Case Name:

Pennefather v. Pike Estate

Between
Nancy Pennefather and Douglas Pennefather, Douglas Parker and Senora Parker, (plaintiffs), and Scott Pike, acting as Estate Executor of the Estate of Andrea Pike, deceased (defendant)

[2004] O.J. No. 3754

133 A.C.W.S. (3d) 609

Court File No. 99-CV-182735CM

Ontario Superior Court of Justice

J. Spence J.

Heard: August 30, 2004.
Judgment: September 16, 2004.

(20 paras.)

[Editor's note: Original reasons for judgment were released January 29, 2004. See [2004] O.J. No. 271.]

Practice -- Costs -- Offers to settle -- Where more than one offer to settle.

Determination of costs in an action by Pennefather against Pike Estate. Pennefather had properly served an offer settle for a lower amount than the final judgment. However, that offer had been revoked prior to trial. Another offer was then prepared for a higher amount than the revoked offer, but for still less than the judgment amount. Unfortunately, the offer was not sent to Pike through inadvertence.

HELD: Costs were allowed to Pennefather on a substantial indemnity scale. In view of Pike's failure to accept the revoked offer, there was no reason to consider that he was prejudiced by Pennefather's failure to deliver the new offer. It was reasonable to allow the substantial indemnity scale from the time of the first offer to the conclusion of trial.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 131.

Ontario Rules of Civil Procedure, Rules 49.10, 49.13, 57.01.

Counsel:

Mr. M. Forget, for the plaintiffs.

Mr. C. Reain, for the defendant.

SUPPLEMENTAL REASONS AS TO COSTS

1 **J. SPENCE J.**:-- Plaintiffs seek costs on the substantial indemnity scale, based on s. 131 of the Courts of Justice Act, Rule 57.01, Rule 49.10, Rule 49.13, the conduct of the defendant, the offers made by the plaintiffs and the relevant case law.

2 The plaintiffs made Rule 49.10 offers on May 22, 2001, a date after December 11, 2002 and on April 20, 2003. The offers were for amounts substantially lower than the recovery of the plaintiffs at trial. The plaintiffs withdrew all of their offers on August 26, 2003. At or after the time of the revocation in August, 2003, the plaintiffs prepared new offers but failed to send them, apparently through inadvertence. The proposed new offers were for higher amounts than the revoked offers, but were also substantially lower than the plaintiffs' recovery at trial.

3 Since the earlier offers were revoked, they do not create an entitlement to substantial indemnity under Rule 49.10.

4 That does not mean they are without relevance.

5 Rule 49.13 provides that the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. (emphasis added)

6 The decision in Thomas v. Bell Helmets Inc. (1999), 40 C.P.C. (4th) 31, 126 O.A.C. 353, [1999] O.J. No. 4293 (C.A.), provides an example of the application of Rule 49.13 in the circumstances of that case, which included that a Rule 49 offer had been made subsequent to the revoked Rule 49 offers. That is not the case here, but the Thomas decision is instructive. A third offer to settle for $800,000.00, which was a Rule 49 offer, expressly withdrew two previous offers, the first for $850,000.00 and the second for $450,000.00. Paragraphs 76 to 81 of the decision states as follows:

> 76. Rule 49.13 may apply in circumstances where rule 49.10(1) does not. The opening part of rule 49.13 makes this clear. In our view, rule 49.13 gives the trial judge a residual discretion in making an order with respect to costs to take into account any (even a revoked) written offer to settle, the date of the offer and its terms. This discretion is separate from the discretion to award solicitor-client costs under rule 49.10(1) and the discretion referred to by Robins J.A. in Mortimer v. Cameron, 17 O.R. (3d) 1, supra, which has "traditionally governed the award of solicitor and client costs." [2] In the context of this case, rule 49.13 permitted the trial judge to consider all

three plaintiffs' offers even though the first two offers were revoked and were thus not open to consideration under rule 49.10(1).

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[2] For example, in cases where fraud is alleged but not proved the defendant is frequently awarded solicitor and client costs.

77. The three settlement offers made by the plaintiffs were written offers. Although the first two offers were revoked with the result that Bell could reasonably conclude that those offers were, "off the table," for rule 49.10(1) purposes, Bell could not, in our view, reasonably conclude that the costs implications of those offers were at an end in light of the provisions of rule 49.13.
78. In our opinion, when the three plaintiffs' offers, their dates and their terms are taken into account in accordance with rule 49.13, those offers provide a basis upon which the trial judge's award of solicitor and client costs from the date of the first offer, December 23, 1992 is justified.
79. All three of the plaintiffs' written offers to settle would, if accepted, have resulted in a resolution of this action on terms more favourable to Bell than the trial judgment. There was no time from December 23, 1992, the date of the first offer, to November 20, 1995, when the trial began when there was not a written plaintiffs' offer on the table substantially more favourable to Bell than the trial judgment. Thus, throughout that period, it was open to Bell to settle this action by paying substantially less than the judgment required it to pay.
80. This application of rule 49.13 is consistent with the policy objectives of Rule 49. These objectives include providing an incentive to plaintiffs and defendants to make settlement offers which represent some reasonable element of compromise: see Walker Estate v. York-Finch General Hospital (1999), 43 O.R. (3d) 461 (C.A.). As circumstances change during the litigation, the settlement positions of the parties may change. That is what caused the plaintiffs to make their three settlement offers.
81. We do not wish to be taken to have concluded that in all cases where rule 49.10(1) does not apply, sequential offers to settle, if less than the judgment in the case of plaintiffs offers, or more than the judgment in the case of defence offers, will automatically lead to an award of solicitor and client costs from the date of the first offer. Each case will have to be considered having regard to its relevant features and the provisions of rule 49.13, assuming, of course, that rule 49.10(1) does not apply.

