply to appeals.

(3) Unless otherwise ordered, the scale of costs in an appeal shall be the same as the scale that applies to the order or judgment appealed from.

[6] A formal offer may permit departing from this default rule.

[7] Formal offers are made in accordance with r 4.24, which states:

(1) At any time after a statement of claim...

... one party may serve on the party to whom the offer is made a formal offer to settle the action or a claim in the action.

[8] Formal offers may be made in the context of an appeal. Rule 14.59 states:

(1) No later than 10 days before an appeal is scheduled to be heard, a party may serve on the party to whom the offer is made a formal offer to settle the appeal or any part of the appeal in accordance with Part 4, Division 5.

(2) A valid formal offer to settle an appeal may be accepted in accordance with rule 4.25.

(3) Unless a valid formal offer to settle an appeal is withdrawn under rule 4.24(4), the valid formal offer to settle an appeal remains open for acceptance until the earlier of

(a) the expiry of 2 months after the date of the offer or any longer period specified in the offer, and

(b) the start of the oral hearing of the appeal.

(4) Where a formal offer to settle an appeal is made, costs of the appeal must be awarded in accordance with rule 4.29.

[9] In turn, r 4.29 states that if a party makes a formal offer to settle which is not accepted, and subsequently obtains a result in the action which is equal to, or more favourable than, the terms of the formal offer, the offering party is entitled to double the costs which it would have regularly been entitled to for all steps taken in relation to the action after service of the offer, excluding disbursements. Rule 4.29(4) sets out several exceptions to this rule, with r 4.29(4)(e) stating that the double costs rule does not apply if in special circumstances the Court orders that it should not apply.

[10] Finally, r 4.25 sets out the ways in which a formal offer may be accepted.

[11] The purpose of the double costs rules in the *Alberta Rules of Court* is to encourage settlement: *H2S Solutions Ltd v Tourmaline Oil Corp*, 2020 ABCA 201 at para 5. As this Court stated in *H2S*, double costs “meaningfully reinforce the importance of encouraging settlement, prevent unnecessary litigation, and ensure a party accepts greater consequences if it gambles and loses”: at para 18. This interpretation is reinforced by r 1.2(2) of the *Alberta Rules of Court*, which states that the *Rules of Court* are intended both to facilitate resolving claims by the quickest means possible and at the least expense, and to encourage the parties to resolve the claim amongst themselves by agreement as early as possible in the litigation process.

[12] In *H2S*, this Court set out the relevant factors for assessing whether an award of double costs should be granted. The four primary factors identified in that decision are: the timing of the offer; the content of the offer; whether the offer was beyond *de minimus*; and whether special circumstances exist which militate against granting double costs: *H2S* at paras 27-39. The

“unifying theme” was the existence of an “identifiable and sufficient compromise” within the offer: *H2S* at para 21.

[13] The timing of the offer is a relevant factor because the double costs rule applies to costs incurred by the offeror after the formal offer is made and before the window for acceptance closes. The accumulation of costs over time during the currency of the formal offer could create a sufficient and identifiable compromise, even if no costs had been incurred by the respondent at the time the formal offer was made: *H2S* at para 30.

[14] The second factor considers the content of the offer. The offer must contain a sufficient and identifiable compromise, and an offer which “amounts to a no-risk, ‘think again’ tactic” does not qualify as a formal offer within the meaning of the *Alberta Rules of Court*: *H2S* at para 33.

[15] Formal offers which trigger the double costs rule must be beyond *de minimus*. This means that a court must be readily capable of identifying the elements of sufficient and identifiable compromise within the formal offer: *H2S* at para 35.

[16] Finally, the fourth factor considers whether special circumstances exist which could lead a court to exercise its residual discretion in disallowing double costs even where the previous three elements have been satisfied: *H2S* at para 39. Some examples of special circumstances include subsequent misconduct by the offeror, the withholding of disclosure by the offeror, or a subsequent amendment to the offeror’s pleadings which allowed the offeror to obtain a more favourable result than what was contemplated in the formal offer: *Stevenson & Côté, Alberta Civil Procedure Handbook*, vol 2 (Edmonton: Juriliber, 2022) at 4-63.

