Date: 2006 11 09
Docket: CV 05834

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BRUCE PETERKIN

Plaintiff

- and -

UNION OF NORTHERN WORKERS, DARM CROOK and LONA HEGEMAN

Defendants

MEMORANDUM OF JUDGMENT ON COSTS

[1] On July 12, 2006, I issued judgment in favour of the plaintiff awarding him, as damages for defamation, $20,000.00 as general damages, $10,000.00 as aggravated damages, and pre-judgment interest (see 2006 NWTSC 34). I stated in my reasons for judgment that my "inclination" was to award the plaintiff the usual costs, on the applicable tariff as set out in the Rules of Court, together with a second counsel fee at trial, but if the parties could not agree on costs then they may file further written submissions. The parties have done so and this Memorandum addresses the question of costs.

[2] The case, for some unexplained reason or more likely reasons, spent an inordinate amount of time in the court system. The actions complained of occurred in 1994; the action was commenced in 1995; but, it did not come to trial until November of 2005. After the first few days of trial, it became apparent that the trial will take far longer than originally envisioned by counsel (and scheduled for by the court) and therefore it was adjourned until June of 2006 for completion. The trial took a total of 12 days.

[3] The case concernedallegations of defamationcontained in four documents.With respect to two of those documents, I held that they were subject to a qualified privilege and thus dismissed the plaintiff's action with respect to those. With respect to the two other documents, I held that one was defamatory while the other one was not since it in fact made no mention of the plaintiff (although, to be accurate, the plaintiff dealt with

these last two documents as one continuous document even though they were created on different days).

[4] With respect to costs, it is evident that there are three primary issues in dispute: (1) the impact of an offer to settle made by the plaintiff; (2) the fact that there was divided success at trial; and, (3) the retention by the plaintiff of counsel not resident in the jurisdiction.

1. The Offer to Settle:

[5] On January 15, 2002, plaintiff's counsel served on the defendants' counsel an offer to settle in writing whereby the plaintiff expressed his willingness to settle the action for $90,000.00 *inclusive of costs* (my emphasis). Plaintiff's counsel has done a calculation as a result of my judgment which, according to counsel, results in a total award in excess of $108,000.00 when one adds up the amounts awarded as damages, pre-judgment interest, and a draft party-and-party Bill of Costs through to the end of the trial totaling in excess of $66,400.00. Thus, according to counsel, the costs consequences of Rule 201(1) apply. That rule states that, if the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle, the plaintiff is then entitled to party-and-party costs to the day on which the offer was served and solicitor-and-client costs thereafter. Plaintiff's counsel has calculated solicitor-and-client costs from January 15, 2002, to judgment as being in excess of $138,200.00.

[6] Defendants' counsel has made two objections to this approach.

[7] First, defendants' counsel submits that the offer to settledid not complywith the Rules because the offer expired prior to trial. The rule requiresthat the offer not expire "before the commencement of the hearing". Here, the plaintiff's offer was stated as remaining open "until the commencement of the trial". In my opinion, there is no difference. They mean the same thing. So, on this point, the offer complies with the requirements of the rule.

[8] Second, defendants' counsel takes issue with the methodology employed by plaintiff's counsel in coming to the conclusion that the judgment exceeds the offer. He argues that one should not use the amounts for pre-judgment interest and costs after trial but the amounts that would have applied at the time of the offer. On this point, I agree. The proper way of analyzing whether a judgment is as favourable or more favourable than the offer is to look at the offer, including interest and costs up to the date of the offer, compared to the amount recovered.

[9] The current Rule 201 (enacted in 1996) is modeled to a great extent on what is Rule 49.10 of the Ontario Rules of Civil Procedure. In the Ontario case of *Mathur v. Commercial Union Assurance Company* (1988), 24 C.P.C.(2d) 225 (Ont.Div.Ct.), Parker C.J.H.C. was reviewing the decision of the trial judge to include pre-judgment interest up to the date of judgment when considering the effect of an offer. He stated (at p.227):

> …the relevant date under R.49.10 was the date of offer. If the date of judgment were the relevant date, a plaintiff's solicitorwould profit by unnecessary adjournments and delay, since pre-judgment interest would be increasing the total award daily. The longer the delay, the greater the likelihood of securing solicitor-and-client costs. Since the purpose of the Rule is to encourage settlement, the interpretation given by the trial judge would frustrate the purpose of the Rule. In this case, if one looks at the amount of the damages and pre-judgment interest as of the date of the offer, then the amount the plaintiff recovered at trial for damages and pre-judgment interest to the date of the offer was not as or more favourable than the term of the offer to settle.

[10] In this jurisdiction, the issue of how to address pre-judgment interest in particular is addressed by Rule 205. That rule states that for comparison purposes the court shall calculate pre-judgment interest as of the date the offer was served.

[11] The difficulty in the present case, of course, is the inclusion of the phrase "inclusive of costs" in the offer. Surely, if one had to assess the risks and rewards of accepting the offer, one would look at the costs incurred up to that point in time. Also, the bare reference to "costs" is open to many interpretations. Does it mean taxable party-and-party costs; or, solicitor-and-client costs; or, does it mean that costs are merely a nominal consideration as part of the global settlement figure? Therefore, I agree with the Ontario approach. The relevant date for purposes of the costs consequences of Rule 201 is the date of the offer. Thus, if I take away from the draft Bill of Costs just the fees and disbursements clearly attributable to the trial, that reduces the costs to a point where the trial judgment is not as favourable to the plaintiff as the offer to settle.

