IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Roeder v. Morton & Company et al.,***
2003 BCSC 1867

Date: 20031211
Docket: C993055
Registry: Vancouver

Between:

John Roeder, James Mashburn,
Larry Mashburn and William Gordon Buchanan

Plaintiffs

And

Morton & Company and Robin D.A. Blues
and Robin D.A. Blues, Personal Law Corporation

Defendants

And

Tim Pinchin and Larry Mashburn and
James Mashburn and William Gordon Buchanan

Defendants By Counterclaim

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Re: Costs

Counsel for the Plaintiffs/Defendants By Counterclaim:	J.H. Frank
Counsel for the Defendants:	A.A. MacDonald
Written Submissions on Costs Received:	October 27, 2003, November 6, 2003

[1] In Reasons for Judgment dated August 14, 2003, I dismissed the plaintiff's claim and the defendants' counterclaim. As they were invited to do, the parties have provided with submissions with respect to costs.

[2] The plaintiff claims that success was divided, the parties should bear their own costs, and the plaintiffs should recover one-half of daily court costs from the defendants. In that context, the plaintiffs do not claim costs for the defence of the counterclaim. The plaintiffs also claim costs in relation to a Rule 18A application that was ultimately heard at the defendants' insistence.

[3] The defendants claim costs at Scale 3 to the date of their offer to settle, and double costs thereafter in respect of the principal action. In that context, the defendants say the plaintiffs should be awarded their costs of the counterclaim at Scale 3. The defendants say that the parties should bear their own costs in relation to the Rule 18A application.

[4] I will not repeat the relevant facts which were fully summarized in my Reasons for Judgment. It is sufficient for present purposes to recount that I found the defendants had breached the terms of an escrow agreement but the plaintiffs had acquiesced to the breach so that the plaintiffs' action must fail. I dismissed the defendants' counterclaim seeking indemnification under the terms of the escrow agreement in respect of their defence costs.

[5] The trial was heard over a period of ten days. The need for a substantial majority of that time arose as a consequence of the defendants not admitting that they had acted in breach of specific terms contained in the escrow agreement and their efforts to demonstrate that the escrow agreement had been amended by a collateral agreement such that they had not acted

in breach of it. Considerably less time was directed to the defence that, if there was a breach of the escrow agreement, the plaintiffs had acquiesced to it.

[6] The length of the trial would have been greatly reduced had the defendants admitted they acted in breach of the clearly worded contract but that the breach had been agreed to by the plaintiffs. There was little, if any, basis for the "no breach" defence.

[7] The court has an unqualified discretion to depart from the general rule that costs follow the event: *Moore v. Dhillon* (1993), 85 B.C.L.R. (2d) 69 (B.C.C.A.). The discretion must be exercised judicially: *Currie v. Thomas* (1985), 19 D.L.R. (4th) 594 (B.C.C.A.). In that regard, a factor to be taken into account is whether the conduct of the defendant has unnecessarily increased costs.

[8] I am satisfied that this is an appropriate instance in which to exercise my discretion to depart from the general direction in Rule 57(9) and to rely on the discretion provided by Rule 57(15) to award costs that relate to some particular issue or part of the proceeding or, alternatively, to award costs except so far as they relate to some particular issue or part of the proceeding. Specifically, I conclude it would not be appropriate to permit the defendants to recover any costs, let alone double costs, in respect of that portion of the trial directed to the advancement of a defence that was bound to fail. It would be equally inappropriate to deny the defendants recovery of some portion of their costs, including double costs, to the extent they were ultimately successful in defeating the plaintiff's claim on the basis of acquiescence.

[9] In all of the circumstances, I conclude it is appropriate to order that the defendants shall have costs at Scale 3, including double costs from the date of offer, in respect of that portion of the action directed to the assertion of the defence that the plaintiff acquiesced in

the defendants' conduct undertaken in breach of the escrow agreement. I consider it reasonable to regard three of the ten days as reasonable for the trial of that issue.

[10] Each of the parties will bear their own costs in respect of the remainder of the trial of the action except that the defendants shall reimburse the plaintiff for one-half of the daily court costs levied by the registry in respect of seven days of trial.

[11] The plaintiffs are entitled to costs at Scale 3 in respect of the counterclaim.

[12] The Rule 18A application was originally filed by the plaintiffs. Upon receipt of the defendants' affidavit material, the plaintiffs advised that they had reconsidered their position and had concluded that the matter was not appropriate for disposition under Rule 18A because of issues regarding credibility. The defendants set the application down for hearing. Bouck J. ordered that the matter could proceed if there were an agreed statement of facts. None was forthcoming. The defence application that the plaintiffs' Rule 18A motion be heard was renewed at the commencement of trial. At the conclusion of submissions by both parties, I ruled that the matter was not suited to disposition under Rule 18A and the trial proceeded.

[13] In all the circumstances, I am satisfied that the plaintiffs and defendants should bear their own costs in relation to the Rule 18A application.

"I.H. Pitfield, J."
The Honourable Mr. Justice I.H. Pitfield