Case Name:

Dhingra v. Pham

Between
Hari Krishan Dhingra v. Quen Thi Hong Pham, Mang Van Pham, Jose Domingos Vicente and Cosima Caterina Vicente, William Boraski and Westlock Pony Express (1984) Ltd.

[2003] A.J. No. 1703

Docket No. 0303 03980

Alberta Court of Queen's Bench
Judicial District of Edmonton

Master Smart
(In chambers)

December 8, 2003

(8 paras.)

Civil procedure -- Costs -- Bullock or Sanderson order.

Application for a Bullock or Sanderson order by the plaintiff, Dhingra, against the defendants, the Phams. The application followed the summary dismissal of Dhingra's action against the defendants, the Vincentes, and summary judgment as to liability against the Phams.

HELD: Application allowed and a Sanderson order was issued. The order was appropriate because it was reasonable for Dhingra to have brought the action against the Vincentes, not knowing which of the parties were at fault. Further, there was no reason to deprive the Vincentes of their costs since the Phams were wholly responsible for the action. Therefore, Dhingra was entitled to add, as part of its costs against the Phams, the amount of the Vincentes' costs.

Counsel:

B. Mohan, for the plaintiff.

S.L. Corbett, for the Phams.
Duncan & Craig LLP, for the Vicentes.

MEMORANDUM OF DECISION

1 MASTER SMART:-- When this matter was before me I granted summary dismissal of the action by the Plaintiff against Jose Domingos Vicente and Cosima Caterina Vicente. Further, costs of the action were awarded to those Defendants including double costs for steps taken following an offer of judgment.

2 Additionally, summary judgment as to liability only was granted in favour of the Plaintiff as against the Defendants Quen Thi Hong Pham and Mang Van Pham. I was not asked to consider nor did I consider the matter of costs in favour of the Plaintiff with respect to this determination. Although clearly the Plaintiff has successfully obtained judgment on liability and will be entitled to costs in that regard, in my view the setting of costs is best dealt with by the trial judge following determination of the quantum of the judgment.

3 The remaining issue for consideration was whether or not this was a proper case for a Bullock or Sanderson Order. Counsel for the Plaintiff and the Phams are essentially in agreement as to the law concerning Bullock and Sanderson Orders. A good summary of the law is set out Ed Miller Sales and Rentals Ltd. v Caterpillar Tractor Co., [1994] A.J. No. 978 (Alta. Q.B.) as follows:

> 24 The Plaintiff submits that, in the circumstances of this case, it is just and appropriate that a Sanderson order, or in the alternative a Bullock order, be made requiring the Caterpillar Defendants to pay the costs of Angus.
>
> 25 Numerous cases refer to a "threshold" test which must be met before a judge should make a Bullock order. The test, and circumstances giving rise to it, are stated by Vaughan Williams L.J. in Besterman v. Br. Motor Cab Co. [1914] 3 K.B. 181 at 186:
>
> > There has been a collision, and it took place under such circumstances that the injured person would naturally, not have full information as to whose fault it was, but it took place under such circumstances that it might have well been the fault of one or other or of both of these people. Those being the circumstances of the case, it turns out after the trial that there is only one wrong-doer, but that wrong-doer was sued and successfully sued.

> UNDER THESE CIRCUMSTANCES WAS IT A REASONABLE THING FOR THE PLAINTIFF IN HIS ACTION AGAINST A MAN WHO ULTIMATELY TURNS OUT TO BE IN FACT THE WRONG-DOER TO JOIN THE OTHER DEPENDANT IN ORDER THAT THE MATTER MIGHT BE THOROUGHLY THRESHED OUT?

26 The underlined portion above has become known as the "threshold question". Vaughan Williams L. J. further stated that if it was reasonable to join the successful Defendant, then the Plaintiff is entitled to add as part of the costs in bringing the action, the costs of the successful Defendant.

