SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd.* v. *37889 Yukon Inc.,* 2012 YKSC 28

20120402
Docket S.C. No.: 09-A0095
Registry: Whitehorse

BETWEEN:

KAREWAY HOMES LTD.

Plaintiff

AND:

37889 YUKON INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
James Tucker — Appearing for the Plaintiff
Michael Tatchell (via teleconference) — Appearing for the Defendant

RULING ON COSTS
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): I have had a chance to review the submissions of counsel before this Case Management, including the case law that was filed by both sides. I have had a chance to give some thought to the matter before hearing from counsel this morning, so I do not find that I need additional time to reserve.

[2] The first issue is whether the Defendant is entitled to costs as following the cause as indicated in our Rule 60(9):

> "…costs of and incidental to a proceeding shall follow the event unless the court otherwise orders."

[3] The issue raised by the Plaintiff's counsel here is that there was a mixed result in the judgment. Defendant's counsel points to the case of *Fotheringham* v. *Fotheringham*, [2001] B.C.J. No. 2083, a decision of Justice Bouck of the British Columbia Supreme Court, who said at para. 60; and this is the B.C. Rule 57(9), which is the equivalent, I understand, of our Rule 60(9):

> "1. [A] party who substantially succeeds on the matters in dispute at trial is entitled to his or her costs unless otherwise ordered.
>
> 2. Substantial success is measured objectively taking into account all the matters in dispute, their weight or importance to the parties and the parties' relative of success or failure with respect of those matters.
>
> 3. As a rule of thumb, substantial success occurs when the prevailing party succeeds on the 75% of the matters in dispute looked at globally."

[4] In *Roach* v. *Dutra*, 2010 BCCA 264, the British Columbia Court of Appeal quoted with approval the trial judge in that case, who found that the Plaintiff was substantially successful in the action below and that the Plaintiff had succeeded on the critical issue in that case. That is at para. 27 of the Court of Appeal judgment.

[5] The critical issue in the case at bar is whether this was a cost-plus or fixed price contract. I found that it was a fixed price contract, which resulted in a substantial award to the Defendant in the amount of overpayment by the owner of over $311,000, plus improper charges by the builder of over $221,000. In my view, that indicates substantial success in favour of the Defendant and, therefore, the Defendant will have its costs in the cause.

[6] The next issue on this matter is whether double costs should be awarded

following an offer made by letter from the Defendant's counsel dated September 20, 2011. That letter reads in part [as read in]:

> "Pursuant to Rule 39(41) of the Rules of the Supreme Court of Yukon, the Defendant, 37889 Yukon Inc., offers to settle the claim and the counterclaim in the above captioned proceeding on the following basis:
>
> 1. Payment to the Plaintiff of the sum of $250,000 all inclusive, out of the monies paid into court in these proceedings in February 2010.
>
> 2. Payment to the Defendant of the balance of monies paid into court in these proceedings in February 2010 and held thereafter.
>
> 3. The parties shall bear their own costs of the proceedings."

There is a fourth paragraph, which is not germane to the current issue.

[7] Plaintiff's counsel submits that this letter does not constitute an offer to settle as defined in Rule 39(1) and (2) of the Yukon *Rules of Court*. He also submits that the Defendant's case authorities on point are distinguishable because they refer to the British Columbia Rule 37(B), which is in a different form.

[8] Defendant's counsel points out that he specifically did not rely on Rule 39(1) and (2), which in turn refers to Form 65, because Form 65 reads as follows: "The [party] offers to settle this proceeding … on the following terms," and then those terms are numbered 1, 2, 3, et cetera, followed by the words, "and costs in accordance with Rule 39" (my emphasis). Because the offer that was made September 20, 2011 anticipated that each side would bear its own costs, the Defendant's counsel says that Form 65 is not applicable. Consequently, he made a specific decision to make the offer pursuant to Rule 39(41), which may be made in any form if that sub-Rule applies.

[9] Further, as was indicated by the British Columbia Court of Appeal in *Roach* v. *Dutra*, *supra*, at para. 35, there is no suggestion in the case at bar that the Plaintiff was misled by the offer in any way or that he believed he could disregard the offer with impunity because it did not comply specifically, in that case, with Rule 37B(1)(c); or, in this case, Rule 39(1) through (40).

[10] I also note that the object of the *Rules of Court* in Rule 1(6) is "to secure the just, speedy and inexpensive determination of every proceeding on its merits …". In addition, our Rule 2(1)(a) states:

> "Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding."

Both these rules were reflected in the Court of Appeal's decision in *Roach* v. *Dutra*, *supra*, at para. 40.

[11] Finally on this point, to accept the Plaintiff's submissions on the offer to settle would result in denying the Defendant its double costs in this case, which I find would undermine the deterrent function of the rule on double costs. As set out in *Martin* v. *Lavigne*, [2010] B.C.J. No. 2240 at paras. 7 and 8:

> "The legislative purpose of Rule 9-1 [which in British Columbia, allows similarly, double cost awards] is to encourage the early settlement of disputes by rewarding the party who made a reasonable settlement offer and penalizing the party who declines to accept such an offer: ... <u>The underlying reason for the rules relating to costs is to discourage the prosecution of doubtful cases.</u> I am satisfied that any refusal to award double costs ignores the important deterrent function of the Rules: … The overriding consideration in awarding double costs under Rule 9-1 is

> whether the acceptance of an offer would have resulted in any significant saving for a party or the Court: … Here, it is clear that an offer accepted in October 2009 would have saved the costs for both parties of attending on the number of motions that were before the Court in 2010, as well as the considerable costs associated with a seven-day trial" (my emphasis).

[12] In *Catalyst Paper Corporation* v. *Companhia de Navegacao Norsul,* 2009 BCCA 16, the Court of Appeal stated at para. 16:

> "It seems to me that the trend of recent authorities is to the effect that the cost rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements" (my emphasis).

[13] In this case, the trial lasted some ten days and I agree with the submission of the Defendant's counsel that the Defendant's offer of September 20, 2011, in all the circumstances, was not only reasonable but generous and ought to have been accepted by the Plaintiff. Had it done so, the result would have been substantial savings to all the parties and the Court.

[14] The third issue in this Case Management is the unsold condominium unit, which I addressed briefly at para. 144 of my Reasons for Judgment (2012 YKSC 10). Plaintiff's counsel seems to rely on a statement that I made in the final paragraph of my reasons, where I indicated that I would remain seized on the issue of costs:

> " … I will remain seized for the purpose of determining this issue [that being costs], and any others that may arise from these reasons."

The other issue that was left in doubt in my reasons was the GST homeowner's rebate. No other issues were left outstanding and the general language that I used in my final paragraph should be understood in that context.

[15] If there was any doubt about the matter, that was clearly resolved when counsel signed the order arising from my reasons, which was filed March 20, 2012 and specifically indicates at para. 8:

> "the parties be at liberty to make submissions on the cost award for these proceedings and/or on the amount of the New Homeowner's Rebates and this Court remains seized for these purposes."

[16] I agree with the Defendant's counsel that this means I am *functus* on the issue of the issue of the unsold condominium and I have no jurisdiction to entertain any submissions or make any decisions on the point.

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GOWER J.