2005 CarswellOnt 5994
Ontario Superior Court of Justice

Frost Insurance Brokers Ltd. v. McMorrow

2005 CarswellOnt 5994, [2005] O.J. No. 1335

Frost Insurance Brokers Limited, Plaintiff and Dan McMorrow, Defendant

Dan McMorrow, Plaintiff in the Defendant's Claim and Frost Insurance Brokers Limited, Defendant in the Defendants' Claim

Lange D.J.

Heard: January 21 - February 10, 2004
Judgment: January 28, 2005
Docket: Lindsay 0047/03, 0047/03A

Proceedings: additional reasons to *Frost Insurance Brokers Ltd. v. McMorrow* (2004), 2004 CarswellOnt 6742 (Ont. S.C.J.)

Counsel: Ivan Reynolds, for Plaintiff
Helen McMorrow, for Defendant

Subject: Civil Practice and Procedure; Employment; Public

Related Abridgment Classifications

2005 CarswellOnt 5994, [2005] O.J. No. 1335

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Costs — Scale and quantum of costs — Inferior court actions in superior court — General principles

Former employer was granted judgment against former employee in amount of $10,000 for breach of non-solicitation agreement — Counterclaim by employee for damages was dismissed — Employer sought costs fixed in amount of $4,000 — Section 29 of Courts of Justice Act ("CJA") provides that award of costs in Small Claims Court, other than disbursements, shall not exceed 15 per cent of amount claimed or value of property sought to be recovered unless court considers it necessary in interests of justice to penalize party, counsel or agent for unreasonable behaviour in proceeding — Employer argued that it was entitled to award of costs of $3,568.83 based upon 15 per cent of proven damages of $23,792.26 — Rules of Small Claims Court pertaining to costs prevail over s. 29 of CJA — Accordingly, court was limited to R. 19.04 of Small Claims Court Rules in awarding costs — Pursuant to R. 19.04, employer was awarded counsel fee of $300 with respect to its claim — Pursuant to R. 19.04, employer was awarded counsel fee of $300 for its defence of employee's claim — As result, total counsel fee awarded to employer was $600.

Table of Authorities

Cases considered by *Lange D.J.*:

Fisken v. Meehan (1877), 40 U.C.Q.B. 146, 1877 CarswellOnt 159 (Ont. H.C.) — considered

Janatco Inc. v. FAEMA Corp. 2000 Ltd. (May 6, 2003), Doc. 926/02, 927/02 (Ont. Small Cl. Ct.) — considered

Jones v. LTL Contracting Ltd. (May 5, 1995), Doc. 987-94 (Ont. Small Cl. Ct.) — not followed

Jones v. LTL Contracting Ltd. (July 20, 1995), Doc. 987/94 (Ont. Gen. Div.) — not followed

Peacock v. Choi (1998), 1998 CarswellOnt 3371 (Ont. Gen. Div.) — followed

Sabo v. DaSilva (November 9, 1999), Doc. 4374/98 (Ont. Small Cl. Ct.) — considered

Scanlon v. Standish (2002), 2002 CarswellOnt 128, 155 O.A.C. 96, 57 O.R. (3d) 767, 24 R.F.L. (5th) 179 (Ont. C.A.) — referred to

Schaer v. Barrie Yacht Club (2003), 2003 CarswellOnt 5233, 108 O.A.C. 95 (Ont. Div. Ct.) — followed

Weiss v. Prentice Hall Canada Inc. (1995), 66 C.P.R. (3d) 417, 1995 CarswellOnt 729 (Ont. Small Cl. Ct.) — considered

Statutes considered by *Lange D.J.*:

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 25 — referred to

s. 29 — considered

s. 131(1) — referred to

Rules considered by *Lange D.J.*:

Small Claims Court Rules, O. Reg. 258/98
Generally — referred to

R. 10 — referred to

R. 10.05(1) — referred to

R. 19.01(3) — referred to

R. 19.02 — referred to

R. 19.04 — considered

ADDITIONAL REASONS to judgment reported at *Frost Insurance Brokers Ltd. v. McMorrow* (2004), 2004 CarswellOnt 6742 (Ont. S.C.J.) with respect to costs.

