

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wormell v. Hagen*,
2009 BCSC 1530

Date: 20091109
Docket: 35570
Registry: Kamloops

Between:

Brent Wormell

Plaintiff

And

Bradley Dean Hagen

Defendant

And

Don Moses and Mojo Enterprises Ltd.

Third Parties

Before: The Honourable Mr. Justice Goepel

Supplementary Reasons to: Supreme Court of British Columbia, August 27, 2009, (*Wormell v. Hagen*), 2009 BCSC 1166, Kamloops No. 35570

Reasons for Judgment

Counsel for the Plaintiff:

T. Delaney

Counsel for the Defendant:

R. Garner
J. Jakel

Counsel for the Third Parties:

M. O'Neill

Written Submissions of Third Parties:

September 17, 2009

Written Submissions of Defendant:

October 23, 2009

Place and Date of Judgment:

Kamloops, B.C.
November 9, 2009

[1] In reasons found at 2009 BCSC 1166, I awarded the plaintiff damages against the defendant of \$570,288.71. I dismissed the third party action brought by the defendant. I dealt with costs at para. 144:

[144] Unless there are matters of which I am not aware, both the plaintiff and third parties are entitled to their costs against the defendant at Scale B. If any party seeks a different cost award, they should make submissions in writing within 21 days of the date of these reasons. Any response to submissions should be filed within 14 days thereafter.

[2] Following the release of the judgment, the third parties on September 17, 2009 filed a submission seeking double costs. The defendant responded on October 23, 2009.

[3] The third parties base their claim for double costs on an offer sent on June 30, 2009 by the third party Don Moses, who at that time was acting in person. The offer on its face was made pursuant to Form 64 and Rule 37(2).

[4] The offer read as follows:

The Third Party offers to settle the Defendant's claim(s) for any contribution or relief from the Third Party in this proceeding on the following terms:

1. Dismissal of the Third Party Notice;
and costs in accordance with Rule 37(22) and (37).

[5] Rule 37 was repealed by B.C. Reg. 130/2008, effective July 1, 2008. At that time Rule 37 was replaced by Rule 37(b) which provides that:

37B(1) In this rule, "offer to settle" means

- (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
- (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or
- (c) an offer to settle, made after July 1, 2008, that
 - (i) is made in writing by a party to a proceeding,
 - (ii) has been delivered to all parties of record, and
 - (iii) contains that following sentence: "The ... [name of the party making the offer]... reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding." [B.C. Reg. 130/2008, s. 1]

[6] The offer served by Mr. Moses on the defendant does not contain the wording required in Rule 37B(1)(c)(iii). The defendant submits that since the offer does not comply with Rule 37B, it cannot be considered by the Court with respect to the issue of costs.

[7] In *Lau v. Rai*, 2009 BCSC 696, Powers J. considered the effect of a non-compliant offer and held that a non-compliant offer did not constitute an "offer to settle" as defined under Rule 37B.

[8] I agree with Powers J.'s conclusion. "Offer to settle" is a defined term. A proposal concerning costs made subsequent to July 1, 2008 that does not comply with the provisions of Rule 37B(1)(c) is not an "offer

to settle” as defined in the Rules and does not trigger the cost options set out in Rule 37B(5).

[9] In the result, therefore, the third party’s application for double costs is dismissed. I confirm the cost order set out in para. 144 of my initial reasons. The defendant is entitled to the cost of this application to be set off against the costs otherwise awarded to the third parties. As the third parties were both represented by the same counsel at trial and took the same positions with respect to defending the third party claim the third parties are collectively only entitled to one set of costs: *Malik v. State Petroleum Corp.*, 2009 BCSC 115.

“R.B.T. Goepel J.”

The Honourable Mr. Justice Richard B.T. Goepel