IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Epic Restoration Services Inc. v. Fuller et. al.,* 2023 BCSC 810

Date: 20230512
Docket: S186318
Registry: Vancouver

Between:

Epic Restoration Services Inc.

Plaintiff

And

The Estate of Desmond Maurice Fuller, Deceased, By His Executor and Personal Representative Rudyard Kippling Fuller

Defendant

And

Epic Restoration Services Inc.

Defendant by way of Counterclaim

And

The Dominion of Canada General Insurance Company and, In French, Compagnie D'Assurance Generale Dominion Du Canada also known as Travelers Canada

Third Party

Before: The Honourable Justice Loo

Reasons for Judgment
Re: Costs

Counsel for the Plaintiff and Defendant by way of Counterclaim:	S. M. Hirji
Counsel for the Defendant:	M.S. Menkes
Counsel for the Third Party:	N. L. Trevethan A. Taggar

Written submission of the Plaintiff and Defendant by way of Counterclaim:	February 27, 2023
Written submission of the Defendant:	March 31, 2023
Written submission of the Third Party:	March 16, 2023
Place and Date of Judgment:	Vancouver, B.C. May 12, 2023

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[1] I pronounced reasons for judgment in this matter on February 16, 2023 indexed at 2023 BCSC 232 (the "Trial Reasons"), following a 12-day trial which was heard in November and December, 2022.

[2] In the Trial Reasons, I invited written submissions from the parties regarding costs. In these reasons, I address the following issues:

a) Is Epic Restorations Services Inc. ("Epic") limited to "Fast Track costs" as the result of the application of Rule 14-1(f) and Rule 15-1(15) to (17) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009?

b) Is Epic entitled to double costs as the result of a refused offer to settle?

c) Is Travelers entitled to costs?

The Action

[3] This action arose as the result of a flood at a residential property at 1112 Sprice Avenue in Coquitlam, British Columbia (the "Property"). The cause of the flood was a ruptured pipe.

[4] The third-party, Dominion of Canada General Insurance Company, also known as Travelers Canada ("Travelers"), responded to an insurance claim made by the insured, Desmond Maurice Fuller.

[5] Epic was retained to perform restoration and repair work on the Property.

[6] Between January and June 2017, Epic performed work at the Property, which gave rise to the disputes which led to the trial.

[7] The amount in issue in the proceeding arose primarily from the non-emergency repair work performed by Epic. On March 3, 2017, an itemized invoice for those repair costs (less a deductible already paid) in the amount of $39,693.80 (the "Repair Invoice") was issued by Epic to Travelers.

[8] In April 2017, a cheque was sent to Desmond Fuller by Travelers, in the amount of the balance then outstanding in respect of the Repair Invoice. It was a "co-payable" cheque, meaning that it was made out to both Epic and Desmond Fuller.

[9] On April 13, 2017, Desmond Fuller deposited the co-payable cheque into his bank account.

[10] In June 2017, Epic took the position that it had finished the work at the Property and sought payment. Desmond Fuller refused to pay.

[11] On June 1, 2018, this action was commenced.

[12] On January 30, 2019, Desmond Fuller passed away. This action was later continued in the name of his estate (the "Estate"), by his executor and personal representative, Rudy Fuller. Rudy Fuller is Desmond Fuller's son.

[13] Epic sought judgment against the Estate in the amount of $38,654.12 (this amount being the full amount of the Repair Invoice less some minor adjustments), interest at the contractual rate of 24% per annum, costs, and an order that the funds paid into court be paid out to Epic in partial satisfaction of its judgment.

[14] The Estate advanced counterclaims against Epic for, among other things, poor workmanship, work not performed, and unauthorized disposal of items.

[15] The Estate advanced various third party claims against Travelers, including allegations that Travelers has breached a duty to defend owed to it under the Policy and a claim for lost rental income.

[16] In the Trial Reasons, I ordered as follows:

a) The Estate shall pay the sum of $37,703.13 to Epic, being the funds paid by Travelers on account of the Repair Invoice $39,693.80 less $1,990.67 for damaged chattels;

b) The Estate shall pay interest to Epic at the contractual rate of 24% per annum on the sum of $32,124.60, from June 6, 2017 to the date of payment;

c) The funds paid into court to the credit of this action shall be paid to Epic or to its counsel in trust for Epic and shall constitute a credit in favour of the Estate in respect of the amounts set out above;

d) Travelers shall pay the sum of $1,205.25 to the Estate, in respect of the Estate's claim for rental loss; and

e) Other than the awards for damaged chattels and rental loss described above, the counterclaim and third party claim of the Estate were dismissed.