***Lange D.J.*:**

1 These supplementary reasons for judgment address the issue of costs. By reasons for judgment dated July 14, 2004, Frost Insurance Brokers Limited ("Frost Insurance") was granted judgment against Dan McMorrow in the amount of $10,000.00 with prejudgment interest at the rate of 2.5 % pursuant to the *Courts of Justice Act* from August 7, 2002 and post-judgment interest in accordance with the *Courts of Justice Act*. There was also a counterclaim in the form of a claim by the defendant, Mr. McMorrow, against Frost Insurance under Rule 10 in the amount of $10,000.00. The counterclaim was dismissed with costs.

2 Each party was represented by counsel prior to trial and at trial. There were two pre-trials. The trial took place over a period of two full days. Both parties made written submission in regard to costs following the reasons for judgment.

3 Frost Insurance seeks costs fixed in the amount of $4,000.00 plus the amount of $486.85 for disbursements as set out in a schedule attached to its costs submissions. There was a finding at trial that the damages suffered by Frost Insurance were $23,792.26. Frost Insurance relies upon s. 29 of the *Courts of Justice Act* which provides a limit on an award of costs, other than disbursements, of 15 per cent of the amount claimed in the Small Claims Court. Frost Insurance argues that it is entitled to an award of costs in the amount of $3,568.83 based upon 15 per cent of the proven damages of $23,792.26. In the alternative, Frost Insurance argues that it is entitled to an award of costs of $3,000.00 based upon 15 per cent of the amount

claimed of $10,000.00 in the plaintiff's claim and based upon 15 per cent of the amount claimed of $10,000.00 in the defendant's claim. Frost Insurance submits that s. 29 of the *Courts of Justice Act* takes precedence over Rule 19.04 which permits a counsel fee of not more than $300.00 if the amount claimed by the successful party represented by counsel exceeds $500.00.

4 Mr. Morrow has three main submissions on the relationship of s. 29 and Rule 19.04. Firstly, Frost Insurance was at liberty to pursue its action in the Superior Court of Justice rather than pursuing its action within the monetary jurisdiction of the Small Claims Court. Secondly, the 15 per cent rule in s. 29 should not be applied as a matter of course but should be reserved for situations where the *Rules of the Small Claims Court* pertaining to costs would not be appropriate. Mr. Morrow maintains that this matter is not appropriate for the application of s. 29. Thirdly, there is no authority to support the position of Frost Insurance that it is entitled to 15 percent of each of the plaintiff's claim and the defendant's claim.

5 The *Rules of the Small Claims Court* are set out in Ontario Regulation 258/98, as amended. The following are relevant Rules for the costs issue:

> **Limit**
>
> **19.02** Any power under this rule to award costs is subject to section 29 of the Courts of Justice Act.
>
> **Counsel Fee**
>
> **19.04** If the amount claimed by a successful party exceeds $500, exclusive of interest and costs, and the party is represented by a lawyer or student-at-law, the court may allow the party as a counsel fee at trial,
>
> (a) in the case of a lawyer, an amount not exceeding $300;
>
> (b) in the case of a student-at-law, an amount not exceeding $150.

The following are relevant sections of the *Courts of Justice Act* for the costs issue:

> **Summary hearings**
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> 25. The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience.
>
> **Limit on costs**
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> 29. An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party, counsel or agent for unreasonable behaviour in the proceeding.
>
> **Costs**
>
> 131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

6 Frost Insurance relies upon a reference to *Jones v. LTL Contracting Ltd.* in the text, *Ontario Small Claims Court Practice 2004*, Zuker, M.A. (Carswell, 2003), p. 83. I have reviewed *Jones v. LTL Contracting Ltd.*, [1995] O.J. No. 4928 (Ont. Gen. Div.) and *Jones v. LTL Contracting Ltd.*, [1995] O.J. No. 4927 (Ont. Small Cl. Ct.) . The case is not relevant to the costs issues at hand. In *Jones* , Deputy Judge Halabisky exercised his discretion under the penalty exception in s. 29. On appeal, Cosgrove J. found no error in the exercise of this discretion. The costs of the appeal were fixed at $4,000.00.

