IN THE SUPREME COURT OF YUKON

Citation: *Dalziel* v. *Yukon Government et al.,* 2008 YKSC 33

Date: 20080513
S.C. No. 07-A0102
Registry: Whitehorse

Between:

BYRON DALZIEL and SHELLY DALZIEL

Petitioners

And

TOWN OF WATSON LAKE, YUKON GOVERNMENT, DEPARTMENT OF ENERGY MINES & RESOURCES (LANDS BRANCH) and BRYAN ANDERSON

Respondents

Before: Mr. Justice R. S. Veale

Appearances:

André Roothman	Counsel for Byron Dalziel and Shelly Dalziel
Michael Winstanley	Counsel for Yukon Government
James Tucker	Counsel for Town of Watson Lake
Peter Morawsky	Counsel for Bryan Anderson

REASONS FOR JUDGMENT

(COSTS)

INTRODUCTION

[1] Byron and Shelly Dalziel (the Dalziels) brought a petition to set aside a decision of the Director of the Lands Branch granting a piece of land to Bryan Anderson.

[2] The respondents were the Lands Branch of the Yukon Government, Bryan Anderson and the Town of Watson Lake.

[3] In *Dalziel* v. *Yukon Government et al.*, 2008 YKSC 04, I set aside the grant to Bryan Anderson and remitted the matter back to the Lands Branch. I dismissed the Dalziels' claim against the Town of Watson Lake.

[4] This is an application for awards of court costs by each of the Dalziels, Bryan Anderson and the Town of Watson Lake. The Dalziels do not claim costs against Bryan Anderson.

[5] The Yukon Government acknowledges that it should pay the costs of the Dalziels and gratuitously agrees to pay the costs of Bryan Anderson, albeit on Scale B as a matter of ordinary difficulty. The Dalziels and Bryan Anderson seek special costs or, alternatively, costs on Scale C for a matter of more than ordinary difficulty. I therefore order the Yukon Government to pay the costs of the Dalziels and Bryan Anderson, subject to my ruling below on the scale of costs.

[6] With respect to the costs of the Town of Watson Lake, the Town and the Yukon Government submit that the Dalziels should pay the Town's costs. The Town seeks special costs, or alternatively, costs on Scale C. The Dalziels submit that the Yukon Government should pay the costs of the Town of Watson Lake.

THE APPLICABLE LAW OF COSTS

[7] Rule 57(9) of the *Rules of Court* states that costs follow the event unless the Court otherwise orders. The usual costs order would have the Yukon Government and Bryan Anderson paying the costs of the Dalziels and the Dalziels paying the costs of the Town of Watson Lake.

[8] The precise issue here is whether Rule 57(18) can be invoked by the Dalziels so that the Yukon Government pays the costs of the Town of Watson Lake. Rule 57(18) states:

> Where the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

[9] Rule 57(18) gives the Court the discretion in cases of multiple defendants or respondents to order the unsuccessful respondent, in this case the Yukon Government, to pay the costs of the successful respondent, the Town of Watson Lake.

[10] This Rule stems from two decisions of the English Court of Appeal in *Sanderson* v. *Blyth Theatre Company,* [1903] 2 K.B. 533 and *Bullock* v. *The London General Omnibus Company,* [1907] 1 K.B. 264. Hence the application of Rule 57(18) is often called a *Sanderson* or *Bullock* order.

[11] In *Robertson* v. *North Island College Technical and Vocational Institute,* [1980] B.C.J. No. 1206, (B.C.C.A.), the Court of Appeal considered the modern formulation of Rule 57(18). In that case, Robertson sued his former employer, the College, for breach of contract and Doctor Wing, the principal of the College, for inducing the breach. Robertson succeeded against the College but his claim against Dr. Wing was dismissed. The Court of Appeal considered the issue of whether the College, as the unsuccessful defendant, should pay the costs of Dr. Wing, the successful defendant.

