In the Court of Appeal of Alberta

Citation: RVB Managements Ltd. v Rocky Mountain House (Town), 2015 ABCA 304

Date: 20150928
Docket: 1403-0062-AC
Registry: Edmonton

Between:

RVB Managements Ltd. and Lavoy Property Development Ltd.

Appellants
(Plaintiffs)

- and -

The Town of Rocky Mountain House

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment Regarding Costs

Appeal from the Order by
The Honourable Madam Justice B.A. Browne
Dated the 24th day of January, 2014
(2014 ABQB 51, Docket: 9803 05368)

Memorandum of Judgment Regarding Costs

The Court:

[1] The appellants challenge the award of costs made against them by the trial judge.

[2] The appellants advanced a claim for $2.5 million against the respondent for illegal diversion of water, resulting in remediation costs and delays in development of their lands. During the litigation they amended the claim to $25 million. At trial their position was that they should receive damages of $24,927,586 plus $500,000. They lost at trial and received nothing: ***RVB Managements Ltd. v Rocky Mountain House (Town)***, 2014 ABQB 51, 90 Alta LR (5th) 215, 582 AR 1. Their appeal was dismissed: ***RVB Managements Ltd. v Rocky Mountain House (Town)***, 2015 ABCA 188.

[3] In unreported reasons, the trial judge awarded the successful respondent costs of the action. She noted that this was a lengthy (27 day) and complex trial, with a number of amendments to the pleadings, complex expert testimony, and voluminous documentation. After ruling on a number of discrete issues, she concluded that the amounts awarded by Schedule C should be increased by 25% to account for inflation.

[4] The trial judge awarded costs for different stages of the trial:

(a) from commencement of the action to May 2007, she awarded costs on Column 5, plus 25% for inflation;

(b) from May 2007, after the claim had been amended to $25 million, she awarded double Column 5, plus 25% for inflation.

The trial judge noted that Column 5 addresses claims over $1.5 million, whereas the present claim was for many times that amount. This, she held, justified a multiple of Column 5.

[5] The appellants challenge only the (i) increase in the costs to account for inflation, and (ii) the multiplication of Column 5 to account for the size of the claim.

[6] Costs awards are discretionary and will not be interfered with unless the trial judge made an error in principle, misstated the law or made an overriding and palpable error: ***Conway v Zinkhofer***, 2008 ABCA 392, citing ***Deans v Thachuk***, 2005 ABCA 368, 376 AR 326; ***Nazarewycz v Dool***, 2009 ABCA 70 at para. 53, 448 AR 1; ***Metz v Weisgerber***, 2004 ABCA 151, 33 Alta LR (4th) 17, 348 AR 143.

Inflationary Adjustments

[7] The amounts in Schedule C have not been updated since 1998. Since then the cost of living has increased by about 39%. While a number of trial judges have adopted the practice of increasing the amounts in Schedule C to allow for inflation, the appellants argue that this is unjustified. They

note that when the new Rules of Court were adopted in 2010, the amounts in Schedule C were not changed. Thus, they argue, the old 1998 amounts were "confirmed" in 2010, and no inflationary adjustment is called for.

[8] The 2010 re-enactment of the Rules of Court was made based on recommendations from the Alberta Law Reform Institute. The Institute did not examine the amounts provided for in Schedule C, stating in para. 32 of its Consultation Memorandum No. 12.17, *Costs and Sanctions*, that this was "beyond the scope of the Rules of Court Project". Section 37 of the *Interpretation Act*, RSA 2000, c. I-8, displaces any assumption that the repeal and substitution of an enactment was intended to either confirm or change the prior law. The re-enactment of the Rules continued the historically wide discretion of trial judges to award costs, and was made against the background of numerous judicial decisions that had been adjusting Schedule C for inflation. The re-enactment should be interpreted on the assumption that, where appropriate, that practice could continue.

