SUPREME COURT OF YUKON

Citation: *Estate of Buyck,* 2015 YKSC 46

Date: 20151102
S.C. No. 14-P0034
Registry: Whitehorse

IN THE MATTER OF THE ESTATE

OF

ALICE MAY BUYCK, DECEASED

Before Mr. Justice R.S. Veale

Appearances:

Breagh D. Dabbs	Counsel for the Estate of Alice May Buyck
Claire E. Anderson	Counsel for the First Nation of Na-Cho Nyak Dun

REASONS FOR JUDGMENT
(COSTS)

INTRODUCTION

[1] The First Nation of Nacho Nyak Dun (the "First Nation) obtained judgment against the Estate of Alice May Buyck in *Estate of Buyck,* 2015 YKSC 23.

[2] This Court ordered the transfer of Lots 11, 12, 13 and 14, Block 12, Plan 21952 (the "Lots"), which were registered in the name of Alice May Buyck, to the First Nation based on an agreement between Ms. Buyck's deceased spouse, Wes Buyck, which was confirmed in writing in a Caveat on the property that was subsequently removed.

[3] The First Nation applies for costs on Scale B to January 22, 2015, and double costs from January 22, 2015, which is essentially preparation and the one day hearing on January 29, 2015.

BACKGROUND

[4] The facts found by this Court at trial are:

1) There is no written agreement between Wes Buyck, Alice Buyck and Na-Cho Nyak Dun relating to the construction of the house and the transfer of the Lots to the Na-Cho Nyak Dun in exchange for life estates for Wes and Alice Buyck and the right to occupy the house.

2) There is evidence of an Agreement based upon the signed Transfer of the Lots by Wes Buyck to Na-Cho Nyak Dun dated August 6, 1992.

3) The Caveat provides sworn evidence that there was an Agreement made on or about August 2, 1992, "whereby Nacho Nyak Dun agreed to construct a house on [the lands] and grant Wesley Buyck and Alice Buyck a life estate in the lands and premises and the right to occupy the house in return for a transfer of the title to the lands to Nacho Nyak Dun …".

4) Na-Cho Nyak Dun constructed the house on the Lots in the spring and summer of 1993 and Alice Buyck resided there until she passed away on April 2, 2014. She paid the property taxes and generally maintained the house.

5) Na-Cho Nyak Dun included the Lots in their Final Agreement dated May 29, 1993, as Settlement Land, conditional upon transfer of the Lots to the First Nation by February 14, 1995.

6) The first written confirmation of Na-Cho Nyak Dun that Alice Buyck did not wish to transfer all four Lots but only the lot or lots on which the house was situated was made by letter dated February 10, 1995.

7) The First Nation did not accept the offer of Alice Buyck to transfer the house and lot or lots upon which the house was situated or pay for the legal survey.

8) There is no evidence by way of a legal survey to indicate the location of the house on the Lots.

[5] The First Nation served an offer to settle pursuant to Rule 39(27) on January 22, 2015, which offered the Estate the vacant lot or lots in exchange for a transfer of the lot or lots on which the house was situated. As the judgment ordered the transfer of all four lots, and the Estate's claim was dismissed, the question is whether the formal offer to settle complied with Rule 39 and specifically the timing requirement in Rule 39(7).

ANALYSIS

[6] The relevant parts of Rule 39 are as follows:

> …
>
> **Time for making offer**
>
> (6) An offer to settle may be delivered at any time before the trial commences.
>
> (7) If an offer is delivered less than 7 days before the trial commences, subrules (24) to (31) do not apply but the court may, in exercising its discretion as to costs, consider the offer and the date that it was delivered.
>
> …
>
> **Consequences of failure to accept defendant's offer for non-monetary relief**
>
> (27) If the defendant has made an offer to settle a claim for non-monetary relief and the offer has not expired or been withdrawn or been accepted,

> (a) if the plaintiff obtains a judgment as favourable as, or less favourable than, the terms of the offer to settle, the plaintiff is entitled to costs assessed to the date the offer was delivered and the defendant is entitled to costs assessed from that date, or
> (b) if the plaintiff's claim is dismissed, the defendant is entitled to costs assessed to the date the offer was delivered and to double costs assessed from that date.

[7] The normal costs Rule is:

> **Cost to follow event**
>
> 60(9) Subject to subrule (12), costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

[8] The *Interpretation Act*, R.S.Y. 2002, c. 125, states:

> s. 18 In an enactment,
>
> …
>
> (k) when a number of days not expressed to be "clear days" is prescribed, it shall be reckoned exclusively of the first day and inclusively of the last, but when the days are expressed to be "clear days" or when the term "at least" is used, both the first day and the last shall be excluded; …

[9] I am satisfied that the “7 days” referred to in Rule 39(7) are not “clear days”. Thus, the calculation of the number of days excludes the first day, i.e. January 22, 2015, the date of service of the formal offer and includes the last day, i.e. the day before the hearing on January 29, 2015.

[10] There is no doubt that if the formal offer is delivered 7 days before the trial commences, Ruled 39(27)(b) is a complete code and mandatory, and double costs must be awarded from the date of the offer. See *Steinhagen v. Steinhagen*, 2004 YKSC 55, *Graham v. Graham*, 2005 BCCA 278 and *P.B. v. R.J.P.,* 2008 YKSC 9.

[11] In the case at bar, the formal offer was delivered 6 days before the trial and the mandatory double costs in Rule 39(27)(b) does not apply. However, the Court may still, in exercising its discretion, consider the offer and the date that it was delivered. This means that the First Nation does not have an automatic right to double costs, but the Court has discretion to award double costs as well as the general discretion under Rule 60(9) that costs follow the event "unless the court orders otherwise". In other words, as stated in *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commission),* 2005 BCCA 368, at para. 8, "… the overarching question is still whether the normal rule is unsuitable on the facts of this case. …" I interpret the "normal rule" to be Rule 60(9).

[12] I conclude that each party should bear their own costs for the following reasons:

a) In this estate matter, the executor must be given some latitude in assessing a factual situation some 20 years ago without explicit written confirmation which only became available to the estate in December 2014;

b) The First Nation did not pursue its claim diligently for 20 years and returned the partially executed transfer to the executor of the estate of Wes Buyck;

c) While the *Heath v. Darcus* (1992), 84 D.L.R. (4th) 694 (B.C.C.A.), precedent finally determined the dispute, it was not a foregone conclusion;

d) The formal offer of settlement had the uncertainty that the Estate did not have a survey to make it clear how many lots, if any, were vacant. In other words, the benefit of receiving the vacant lots was uncertain at best;

e) Alice May Buyck generally paid property taxes and maintained the property under the perhaps mistaken impression that she owned the lots.

[13] In all of the circumstances, I order that each party shall bear their own costs.

VEALE J.