[12] An offer to settle should be fixed, certain and understandable. The difficulty when an offer comes in at a lump sum is that it becomes a "moving target". The longer the case goes on after the offer is made the more the potential for higher awards simply due to the passage of time. This is particularly the case with the accumulation of pre-

judgment interest but it also has a bearing on costs. And that is what happened in this case. But, again, if an offer is inclusive of costs, one looks at the offer amount compared to the judgment recovered with the costs of the action calculated, like pre-judgment interest, up to the date of the offer: see *Merrill Lynch Canada Inc. v. Cassina,* (1992), 14 C.P.C.(3d) 264 (Ont.Gen.Div.).

[13] For these reasons, I hold that the costs consequences of Rule 201(1) do not apply in this case.

2. Divided Success at Trial:

[14] Defendants' counsel submits that the defendants should be awarded costs, because on three of the four specific items alleged to be defamatory the defendants were successful in defending the claims, or alternatively the plaintiff's costs should be reduced or apportioned to reflect the divided success. There is certainly a great deal of case law that supports such an exercise by a trial judge of his or her discretion in such circumstances.

[15] A case noted by defendants' counsel which bears some similarity to the present one is *Dhillon v. Brar,* (1991), 74 Man.R.(2d) 12 (Q.B.). There, a defamation action, the defendant successfully defended some claimsbut the plaintiffssucceeded on others recovering, however, modest damages. The trial judge ordered each side to bear their own costs. He wrote (at para.99):

> The plaintiffs have established they were defamed, but they alleged far greater defamation than they proved and far greater damages than they could justify. The defendant was put to considerable additional effort and, undoubtedly, expense to contest these unsuccessful claims. To that extent, success has been divided and I believe that should be reflected favourably to the position of the defendant on the matter of costs.

[16] There is no doubt that the general principle is that the successful party should be awarded costs. In this case there was nothing to say that the claims advanced by the plaintiff were unmeritorious on their face. The specific defamation claims on which the plaintiff did not succeed were not because the items in question were not defamatory. He was unsuccessful because I held that they were subject to a claim of qualified privilege. That issue consumed much of the time at trial and the result was far from being clear-cut. So this case is not like the one in *Dhillon* where much of the claim advanced by the plaintiff was indeed unmeritorious.

[17] Nevertheless, there is some merit in the defendants' position. They were successful in large measure at the trial. This should be reflected in the amount of costs awarded. I do not suggest some strict apportionment according to which claims were successful and which were not. But some adjustment must be made to reflect the fact that the plaintiff was not successful in at least half of his case.

3. Non-resident Counsel:

[18] The use of non-resident counsel, and the abilityto recoveras disbursements on a Bill of Costs the additional expenses incurred as a result, has been the subject of numerous cases in this jurisdiction. The applicable principle, as reflected in those cases and in Rule 648(4), is that the travelling and living expenses of counsel who reside outside of the Territories are not recoverable unless (a) the expertise required to perform the particular service is not available from counsel resident in the Territories; or (b) conflicts of interest prevent local counsel from acting in the matter. Generally speaking, some special circumstance must be demonstrated to justify the retention of non-resident counsel if recovery for the additional costs of doing so (such as travel expenses) is sought from the other side: see, for example, *Seeton v. CommercialUnion Assurance Company et al*, (1999) 41 C.P.C.(4th) 361 (N.W.T.S.C.).

[19] In this case the plaintiff does not seek to justify the retention of non-resident counsel on the basis of either expertise or conflicts of interest. The plaintiff retained his lead counsel, Mr. Steven Cooper, in 1993 (even before the first matterscomplained of in the action). At that time, Mr. Cooper was practicing with a firm in Hay River. He was therefore a resident of the Territories. Mr. Cooper moved, in 1997 (after the commencement of this action), to Sherwood Park, Alberta, and has been a partnerwith a firm there since that time. The plaintiff says that he was too involved in the litigation by that time with Mr. Cooper so he did not wish to change counsel. The implicit suggestion is that he had trust in his counsel and any switch would have been counter-productive.

[20] As I have said in previous cases where this issue has come up, a client can choose any lawyer he or she wants but that does not automatically mean that the other side is going to pay for it. The traditional rule was that the client is responsible for putting his or her counsel at the place of trial. Here, as well, the firm advertises as providing legal services in the Northwest Territories. If it choosesto do business in the jurisdiction from an office out of the jurisdiction then the additional costs of doing business that way is something it or its clients must bear: see, for example, *MacNeil v. MacNeil-Norris*, [2005] 7 W.W.R. 578 (N.W.T.S.C.), at para. 15.

[21] If this were the only issue in dispute, however, I would not strike out all of the expenses claimed for travel for counsel. The plaintiff's decision to continue with Mr. Cooper is an understandable one in the circumstances. However, those expenses would have to be the subject of some analysis for reasonableness and likely adjustment.

4. Conclusions:

[22] Taking into account all of the aforementioned considerations, specifically that the costs consequences of the offer to settle rules do not apply, that an apportionment should be made due to the divided success, and that some adjustment must be made to the travel disbursements claimed for non-resident counsel,I have concludedthat this is an appropriate case for the exercise of my discretion by fixing a lump sum for costs. Having reviewed all of the draft bills submitted by plaintiff's counsel, I will fix those costs at approximately 50% of the plaintiff's draft party-and-party bill.

[23] The plaintiff will therefore recover costs from the defendants, jointly and severally, in the fixed amount of $33,000.00 inclusive of disbursements and GST.

J.Z. Vertes
J.S.C.

DATED at Yellowknife, NT,
this ___ day of November, 2006.

Counsel for the Plaintiff: Theresa L. Wilson

Counsel for the Defendants: Austin F. Marshall

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