Carleton et al. v. Beaverton Hotel et al.
[Indexed as: Carleton v. Beaverton Hotel]

96 O.R. (3d) 391

Ontario Superior Court of Justice,
Divisional Court,

Cunningham A.C.J., Hackland R.S.J. and Taliano J.

May 21, 2009

Civil procedure -- Costs -- Costs against solicitor personally -- Motions judge awarding costs against solicitor personally on basis that he made groundless or unproved allegations of unprofessional conduct on part of defendants' lawyer and that he had been conducting litigation in unreasonable manner -- Solicitor's appeal allowed -- Costs should be awarded against solicitor personally sparingly and only in clear cases -- Motions judge failing to indicate how solicitor's misconduct caused costs to be unreasonably incurred -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 57.07.

The motion judge awarded costs against the plaintiff's solicitor personally under rule 57.07 of the Rules of Civil Procedure, largely on the basis that he had made groundless or unproved allegations of unprofessional conduct on the part of the defendant's lawyer and that he had been conducting the litigation in an unreasonable manner for many months. The solicitor appealed.

Held, the appeal should be allowed.

Awards of costs against a solicitor personally under rule 57.07 should be made sparingly, with care and discretion, only in clear cases and not simply because the conduct of a solicitor may appear to fall within the circumstances described in rule 57.07(1). In determining whether to award costs against a solicitor personally, the first question is whether the lawyer's conduct falls within rule 57.07(1) in the sense of causing costs to be incurred unreasonably, and the second question is whether in the circumstances of the particular case the imposition of costs against the lawyer is warranted. In this case, the motions judge failed to indicate how the solicitor's misconduct caused costs to be unreasonably incurred. Costs should not be awarded against a solicitor personally under rule 57.07 for professional misconduct which does not create unnecessary costs.

Cases referred to

Walsh v. 1124660 Ontario Ltd., [2007] O.J. No. 639, 155 A.C.W.S. (3d) 701 (S.C.J.); Young v. Young, [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112, 108 D.L.R. (4th) 193, 160 N.R. 1, [1993] 8 W.W.R. 513, J.E. 93-1766, 34 B.C.A.C. 161, 84 B.C.L.R. (2d) 1, [1993] R.D.F. 703, 49 R.F.L. (3d) 117, 43 A.C.W.S. (3d) 410, apld

Other cases referred to

Carleton v. Beaverton Hotel, [2008] O.J. No. 542, 164 A.C.W.S. (3d) 703 (S.C.J.) [Leave to appeal granted [2008] O.J. No. 3050 (S.C.J.)]; Carleton v. Beaverton (2007), 88 O.R. (3d) 792, [2007] O.J. No. 5020, 163 A.C.W.S. (3d) 228 (S.C.J.); Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, [1998] O.J. No. 527, 51 O.T.C. 321, 16 C.P.C. (4th) 201, 77 A.C.W.S. (3d) 717 (Gen. Div.); Rand Estate v. Lenton, [2007] O.J. No. 831, 31 E.T.R. (3d) 46, 156 A.C.W.S. (3d) 234 (S.C.J.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 57.07 [as am.], (1)

APPEAL from an award of costs made against the solicitor personally. [page392]

Gordon D. Capern, for solicitor Gary Neinstein.

Martin P. Forget, for defendant Robert James Davis.

---

[1] **HACKLAND R.S.J.**: -- This is an appeal by a solicitor, Gary Neinstein (the "solicitor"), of an order for costs made against him personally by the motions judge on February 15, 2008 [[2008] O.J. No. 542, 164 A.C.W.S. (3d) 703 (S.C.J.)]. Leave to appeal to this court was granted by Justice J.B. Shaughnessy by order dated August 6, 2008 [[2008] O.J. No. 3050 (S.C.J.)].

[2] The solicitor is counsel to the plaintiff Randy Carleton in this action which arises out of an injury sustained in March of 2003 while the plaintiff was undertaking repairs at the premises of the defendant Robert James Davis. The plaintiffs allege that an improperly secured patio stone dislodged from the roof and struck Mr. Carleton in the head resulting in injury and loss of income.