[12] The majority of the Court of Appeal decided that the costs of Dr. Wing should be paid by the College. Lambert J.A. stated that Rule 57(18) is a rule relating to the trial judge's discretion on costs. The threshold question is whether it was reasonable for the plaintiff to join the other defendant "in order that the matter might be thoroughly threshed out". Lambert J.A. stated that the relevant facts in Robertson's claim against the College and his claim against Dr. Wing "were largely the same facts".

[13] As to the threshold issue of whether the trial judge's discretion comes into play, Lambert J.A. said at para. 25:

> … In my opinion it was reasonable to join Doctor Wing in these proceedings so that the matter might be thoroughly threshed out. Even if the causes of action could be said to be independent with respect to the two defendants, the alleged breaches of duty are intimately connected with each other. In my opinion the threshold question should be answered affirmatively in this case and the discretion with respect to a Bullock order arises.

[14] As to the exercise of trial judge's discretion, Lambert J.A. stated at para. 24:

> Once the threshold question is answered affirmatively then the discretion of the trial judge arises. Of course, he may exercise it either way. It is a true discretion. Whether he grants a Bullock order, or not, must depend on his assessment of the circumstances of the case. In my opinion it is inappropriate to trammel that discretion by endeavouring to extract principles from those cases where the discretion was exercised and from those cases where it was refused. The threshold question must be answered affirmatively; the discretion must be exercised judicially; and that is all.

[15] The majority concluded that as between the College and the plaintiff Robertson, it was appropriate that the College should bear the burden of Dr. Wing's costs. The Court of Appeal exercised this discretion because the trial judge did not consider the question.

[16] The British Columbia Court of Appeal again addressed the issue of when it is reasonable for a plaintiff to join another defendant in *Grassi* v. *WIC Radio Ltd.,* 2001 BCCA 376, in the context of considering a *Bullock* order. Here, Grassi had brought a successful libel action and applied to have the unsuccessful defendant radio station pay for the costs incurred by the other individual defendants who were successful. Grassi's argument was simply that the radio station attributed certain things to the successful defendants, Inspector Doern and the City of Vancouver, which made it reasonable for Grassi to include them in the action. In his reasons, the trial judge only stated that a *Bullock* order was not appropriate. In the Court of Appeal, Southin J.A. wrote at para. 33:

> I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction.

Southin J.A. went on to say that there must be something which the unsuccessful defendant did to warrant their paying the successful defendant's costs.

[17] Southin J.A. also stated at para. 34:

> But orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.

DECISION ON RULE 57(18)

[18] The facts in *Dalziel* v. *Yukon Government et al*, cited above, arose out of the competing claims of the Dalziels and Anderson for a piece of government-owned land, zoned greenbelt and situated between their respective properties. There were two steps in this process. The first step was the hearing process where the Yukon Government consulted widely and decided how the piece of land should be divided and to whom it would be transferred. The second step was the rezoning of the land to residential, which was the responsibility of the Town of Watson Lake.

[19] The hearing process before the Yukon Government was separate and distinct from the application to the Town of Watson Lake for a zoning change. The decision of the Yukon Government to divide the disputed piece of land in a certain way was exclusively in the control of the Yukon Government. The Town of Watson Lake was not a decision-maker in that process but the Town did express its support at various stages for one proposal or another. It is that participation in the Yukon Government process that undoubtedly contributed to the Dalziels' decision to join the Town of Watson Lake in the court case.

[20] The threshold question is whether it was reasonable of the Dalziels to join the Town as a respondent in the court action against the Yukon Government. I conclude that it was because it was the same piece of land at issue and both the Dalziels and Bryan Anderson had to follow the same two-step process of applying to the Lands Branch and then the Town of Watson Lake. It was reasonable to have all the issues heard by the court at the same time.