7 Frost Insurance also relies upon a reference to *Weiss v. Prentice Hall Canada Inc.* (1995), 7 W.D.C.P. (2d) 99 (Ont. Small Cl. Ct.) in the text, *Ontario Small Claims Court Practice 2004*, Zuker, M.A. (Carswell, 2003), p. 82. I have reviewed *Weiss v. Prentice Hall Canada Inc.*, [1995] O.J. No. 4188 (Ont. Small Cl. Ct.). In *Weiss* , Deputy Judge Harris addressed the relationship of Rule 19.04 and s. 25 and s. 29 of the *Courts of Justice Act*. Deputy Judge Harris stated:

> ¶ 44 The application of Rule 20.03 [19.04] of the Small Claims Court Rules with its maximum counsel fee provision of $300 would not seem to accord with the discretion in s. 25 of the Courts of Justice Act, that this Court may make such order as is considered just and agreeable to good conscience. This direction applies as much to quantum of counsel fee as to any other order the Court may make. In furtherance of the provisions of s. 25 the Court may look at s. 29 of the Courts of Justice Act.
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> ¶ 45 S. 29 limits an award of costs, exclusive of disbursements to 15 per cent of the amount claimed (which means the amount awarded) unless a party or counsel are to be penalized for unreasonable behaviour in the proceedings. I do not think circumstances have arisen which would justify my invoking such a penal provision. Hence no counsel fee awarded hereunder, can exceed $900, being 15 per cent of $6,000. While s. 29 appears to be in conflict with Rule 20.03 [19.04] of the Small Claims Rules, in my opinion any conflict between a Rule and a sect[i]on of an Act must be resolved in favour of the Act, which is, after all, the voice of Parliament, whereas the Rule is only the voice of the executive. Hence I am satisfied that counsel fees of up to $900 can be awarded to each party entitled to such an award and I propose to award them as follows.

8 There is support in the Small Claims Court jurisprudence that s. 29 prevails over Rule 19.04. In *Sabo v. DaSilva*, [1999] O.J. No. 4177 (Ont. Small Cl. Ct.), the amount claimed was $1,276.25. The amount of the judgment was $125.00. Deputy Judge Young held that the plaintiff was entitled to 15 per cent of the amount claimed, or $191.44 plus disbursments. Deputy Judge Young stated:

> ¶ 6 It is my view that sub-rule 19.02 is in a way superfluous, serving as little more than a reminder that the effect of Section 29 is pervasive. Because Section 29 refers to all awards of costs in Small Claims Court, any power to award costs found in Rule 14 is every bit as much "subject to section 29 of the Courts of Justice Act" as the power to award costs under Rule 19. Consequently, absent a judicial finding that it is "... necessary in the interests of justice to penalize a party, counsel or agent for unreasonable behaviour in the proceeding," my authority to award costs, apart from disbursements, is limited to 15 per cent of the amount claimed. I can make no finding of unreasonable behaviour in this case. In all the circumstances, I have concluded that the appropriate award for costs is $191.44 plus allowable disbursements incurred by the defence.

9 This view of the prevailing relevance of s. 29 is also found in *Janatco Inc. v. FAEMA Corp. 2000 Ltd.*, [2003] O.J. No. 1645 (Ont. Small Cl. Ct.). In *Janatco Inc.* , Deputy Judge Criger stated:

> ¶ 33 Section 29 of the Courts of Justice Act, R.S.O. 1990, c. C.43 as amended states that I may award costs of up to 15% of the amount claimed. Rule 19 of the Small Claims Court Rules, which permits counsel fee or compensation for inconvenience or expense in the case of an unrepresented party is specifically made subject to section 29. Rule 19.02 says:

> Any power to award costs is subject to section 29 of the Courts of Justice Act.
>
> (Emphasis added)

¶ 34 Therefore, section 29 is the primary mechanism under which I am permitted to award costs of a proceeding, and it permits me to award costs whether or not a counsel fee is mandated by Rule 19, so long as that award does not exceed 15% of the amount claimed in the proceeding.