Chronology

[17] The relevant chronology relating to the formal offer in this appeal is as follows:

- (a) On February 4, 2022 the appellants filed their factum for this appeal.
- (b) On February 10, 2022 the respondents made their formal offer.
- (c) On March 3, 2022 the respondents filed their factum.
- (d) The appellants did not accept the offer. Under r 14.59(3)(a) of the *Alberta Rules of Court*, the respondents formal offer expired two months after it was made. Therefore, it expired on April 10, 2022.
- (e) On June 13, 2022 the appeal was heard.
- (f) On July 6, 2022 the Court dismissed the appeal, 2022 ABCA 239. The appeal was dismissed.

[18] The respondents' formal offer stated:

The Appellants shall discontinue the Appeal, on a without costs basis.

The Respondents will consent to the Appeal being discontinued on a without costs basis.

Parties' Submissions

[19] The respondents argue that r 14.59(4) uses mandatory language in stating that costs "must" be awarded in accordance with r 4.29 when a formal offer is made. They submit that their offer is a formal offer, citing the cases of *Pillar Resource Services Inc v PrimeWest Energy Inc*, 2017 ABCA 141, and *Morin v Alberta Utilities Commission*, 2017 ABCA 39.

[20] The appellants oppose the respondents' request for double costs on three alternative grounds.

[21] First, they argue that the offer in this circumstance did not constitute a formal offer within the meaning of r 4.24.

[22] Second, they argue the offer lacks a sufficient and identifiable compromise.

[23] Third, the appellants argue that the court should exercise its discretion under r 4.29(4)(e) as a double costs award in this circumstance would result in over-indemnification which constitutes a "special circumstance" within the meaning of that rule.

Analysis

i. The respondents' offer is a formal offer within the meaning of the *Alberta Rules of Court*

[24] The appellants argue that the formal offer made by the respondents does not satisfy the wording of r 4.24, which defines a formal offer as one which offers to settle "the action or a claim in the action". The appellants submit that because this was an interlocutory appeal relating to the format for questioning, the respondents' offer did not propose to settle either the action or a claim within the action, and therefore was not a formal offer as contemplated by the *Alberta Rules of Court*.

[25] Rule 14.59 of the *Alberta Rules of Court* simply states that a party to an appeal may make a formal offer "to settle the appeal or any part of the appeal" and stipulates that the offer must be made in accordance with Part 4, Division 5 of the *Alberta Rules of Court*. This is an indication that formal offers within the appellate context are still subject to the procedural rules within Part 4,

Division 5. It does not indicate that the scope of formal offers which seek to settle the appeal or part of the appeal should be limited by the precise wording of r 4.24.

[26] Formal offers made in the context of an interlocutory appeal equally satisfy the *Alberta Rules of Court* objectives as formal offers within other contexts. Whether the appeal in question is interlocutory or not, a formal offer still encourages settlement and prevents unnecessary litigation. It promotes quicker settlement and the resolution of the dispute among the parties themselves. A similar point was made by Rowbotham JA in *Morin* at paras 10-11, where she stated that r 14.59(1) also applies to applications and interlocutory appeals.

[27] Limiting the scope of formal offers within the appellate context based on the wording of one rule in Part 4, Division 5 of the *Alberta Rules of Court*, as the appellants suggest, would run contrary to the above stated objectives and the general objectives of the *Alberta Rules of Court* as identified in r 1.2(2). The respondents' offer is a formal offer within the meaning contemplated by the *Alberta Rules of Court*.

ii. The respondents' offer contains a sufficient and identifiable compromise, and satisfies the elements of a formal offer

[28] In the alternative, the appellants argue that the respondents' offer did not contain a sufficient and identifiable compromise. According to the appellants, the fact that the respondents' formal offer expired two months prior to the hearing date for the appeal, and the fact that it was served between the filing of the appellants' factum and the respondents' factum, indicates that it is a "think again" offer without real compromise.