[21] The next question is whether the court should exercise its discretion under Rule 57(18) to order the respondent Yukon Government to pay the costs of the Town of Watson Lake rather than the Dalziels paying those costs. In other words, did the Yukon Government by assertions against the Town or by its actions cause the Town to be brought into the litigation? In my view, the answer to this question is clearly no. The Town of Watson Lake became a respondent to the litigation because of its own actions in the Lands Branch hearing and by its actions in the rezoning process. It would be unfair to visit the Town's costs on the Yukon Government on these facts. The Yukon Government did not by their actions or by allegations make it necessary to bring the Town of Watson Lake into the court action.

[22] I conclude that the costs of the Town of Watson Lake shall be paid by the Dalziels.

THE SCALE OF COSTS

[23] The Dalziels, Bryan Anderson and the Town of Watson Lake claim that special costs should be awarded to them. Special costs refer to the fees and disbursements a client has paid his or her lawyer. Where special costs are awarded, it will be on the basis of full recovery of, or a lesser percentage of, the fees and disbursements incurred by the party.

[24] An award of special costs requires a finding of reprehensible conduct. A recent example may be found in *Brosseuk* v. *Aurora Mines Inc. et al.*, 2008 YKSC 18, where there was a pre-trial fraudulent transfer of mining claims and misconduct after the proceeding was commenced by one party's failing to disclose the existence of a significant agreement.

[25] Reprehensible conduct not only means conduct that is scandalous or outrageous, but as stated in *Garcia* v. *Crestbrook Forest Industries Ltd.* [1994], B.C.J. No. 2486 (B.C.C.A.), at para. 17, “it also includes milder forms of misconduct deserving of reproof or rebuke”. The following are examples:

1. improper allegations of fraud;
2. improper motive for bringing the proceedings such as imposing a burden on a weaker party;
3. improper conduct of the proceedings themselves;
4. material non-disclosure or misrepresentation;
5. obtaining an order without notice when the situation required notice.

DECISION ON SCALE OF COSTS

[26] There is no doubt that the Dalziels made a wide variety of allegations against the Town of Watson Lake involving discrimination, bias and failing to comply with notice requirements. The Town took umbrage with the allegations. The only ground that had any merit was the failure to comply with notice requirements which I found to be cured by statute.

[27] While there is no doubt that the relationship between the Dalziels and the Town of Watson Lake was somewhat unfriendly, I do not find that the actions or allegations of the Dalziels were reprehensible or deserving of reproof or rebuke. It has been said before that a trial is no tea party and certain allegations may be considered offensive without being a matter of misconduct. An award of special costs against the Dalziels is not appropriate.

[28] By the same token, an award of special costs is not appropriate between the Dalziels and the Yukon Government. While I found that the Yukon Government’s

decision should be set aside, the conduct of the Yukon Government cannot be characterized in any way as reprehensible. The Yukon Government devoted a great deal of time and resources to the dispute between two landowners.

[29] An award of special costs is also not appropriate as between Mr. Anderson and the Yukon Government. In fact, the decision of the Lands Branch, ultimately set aside, was favourable to Bryan Anderson and he supported the argument of the Lands Branch throughout the court hearing. Any failure of the Lands Branch was not systemic but rather case specific.

[30] As to whether the litigation was of ordinary versus more than ordinary difficulty, there is no doubt that on a factual basis there was substantial complexity in terms of the events and documents that were prepared and exchanged over a four-year period. The Dalziels had to put these before the court, and by the same token, Mr. Anderson and the Town of Watson Lake had to review the voluminous material in order to respond.

[31] I find that Scale C, a matter of more than ordinary difficulty is appropriate for the costs of the Dalziels, Mr. Anderson and the Town of Watson Lake.

SUMMARY

[32] To summarize, I make the following award of costs:

1. The Dalziels shall have their costs against the Yukon Government on Scale C;
2. Mr. Anderson shall have his costs against the Yukon Government on Scale C; and
3. The Town of Watson Lake shall have its costs against the Dalziels on Scale C.

[33] If a taxation is required, counsel may bring the matter before me, rather than the usual taxing officer.

Veale J.