7 As stated in paragraph 81, "each case will have to be considered having regard to its relevant features and the provisions of rule 49.13."

8 In Thomas the court granted solicitor and client costs from the first offer. The court did not allude to whether the fact that the first offer required a higher amount then the final offer was a relevant factor in deciding. So it might be inferred that the fact that an offer is withdrawn and not replaced at all should not preclude the possibility of substantial indemnity. In both cases, the defendant had an advantageous opportunity to settle for a period of time which it failed to take.

9 The court in Thomas considered it important, as indicated in paragraph 79, that there was an outstanding Rule 49 offer at the time the trial began. That is not so here.

10 It appears to me that the guidance to be taken from the Thomas decision is that the previous but withdrawn Rule 49 offer is potentially important in favour of the offeror, but the extent of its importance depends on all "the relevant features" of the case.

11 The offers made by the plaintiffs were made in a timely way reflecting first the views expressed by Master Haberman at the settlement conference in May of 2001 and later the views of Rouleau J. which he expressed at the pretrial at the end of April 2003. The defendant's offers fell far short of the settlement levels indicated in those expressed views.

12 No significant evidence emerged after May 22, 2001 except for Mr. Benzie's evidence favourable to the plaintiffs which emerged after August 18, 2003 and led to an adjournment of the trial on August 25, 2003 to allow for an Examination for Discovery which was held on August 27, 2003. The trial started on December 15, 2003.

13 So, from May of 2001, in the case of the Pennefathers, and December of 2002 in the case of the Parkers, to August 25, 2003, the then rescheduled trial date, the defendant had an advantageous opportunity to settle. During the period no new evidence came to light. During the period, the only offers they made fell far short of the reasonably indicated settlement ranges, which were reflected in the plaintiffs' offers.

14 The plaintiffs requested the defendants to agree on damages. The defendant refused. The only evidence on damages was from the plaintiffs. The defendant obtained a 15% discount for depreciation in respect of certain assets.

15 The plaintiffs complain of other conduct on the part of the defendant which they say unnecessarily delayed the trial or unnecessarily increased the costs of the litigation. What can be concluded is that the defendant did not cooperate with any of the efforts of the plaintiffs to contain or reduce the duration and costs of the proceeding. But this conduct, taken in respect of individual acts and cumulatively was not by itself, such as to warrant costs beyond party and party costs. A defendant may properly insist that a plaintiff proves its case.

16 However, all of these positions taken by the defendant during the course of the litigation were almost without exception ineffective for it. And the lack of cooperation when combined with the very low level of the offers of the defendant in contrast to the reasonable offers of the plaintiffs lend force to the plaintiffs' allegation that the aim of the defendant was to put the plaintiffs through an extended and expensive ordeal in the prospect that they would get sick of it and settle on the defendant's terms. It cannot be ignored in this regard that the Pennefather plaintiffs were in a position that obliged them to give evidence against a cherished deceased member of their immediate family if the matter failed to settle and went to trial. The defendant is a general insurer and must be taken to be a sophisticated and experienced litigant that would be alert to such matters. It is reasonably probable,

for the reasons given above, that the defendant was trying to do what the plaintiffs allege. In these circumstances, the substantial indemnity scale is warranted.

17 The defendant knew nothing of the plaintiffs' intention to make a new offer on August 25, 2003. But the offer would have required amounts higher than those in the previous offers of the plaintiffs. In view of the level of the defendant's offers and their refusal of the previous offers of the plaintiffs, there is no reason to consider that they were prejudiced by the failure of the plaintiffs to deliver the new offer. So it is reasonable to allow the substantial indemnity scale from the times of the first offers to the conclusion of the trial. There was no comment as to whether any adjustment is needed in respect of any Parker time that pre-dates the Parker offer in December, 2002 and thus should be charged on the partial indemnity scale but counsel should be able to sort that out.

18 The plaintiffs' bill of costs includes time not billed to the clients. The plaintiffs say it is 35 hours for Mr. Forget. The defendant says it is 45.7 hours based on a calculation by its firm's law student. The basis of the plaintiffs' number is not indicated, so the defendant's number is to be preferred if the parties cannot agree (which they ought to be able to do so).

19 The defendant says that the time spent by the plaintiffs' counsel was excessive, as shown by the fact that it was 35% higher than that of the defendant's counsel. It appears to me that the adjustment required under the above paragraph will largely remove any significant difference between the hours of the two counsel so the point need not be addressed.

20 Accordingly, costs are to be fixed on the substantial indemnity scale in the amount of the plaintiffs' bill of costs and to be payable by the defendant within thirty days of the determination by counsel of the adjustment required for the excessive time recorded and any adjustment in respect of the Parker time.

J. SPENCE J.

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