[29] The appellants cite paragraph 23 of *H2S* in support of this proposition, where this Court referred to *Terrigno Investments Inc v Farrell*, 2019 ABCA 426 at para 9 for the proposition that "[f]ormalistic offers merely designed to double costs are discouraged". However, the circumstances in *Terrigno* are not analogous to this case. In *Terrigno*, the respondent's formal offer was made after their factum had been filed. Here, the respondents' formal offer was made prior to the filing of their factum. As elaborated in *H2S* at paragraph 30, "if an offer is made *before* a respondent incurs costs but does not expire until *after* costs have been incurred, there is no principled basis for this Court to refuse awarding double costs" (emphasis in original).

[30] Moreover, both in *Pillar* and in *Morin*, double costs were awarded after very similar formal offers were made, both of which offered to discontinue the appeal of an interlocutory matter in exchange for the parties' bearing their own costs in the appeal. In *H2S*, this Court declined to award double costs after a similar formal offer was made by the respondent because the respondent had not incurred any costs during the currency of the offer: at para 40. That was not the case here. Although the respondents had not incurred any Schedule C costs at the time the offer was made, they incurred costs throughout the currency of the offer. As stated in *Pillar*, "[r]ule 4.29 applies to the risk of prospective costs as well as to costs already awarded in an action": at para 9.

[31] As a result, the respondents' formal offer exhibits sufficient and identifiable compromise. The respondents offered to forego the very costs which they will now be awarded, and the appellants did not accept that offer.

iii. The awarding of special costs does not result in over-indemnification, and does not constitute a special circumstance in which double costs should not be awarded to the extent of the over-indemnification

[32] Finally, the appellants argue that even if the respondents' offer was a valid formal offer with sufficient and identifiable compromise, this Court should exercise its residual and overarching discretion under r 4.29(4)(e) and decline to award double costs in special circumstances. The appellants submit that an award of double costs may result in over-indemnification, which they argue is a special circumstance, citing in support O'Leary JA's dissenting opinion in *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2005 ABCA 46.

[33] In *Freyberg*, the costs award was very substantial even before the double costs rules were applied. The trial judge had some concerns regarding the possibility of over-indemnification and so requested that counsel for the defendants provide her with their bills of costs, on a confidential basis, in order to determine the presence and extent of any over-indemnification: *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2003 ABQB 176 at para 23 (*Freyberg* ABQB). Following a review of the bills of costs, the trial judge determined that any over-indemnification which would occur would be minor and awarded double costs: *Freyberg* ABQB at para 24. It was this approach with which O'Leary JA took issue in his dissent in *Freyberg* at paras 229-232. He would have set aside the double costs award due to the over-indemnification as such an award would both punish the unsuccessful party and provide a windfall to the defendants: *Freyberg* at para 230.

[34] In some circumstances, the possibility of significant over-indemnification may constitute a special circumstance to not award double costs. For example, where solicitor and own client costs are awarded, this Court has stated that the doubling of such costs may constitute a special circumstance under r 4.29(4)(e): *Boje v Boje (Estate of)*, 2005 ABCA 73 at para 39. However, this Court also stated that the double costs regime may in some circumstances even apply to awards of solicitor and own client costs: *Boje* at para 39.

[35] The purpose of the double costs regime in the *Alberta Rules of Court* is to encourage settlement and to ensure that a party which "gambles and loses" on an appeal accepts greater consequences for doing so: *H2S* at para 18.

[36] In this case, no evidence has been provided that a double costs award would result in over-indemnification. Absent such evidence, there is no basis to depart from the standard application of the double costs regime in the *Alberta Rules of Court*. The respondents are seeking party-party costs, not solicitor and own client costs. Therefore, the considerations identified in *Boje* do not apply here. Double costs awards will be greater than standard costs awards by their very nature.

The mere possibility of over-indemnification is not a special circumstance within the meaning of r 4.29(4)(e).

Conclusion

[37] The respondents are entitled to their costs of this appeal from the appellants. The costs shall be taxable on a single basis for steps taken prior to February 10, 2022, and steps taken after February 10, 2022 will be taxable on a double basis, in each case, under the appropriate column in Schedule C of the *Alberta Rules of Court*.

Costs submissions filed September 6 and 16, 2022

Memorandum filed at Calgary, Alberta
this 15th day of November, 2022

Veldhuis J.A.

Wakeling J.A.

Schutz J.A.

Appearances:

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J. Duguay

for the Respondents

C.M. Smith

M. James

for the Appellants