[9] The appellants cite a number of cases in which judges declined to adjust Schedule C for inflation, including ***Chisholm v Lindsay***, 2015 ABCA 179 at paras. 48, 53, which upheld an award of costs at trial which did not include an inflationary adjustment. ***Chisholm*** does not stand for the proposition that Schedule C must or must not be adjusted for inflation. It merely confirms at para. 49 that trial judges have a wide discretion over costs, and that the costs award in that case (considered globally) did not contain any error warranting appellate interference.

[10] The appellants also argue that the trial judge erred because there was no evidence presented of the amount of inflation experienced in Alberta. The fact that the cost of living varies over time is sufficiently notorious that notice can be taken of it. The exact amount of inflation is something upon which evidence should ordinarily be presented. The trial judge awarded 25%, whereas the Bank of Canada online Inflation Calculator indicates that the average increase in the cost of living in Canada since 1998 has been approximately 39%. While more exact evidence would have been desirable, the award of 25% for inflation does not demonstrate any miscarriage of justice.

[11] The re-enactment of Schedule C in 2010 does not limit a trial judge's discretion to set the quantum of costs. The amounts in Schedule C are presumptive amounts only. Rule 10.31(3)(a) allows a judge to award costs "with or without reference to Schedule C": ***Hill v Hill Family Trust***, 2013 ABCA 313 at para. 38, 561 AR 50. The criteria for exercising the court's discretion over costs found in R. 10.33 would lose much of their meaning if the Court was nevertheless bound by the amounts in Schedule C. It was not an error in principle for the trial judge to adjust the costs for inflation, and that aspect of the award does not reflect any other reviewable error.

Multiples of Column 5

[12] The appellants argue that Column 5 of Schedule C covers all claims over $1.5 million, and that it was an error to award a multiple of that column because of the size of the claim.

[13] Rule 10.31 continues the broad discretion that trial judges have over costs, and R. 10.31(3)(b) specifically authorizes the trial judge to award "a multiple, proportion or fraction of an amount set out

in any column of the tariff". Rule 10.33 lists the criteria to be considered, and includes in R. 10.33(1)(b) "the amount claimed and the amount recovered". It is common practice for trial judges to award multiples of the columns for various reasons, and given the express provisions of the rule it was not an error of principle for this trial judge to award a multiple of the Column because of the size of the claim: ***Hill v Hill Family Trust*** at para. 39.

[14] The appellants argue that the trial judge failed to consider whether awarding a multiple of Column 5 would result in the respondent receiving more than full indemnity for its legal fees. The appellants correctly point out that the philosophy behind the costs rules is that litigants will only be partly indemnified by an award of costs, and, except in exceptional circumstances, costs awards should not result in over-indemnification: ***Shillingford v Dalbridge Group Inc.***, 2000 ABQB 28 at para. 17, 268 AR 324, 76 Alta LR (3d) 361.

[15] The respondent does not challenge the general principle that over-indemnification is inappropriate, but merely alleges that there is no evidence of any over-indemnification. Such evidence would, obviously, be particularly under the control of the respondent. In order to avoid further expense, the trial judge's costs order should be interpreted as implicitly including a cap on costs at full indemnity. Full indemnity for this purpose would be applied to the action as a whole, not to any of the discrete steps mentioned in Schedule C. If the parties are unable to resolve any remaining dispute over this issue, the assessment officer can ensure that there is no over-indemnification under R. 10.41(3)(e)(ii).

Conclusion

[16] In conclusion, the appellants have not demonstrated any reviewable error in the costs award, and the appeal is dismissed.

Written submissions received on September 4 and September 17, 2015

Memorandum filed at Edmonton, Alberta
this 28th day of September, 2015

Authorized to sign for: Paperny J.A.

Watson J.A.

Slatter J.A.

Appearances:

K.D Wakefield, Q.C. and A.M. Simmonds
for the Appellants

J. McGinnis, Q.C. and G. Joshee-Arnal
for the Respondent