Epic's Costs Claim

The Application of Fast Track Costs

[17] Although Epic was substantially successful at trial, its entitlement to recover costs is limited to $11,000 unless the court orders otherwise, as a result of the application of R. 14-1(f) and R. 15-1(15) to (17). The relevant portions of those Rules include:

> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> …
>
> (f) subject to subrule (10) of this rule [regarding small claims],
>
> (i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100 000 or less, exclusive of interest and costs, or
>
> (ii) the trial of the action was completed within 3 days or less,

> in which event, Rule 15-1(15) to (17) applies to the action unless the court orders otherwise.
>
> …
>
> **Costs**
>
> (15) Unless the court otherwise orders or the parties consent, and subject to Rule 14-1 (10), the amount of costs, exclusive of disbursements, to which a party to a fast track action is entitled is as follows:
>
> (a) if the time spent on the hearing of the trial is one day or less, $8 000;
>
> (b) if the time spent on the hearing of the trial is 2 days or less but more than one day, $9 500;
>
> (c) if the time spent on the hearing of the trial is more than 2 days, $11 000.

[18] The plaintiff submits that the circumstances in this case warrant an order for costs under the standard tariff in Appendix B.

[19] This Court has applied R. 14-1(f) and R. 15-1(15) to (17) in two recent decisions.

[20] *345 Builders Ltd. v. Su*, 2022 BCSC 949 [*345 Builders*] involved a builders' lien claim of approximately $46,000, and a counterclaim of approximately $40,000. Judgment was given in favour of the plaintiff in the amount of approximately $11,000 following a two-week trial.

[21] In *345 Builders*, Justice Riley noted that the costs being sought would significantly exceed the amount awarded. On the other hand, the matter was not commenced as a Fast Track action and neither party sought to place it into Fast Track. Further, the Court held that the trial was complex and that it was not capable of being tried in less than the ten days than it took to complete. There were credibility and reliability challenges with respect to both the plaintiff's case and the defendant's case. There was a significant amount of documentary evidence.

[22] In these circumstances, Justice Riley held at para. 21:

> [21] … The effect of Rule 15-1(15)(c) is to effectively cap the costs of a "fast track" trial at three days. The successful party cannot recover costs of

> any more than $11,000 (other than disbursements) for a trial that lasts longer than three days. The effect of Rule 14-1(1)(f) is to presumptively extend that limit to builder's lien cases where the total monetary value of the judgment does not exceed $100,000. There may be sound policy reasons for imposing such a presumptive limit, in the interests of proportionality. However, there are some cases that simply cannot be tried in three days or less. This case is one of them. This feature of this particular case weighs heavily against an application of the presumptive rule capping costs at $11,000 under the combined operation of Rule 14-1(1)(f) and Rule 15-1(15).

[23] On balance, the Court held that the presumption under R. 14-1(f) was overcome by the complexity and time issues, and, awarded costs to be assessed under the Appendix B tariff at Scale B.

[24] In *Belknap v. Hicks*, 2023 BCSC 172 [*Belknap*], the plaintiff claimed damages arising from the way the defendant, an orthopedic surgeon, dealt with her broken femur. The plaintiff was awarded judgment in the amount of $55,000 after a nine-day trial.

[25] In assessing the issue of costs, the Court at para. 31 had regard to the fact that no party took any steps to limit process, procedure, discovery, or costs by seeking to place the matter into the Fast Track regime. The trial took place over the course of ten days, and each party called expert witnesses.

[26] In *Belknap*, Justice Caldwell held that the case before him was much different in duration, complexity, and in the extent of the prosecution and defence of the parties' respective positions than the cases cited by the defendant, most of which were in the Fast Track regime from their inception. He held at para. 32 that “in practical terms, this case never resembled nor was it approached by either party as a Fast Track type of case.”

[27] In those circumstances, the Court ordered that the plaintiff's costs be assessed under the Appendix B tariff at Scale B.

[28] In this case at bar, the evidence was factually complex, although perhaps less so than in *345 Builders*. This case did not resemble a Fast Track case, in that there was a counterclaim and a third-party claim.

[29] The original notice of trial contemplated a seven-day trial which was then increased to ten days. As stated above, the trial ultimately took twelve days. It is difficult to see how the issues raised in this case, many of which were raised by the defendant, could have been reasonably tried in significantly less time. In its written submissions, the Estate advanced eleven separate claims against Epic and twelve separate claims against Travelers.