[3] The motions judge had been appointed by the Regional Senior Judge to case-manage this action. He heard several motions and conducted a pre-trial on May 22, 2007. He no doubt had considerable familiarity with the somewhat complex series of interlocutory motions which took place.

[4] On December 20, 2007, the motions judge heard two motions, both brought by the defendants. The first was to validate the late service of a jury notice served by the defendants. The second was to dismiss the plaintiff's claim for failure to answer undertakings or, in the alternative, to compel the plaintiff to attend a further examination for discovery and to comply with an earlier order of the motions judge dated April 30, 2007.

[5] The motions judge's April 30, 2007 order required the plaintiffs to produce several medical reports and financial records, serve a sworn Supplementary Affidavit of Documents and to pay costs fixed in the amount of $500. This order was not complied with and therefore defendants' counsel

brought the motion referred to above, seeking an order compelling the plaintiff to re-attend on examination for discovery, to produce the required documents and to pay costs.

[6] The motions were adjourned a number of times; once on consent, twice because either no judge was available or the matter was not reached. The initial return of the motion was June 12, 2007. This was a contested adjournment which was granted. The defendants had served the Notice of Motion on the plaintiff only one week before the return date and without prior consultation with plaintiff's counsel, who was unavailable on the return date. [page393]

[7] In any event, the motions were finally argued before the motions judge on December 20, 2007 [(2007), 88 O.R. (3d) 792, [2007] O.J. No. 5020 (S.C.J.)]. He granted much of the relief the defendants sought on the productions motion. He ordered the plaintiff to re-attend for examinations for discovery and ordered production of various documents and set a timetable for the remaining steps in the litigation. He also dismissed the plaintiff's motion to strike the late-served jury notice.

[8] The motions judge delivered a costs ruling, awarding the defendants costs in the total amount of $15,000. He also stated that he was considering making an order under rule 57.07 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] against the solicitor personally. The motions judge's endorsement stated:

There are a number of relevant factors including:

1. The position taken by the plaintiffs on the issue of re-attendance had no merit.
2. The plaintiff breached two previous court orders for the delivery of an affidavit of documents and still has not complied.
3. The defendant made an offer and has achieved a better result than offered.
4. The affidavit sworn by Mr. Neinstein contained many allegations of unprofessional conduct on the part of Davis' counsel which are either not proved or groundless. The allegations include deliberate deception.
5. Some time ago Mr. Neinstein proposed that Mr. Davis pay the Plaintiff $10,000 for the recent events.
6. The material satisfies me that Mr. Neinstein has been conducting this litigation in an unreasonable manner for many months. I had the benefit of observing his behaviour at the pre-trial.

I fix the costs of all preparation for and attendances listed at $15,000 payable within thirty days.

All the circumstances indicate to me that Mr. Neinstein's conduct has resulted in costs being incurred without reasonable cause, wasted costs and delay. However he is entitled to make submissions in that regard.

I am considering making an order under Rule 57.07. Mr. Neinstein may make submissions as to whether I should make an order under Rule 57.07 by sending them to me in writing, by fax or mail on or before January the 16th.

[9] On February 15, 2008, the motions judge released an endorsement in which he gave his reasons for awarding costs against the solicitor personally. It is necessary to quote these reasons in full [at paras. 1-12]:

> These are my reasons on whether the costs ordered on December 20, 2007 should be paid by the plaintiff or his counsel, Mr. Neinstein.
>
> I have considered Mr. Neinstein's written submissions. [page394]
>
> I agree with him that I must disregard anything that happened at the pre-trial and I do so.
>
> In my oral reasons awarding costs I considered several factors. Of those listed, 1 and 2 warrant costs paid by the plaintiff. Those in 4, 5 and 6 (relating only to the material considered on the motion) are relevant to whether Mr. Neinstein should pay costs personally.
>
> I have already made findings in that earlier endorsement that Mr. Neinstein's conduct has resulted in costs being incurred without reasonable cause, wasted costs and delay. Mr. Neinstein's submissions do not persuade me to change that tentative conclusion.
>
> I heard about and read the history of this motion during the hearing of the motion. Mr. Neinstein's history in his written submissions is unsworn evidence which I am not prepared to accept whether it conflicts with what was said during the submissions by counsel before me.
>
> Consequently, the circumstances warrant costs under Rule 57.07.
>
> As noted in Mr. Neinstein's factum, a judge's discretion as to costs is not limited to the authority of Rule 57.07. The judge has inherent jurisdiction to control any abuse of process: Young v. Young, [1993] 4 S.C.R. 3 (S.C.C.) at p. 135.
>
> There can be no doubt that Mr. Neinstein failed in his professional duty. His filing an affidavit on this motion containing many allegations of unprofessional conduct on the part of Mr. Davis' counsel which were either not proved or groundless is a clear breach of Rule 4 of the Law Society's Rules of Professional Conduct:
>
> > Courtesy
> >
> > 4.01(6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