27 The threshold requirements for an Bullock or Sanderson order were enunciated by Bury D.C.J. as a three part test in Macleod v. Great West Distributors Limited [1941] 3 W.W.R. 827 (Alta. D.C.) at 829:

> To justify an order in either form the facts must satisfy the Judge, in the exercise of his discretion: (1) That it was, in the circumstances of the case, reasonable for plaintiff [sic] to joint the successful defendant (Collins, M.R. in Bullock v. London General Omnibus Co...., approved as the proper test by Vaughan Williams, L.J. in Besterman v. Br.Motor Cab Co. [1914] 3 K.B. 181 ...); (2) That there is no good cause for depriving the successful defendant of his costs (Sanderson v. Blyth ...); and (3) That as between the co-defendants the unsuccessful defendant was wholly responsible for the action, or, to use the words of Jessel, M.R. in the Rudow case, that the unsuccessful defendant "is liable to them [his co-defendant's costs] as between himself and his co-defendant."

4 Succinctly, it is argued that the Plaintiff has met the test. Counsel for the Defendant argues that it was not reasonable for the Plaintiff to join the successful Defendant in the action, or alternatively, the Plaintiff should not have proceeded once Vicente swore his Affidavit on May 21, 2003 setting out his description of the accident. A Notice of Motion was filed on May 27, 2003 on behalf of lose Vicente returnable June 10, 2003. That motion indicates that service was made upon counsel for the Phams. A further Affidavit was sworn by Debbie Bannerman an adjuster who interviewed the Plaintiff within days of the accident She attaches the Plaintiff's statement to that Affidavit. It is unclear when this Affidavit was served on counsel for the Phams.

5 On reviewing the statement provided by the Plaintiff to the adjuster, it is clear that the statement made by the Plaintiff was a conclusion based on his observations following the collisions

and that he did not personally observe the actual events immediately prior to nor the collisions themselves. In my view nothing turns on that statement one way or the other. With respect to the evidence set out in the Affidavit of Jose Vicente sworn May 21, 2003, the simple response to the argument by counsel for the Pham Defendants is that if the matter was so clear in light of"that evidence that the Plaintiff ought not to have continued proceedings as against the Vincentes then why was it appropriate for those same Defendants, who also had the benefit of that evidence, to file a statement of defence on June 16, 2003 denying that a collision occurred or that they were negligent as alleged or at all.

6 A further argument made by counsel for the Phams that this is not a proper case for a Bullock or Sanderson Order is that those Defendants made no claim for indemnification or contribution from the Vicentes. Counsel relies on the case of S.G.H. v. Gorsline, [2001] A.J. No. 1021, 2001 ABQB 671 at para. 21. It is true that Justice McMahon uses the fact that there had been no claim for indemnification to distinguish that case from Wendon v. Trikha, [1992] A.J. No. 217 (Alta. Q.B.). What counsel for the Defendants fails to address is the observation of the court in S.G.H. v. Gorsline, that it was not a case where the evidence had to determine which of the two Defendants was liable or where the actions of one would exclude liability of the other, and further in that case that the Defendant ultimately responsible had admitted his guilt and offered no defence at trial. Not immaterial is the Court's decision to grant a Bullock Order having found that a Sanderson Order was not justified in the circumstances.

7 Again, the Defendants say that the Plaintiff's understanding of the event and the evidence sworn by lose Vicente should have been sufficient for the Plaintiff not to take or subsequently continue proceedings as against the Vicentes. Nonetheless, those Defendants were not prepared to admit their responsibility for the collision with at least the evidence of Jose Vicente in their possession. From my prospective, the filing of the defence by the Phams in and of itself justified the Plaintiff's actions. This is a case where the finding of liability against these Defendants excluded the liability of the Vicentes. Accordingly, I conclude that a Sanderson Order is appropriate in these circumstances.

8 The Plaintiff is entitled to its costs of this motion payable forthwith and in any event of the cause.

MASTER SMART

cp/s/qw/qlmmm/qlcas