[30] In its written submissions regarding costs, the Estate refers to *345 Builders* as a more analogous case than *Belknap*, and I do not disagree with that assessment. The amount of the judgment in this case weighs in favour of applying the cost limits in R. 14-1(f) and R. 15-1(15) to (17), but this factor is outweighed by the time taken to try the action and the complexity of the trial.

[31] I order that, subject to the analysis below, costs shall be payable by the Estate to Epic at Scale B.

Epic's Claim for Double Costs after November 26, 2020

[32] The second issue regarding costs between the Estate and Epic arises from an offer to settle made by Epic on November 26, 2020 to settle the entire proceeding in exchange for an all-inclusive payment from the Estate of $32,000. Although the plaintiff was self-represented at trial, the fact that an offer had been made was communicated to then-counsel for the plaintiff in January 2021. Epic seeks double costs for steps taken in the proceeding after the delivery of the offer to settle, pursuant to R. 9-1(5)(b).

[33] Although the principal amount of the judgment in favour of Epic was $37,703.13, the plaintiff's claim also included interest at the contractual rate of 24% on the sum of $32,124.60 from June 6, 2017 to the date of payment. The interest obligation adds a sum exceeding $42,000 to the amount payable by the Estate. As a result, the total award in favour of Epic exceeds $74,000.

[34] An order for double costs is a discretionary order. Rule 9-1(6) sets out the four considerations that may guide the court's analysis. The policy underlining

R. 9-1(5) and (6) is to encourage early settlement of lawsuits by rewarding parties who make reasonable settlement offers that should have been accepted and, correspondingly, penalizing parties who should have accepted reasonable settlement offers: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.

[35] The reasonableness of an offer is to be assessed under R. 9-1(6)(a) by considering factors such as "the timing of the offer, whether it had some relationship to the claim (as opposed to being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided.": *Hartshorne* at para. 27. A party who rejects a reasonable offer to settle should face some sanction in terms of costs: *Wafler v. Trinh,* 2014 BCCA 95 at para. 81.

[36] Rule 9-1(6)(b) provides that the court may also consider the relationship between the terms of settlement offered and the final judgment of the court. This is an independent factor to be considered in considering whether a double costs order should be made: *Hartshorne* at para. 30.

[37] The Estate argues that the offer was ambiguous. The relevant paragraph of the offer letter stated:

> I have received instructions that my client will accept $32,000 as a full and final payment of the outstanding $39693.80 plus the accrued interest and legal fees that are owed at the date of settlement. Both parties shall bear their own costs of this litigation.

[38] The Estate argues that the offer may be read as requiring the offeree to pay $32,000 plus accrued interest and legal fees, but in my view, it would not be reasonable to read the offer in this way. The proposition that legal fees would have to be paid by the offeree is directly contradicted by the paragraph's last sentence.

[39] As a result of Epic's offer, the Estate had an opportunity to extract itself from this litigation well-ahead of the scheduled trial date for a reasonable amount which included some credit for the Estate's counterclaim and an abandonment of the plaintiff's claim for contractual interest. The offer provided Epic's rationale for the amount offered. Further, the offer could have been satisfied with the funds already

paid into court by Travelers, with the remaining balance being returned to the Estate. Instead, the Estate chose to engage in what turned out to be a 12-day trial. That trial was largely consumed by the Estate's counterclaim which, in large part, was unsuccessful. At the end of the trial, Epic was awarded an amount which, including interest, was more than double the offer to settle.

[40] In my view, the double costs rule should apply in this case, and Epic shall receive double costs for steps taken after November 26, 2020.

Travelers' Claim for Costs

[41] It does not appear that the provisions of R. 14-1(f) and R. 15-1 apply to the third party claim against Travelers; however, this specific issue was not argued and, if I am incorrect in that conclusion, I find that the cost limits in those Rules are inapplicable as against Travelers for the same reasons that they are inapplicable to Epic.

[42] An offer to settle was made by Travelers to settle the matter for a waiver of costs and disbursements in exchange for a release and consent dismissal order, but no claim for double costs was made by Travelers in its submissions.

[43] In these circumstances, the only issue to be determined regarding the costs payable to Travelers is whether its defence of the third-party claim was substantially successful. As the third-party claim was dismissed except for an award of $1,205.25, I find that Travelers was substantially successful in the action, and should have its costs at Scale B.

"Loo J."