In my view that conduct is also an abuse of the court's process.

My consideration of costs is not based on the fact that the plaintiff sought to strike the jury notice. It is based on the manner in which that right was pursued by Mr. Neinstein.

I make the following orders:

(a) Mr. Neinstein shall forthwith personally pay the $10,000 of the $15,000 costs awarded.
(b) The plaintiff shall forthwith pay $5,000 of the $15,000 costs awarded.
(c) Mr. Neinstein shall send a copy of this endorsement to his client and file a copy of his covering letter in the court file.

[10] The motions judge refers, in para. 4 of his endorsement, to references in the solicitor's affidavit filed on the motion. Unfortunately, the motions judge did not specify the references to which he took objection. Justice Shaughnessy, in his reasons on the application for leave to appeal, reported at [page395] [2008] O.J. No. 3050 (S.C.J.), attempted to identify the impugned references as follows [at para. 14]:

The Affidavits of Mr. Neinstein filed in response to the motions brought by the defendant contain a number of statements that indeed are unprofessional. A brief summary of the more serious transgressions is summarized as follows:

(A) Affidavit of Gary Neinstein sworn June 29, 2007;

(i) "In my opinion solicitors for the Defendant, Davis had not prepared himself for the Examination for Discovery"
(ii) "The other parties would not have been released if solicitors for the Defendant had been candid and disclosed their intention to file a Jury Notice"

(B) Affidavit of Gary Neinstein sworn September 11, 2007 (incorrectly dated July 11, 2007);

(i) "the contents of the defendant's July 13, 2007 Affidavit were inappropriate and were designed to mislead"
(ii) "The defendant's solicitors lack of cooperation is alarming"
(iii) "the defendants proposal was unacceptable and a complete waste of time of counsel and the court"
(iv) "the time lost because of the defendant's solicitors conduct is well beyond the realm of professionalism"
(v) "This last minute delivery of new materials was deliberate on the part of the defendant"

(vi) "I ought to have expected this unprofessional conduct from the defendant's solicitor"
(vii) "the defendant had prepared this material well in advance and delivered it at the final hour to only further frustrate the matter"
(viii) "the defendant's solicitor at this point could not care less whether this matter was to proceed by way of a jury or not as long as the trial does not proceed in October 2007"
(ix) "the late filing of the Jury Notice, the late filing of material, the lack of courtesy to our office with respect to scheduling motions, the numerous Practice Direction violations, the failure to revise undertaking charts, the failure to submit defense medical reports are all deliberate and unprofessional"

Issues

[11] The issues to be decided on this appeal are:

(1) Did the motions judge accord the solicitor procedural fairness in his approach to dealing with the award of costs personally against the solicitor and in providing sufficient reasons? [page396]
(2) Did the motions judge apply the proper legal test and consider the appropriate criteria in ordering costs against the solicitor personally?

Disposition

[12] I am of the opinion that the award of costs against the solicitor personally was not proper in this case and must be set aside for the reasons which follow.

Analysis

[13] Rule 57.07 of the Rules of Civil Procedure deals with orders for costs against a solicitor personally:

Liability of a Lawyer for Costs

57.07(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between a lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
(c) requiring the lawyer personally to pay the costs of any party.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.

> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

[14] The governing principles in awarding costs personally against a lawyer were set out by the Supreme Court of Canada in Young v. Young, [1993] 4 S.C.R. 3, [1993] S.C.J. No. 112, at para. 254.

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control the abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be [page397] placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

(Emphasis added)

[15] I agree with the appellant's submission that the "extreme caution" which courts must exercise in awarding costs against a solicitor personally as stated in Young v. Young, means that these awards must only be made sparingly, with care and discretion, only in clear cases and not simply because the conduct of a solicitor may appear to fall within the circumstances described in rule 57.07(1).

[16] With due respect to the motions judge, his reasons do not reflect an application of the "extreme caution" principle. The solicitors comments, while unfortunate and discourteous, were not egregiously so. The matters in issue on the motion included the diligence of the parties in satisfying their undertakings, the conduct of the parties in relation to preparation for and scheduling of the motions and whether the defendants' jury notice should be struck for having been late-served. The solicitors' comments were directed to those issues.

[17] In my opinion, it also follows from the "extreme caution" principle that a judge awarding costs personally against a lawyer is required to give sufficiently detailed reasons to enable a party, and counsel, to know why costs were awarded against him or her and to allow meaningful review of the order made. It is not clear that this occurred in this case.

[18] It would appear that the motions judge's primary concern was with the solicitor's professionalism and demeanor, having regard to his endorsements set out above, at paras. 8 and 9. The appellant submits that while counsel's professionalism and demeanour may merit the sanction of the court in certain circumstances, that sanction should not come in the form of an order under rule 57.07 unless the legal test for granting an order under that rule is also satisfied. I agree. The legal test under rule 57.07 is concerned with costs unreasonably incurred and not with professional conduct generally.

[19] I would adopt and follow the approach of Lane J. in Walsh v. 1124660 Ontario Ltd., [2007] O.J. No. 639, 155 A.C.W.S. (3d) 701 (S.C.J.), wherein the learned judge refused to order costs against a lawyer personally where the primary complaint was unprofessional conduct, where such conduct was not related to delay. Lane J. stated, at paras. 36-37:

> Mr. Guiste certainly caused some delays. His appearance without tabs caused some delay, his challenges to the speeches and to the charge were lengthy, not always well thought out and often seemed to be knee-jerk objections to whatever was said that differed from his client's case. His arguments during [page398] motions and objections could be repetitive. Mr. Guiste certainly raised many objections in the process of refining the questions, but not all of his concerns were unfounded or unsuccessful. It is also true, as Mr. Shiller asserts, that there was some delay on each of the three occasions when he required the reading back of transcript because he would not agree that other counsel's and my notes were correct, which they in fact were. There was an unfortunate tendency to get into the facts of the Amanda McNeil case, which Moore J. had separated from the Walsh case, and which I had ruled would not be explored.
>
> Twice he accused me of bias, and once of having had a "private conference" with his opponents. He told me that, if I had been listening to the evidence, I would not have said there was evidence on a certain point. These were unpleasant occasions, to say the least, quite uncalled for, rude and occasionally bordering on, if not actually, contempt. Each occupied some time. But the idea that these transgressions cumulatively caused a delay and the loss of 15 trial days is absurd.
>
> It would not be right to award costs to the Tim Hortons defendants as punishment of Mr. Guiste for the contempt or near-contempt of which I have spoken.

[20] It cannot be discerned from the motions judge's endorsement specifically how the solicitor's default related to the costs unreasonably incurred criteria in rule 57.07. The motions judge did state generally that the solicitor ". . . has been conducting this litigation in an unreasonable manner for many months". However, the record reflects that there were systemic factors involved in the motions not proceeding on several occasions and dates were selected without consultation with plaintiffs' counsel. The generality of the motions judge's observation does not permit an identification of what conduct may have contributed to delay and unnecessary costs. It is speculative as to what evidence or circumstances the motions judge considered in making this observation and this precludes meaningful appellate review of whether the criteria for the application of rule 57.07 were properly applied.

[21] The appellant submits that the motions judge, in awarding costs personally, neglected to apply what the jurisprudence reflects as a two-part test. The first inquiry is whether the lawyer's conduct falls within rule 57.07(1) in the sense of causing costs to be incurred unnecessarily and then the second step is to consider, as a matter of discretion (and applying the extreme caution principle), whether in the circumstances of the particular case, the imposition of costs against the lawyer personally is warranted. I agree that there is a required two-step procedure applicable and that the motions judge does not appear to have addressed the second step. This omission reflects an error in principle. He should have adverted to the second part of the test and addressed the question of whether the imposition of costs [page399] against the solicitor was appropriate in the circums-

tances: see Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham, [1998] O.J. No. 527, 51 O.T.C. 321 (Gen. Div.) and Rand Estate v. Lenton, [2007] O.J. No. 831, 31 E.T.R. (3d) 46 (S.C.J.).

[22] The motions judge included in his reasons for awarding costs personally under rule 57.07 the observation that the solicitor at one point offered to pay an amount in costs to the defendant. I agree with the appellants submission that this is irrelevant to the considerations which properly pertain to an award of costs personally under rule 57.07. Similarly, the motions judge's observation that he preferred the oral submissions of counsel at the hearing to the solicitor's "unsworn evidence" in his written costs submissions is unhelpful in that submissions of counsel, written or oral, are not evidence and if the solicitor's evidence was required by the motions judge, he should have been so advised.

[23] As noted, the motions judge identified in his endorsement as reasons for awarding costs personally against the solicitor, that he had made assertions of unprofessional conduct against opposing counsel "which were either unproved or groundless, and which was a breach of the Rules of Professional Conduct, and an abuse of process" and that the solicitor had been conducting the litigation "in an unreasonable manner for many months".

[24] However, costs are intended to be compensatory and rule 57.07 clearly speaks to the issue of compensating parties for unnecessary costs. A quite separate issue is the application of the inherent power of the court to control its own process in which punishment is an objective. Costs can be awarded in rare cases but that is separate from the rule 57.07 regime applicable to the present case. These concepts were helpfully explained by Lane J. in Walsh, at paras. 20-21, in words with which I respectfully agree:

[O]ne must be sure what jurisdiction is being invoked. . . .

> When dealing with objectionable conduct of counsel, the court may be exercising its disciplinary jurisdiction based on the contempt power or its inherent jurisdiction to control its own process and officers. If there is to be a finding of contempt, there must be more than simple negligence involved; the conduct in question must be egregious or done in bad faith, or similarly deserving of punishment. The appropriate reaction to contempt is punishment, which will rarely include costs other than those of the contempt proceeding itself, or costs actually wasted by the contemptuous conduct itself. Contempt is generally punished by a fine, not by costs. This is to be contrasted with the inherent power to control misconduct falling short of contempt by the imposition of a costs [page400] order to secure the compensation of the opposite party where the misconduct has wasted costs or caused expense to be incurred unnecessarily and in bad faith: Young, supra.

[Footnote omitted]

[25] There is in my opinion a danger to applying rule 57.07 and awarding costs personally against counsel for professional misconduct as opposed to conduct which creates unnecessary costs. Counsel's conduct of an action can and often should be resolute, and issues of client instructions and solicitor and client privilege are often engaged. Caution and certainly careful reasons are required from a court entering into these issues, whether or not on a compensatory basis.

[26] Appellants' counsel addressed this point in a thoughtful manner, at para. 53 of his factum, in words with which I agree:

> However to impose costs personally against Mr. Neinstein for raising these concerns puts him squarely in the conflict of duties between his client and his pocketbook that courts are implored to avoid. Lawyers must not be chilled into quieting their concerns about inappropriate conduct of opposing counsel, particularly when that conduct bears some relevance to an issue before the court. Imposing costs sanctions on lawyers personally when those concerns are found to be "not proved or groundless" draws the line too far, particularly where there is no connection between the impugned remarks and any wasted costs.

[27] For the reasons discussed above, the order of the motions judge requiring the solicitor to pay personally a portion of the costs awarded against the plaintiffs must be set aside.

[28] While the solicitor has been successful, in view of the issues giving rise to the challenged costs award, I do not think that costs should be awarded for this appeal.

Appeal allowed.