¶ 35 Neither party behaved unreasonably in the course of this proceeding. Rather, there was a genuine issue which required determination by a Court, and which was fairly presented to the Court by each side. Accordingly, I find no reason to exceed the maximum specified in section 29 of the Courts of Justice Act.

¶ 36 The amount claimed here was $10,000.00. Accordingly, Mr. Natale shall have his $1,500.00 costs of the proceeding, including all interlocutory orders for costs, in addition to his assessable disbursements for issuing, serving, pleading and setting this action down for Trial.

10 Notwithstanding the foregoing authorites in the Small Claims Court that s. 29 prevails over Rule 19.04, there are two decsions of the Divisional Court, on appeal from the Small Claims Court, which have held that the *Rules of the Small Claims Court* pertaining to costs prevail over s. 29. After the 1995 Small Claims Court decision in *Weiss* , the Divisional Court in *Peacock v. Choi*, [1998] O.J. No. 2972 (Ont. Gen. Div.)[1] held, albeit in *obiter dicta*, that the limits set out in the *Rules of the Small Claims* Court pertaining to costs prevail over s. 29. The Court further held, unlike the earlier decision in *Weiss* ,[2] that s. 25 cannot be relied upon with respect to costs orders. Coo J. stated:

> ¶ 2 There was no support found, or referred to, for increasing costs in consequence of any misconduct of the sort envisaged by the wording of s. 29 of the Courts of Justice Act, even assuming, as, obiter, I am not prepared to do, that the section permits costs beyond the limits provided in the Small Claims Court Rules. (In my view the interpretive approach set forth in such cases as Trudel v. Virta, [1972] 2 O.R. 761, Re Lachowski and Federated Mutual Insurance Co. (1980), 29 O.R. (2d) 273 and *Miller v. York Downs* (1987), 17 C.P.C. (2d) 142, ought to apply to the assessment of the authority of a Small Claims Court judge to award costs. I do not accept that s. 25 of the Courts of Justice Act should be read as to provide a[n] open door for the free exercise of discretion on the subject[.]

11 In addition, after the 2003 Small Claims Court decision in *Janatco Inc.* , the Divisional Court again held that the *Rules of the Small Claims Court* pertaining to costs prevail over s. 29. The decision is *Schaer v. Barrie Yacht Club*, [2003] O.J. No. 5278 (Ont. Div. Ct.).[3] In this case, there were two Small Claims Court actions involving the parties. One of these actions had a defendants' claim. The plaintiffs' claim in the action without the defendants' claim was dismissed with costs payable to the defendants of $1,000.00 "in the nature of a counsel fee"[4] plus disbursements. The defendants had been represented by counsel at trial. On appeal, the Divisional Court held that the Deputy Judge of the Small Claims Court erred in law when he deviated from the maximum counsel fee of $300.00 and awarded costs of $1,000.00 pursuant to s. 29. R. MacKinnon J. stated:

> ¶ 10 7. The Appellants argue that in coming to the costs orders that he did, the trial judge breached s. 19.04 of the Small Claims Court Rules and s. 29 of the Courts of Justice Act. I agree. The respondents were successful at trial in action 2201/00 (the "Lien Action"). They were represented by counsel and accordingly, Rule 19.04 of the Small Claims Court Rules is applicable. Section 29 of The Courts of Justice Act cannot be used to circumvent the inapplicability of Rule 19.05[5] to compensate the successful defendant at trial when there was no finding of unreasonable behaviour against the unsuccessful plaintiff at trial. Consequently, the trial judge's finding of counsel fee in excess of $300.00 in that action was not justified and I allow the appeal to that extent and vary the trial judgment to reduce the costs in the "Lien Action" to $160.00 for filing fee and disbursements, plus $300.00 for counsel fee.

12 The claim by Frost Insurance and the defendant's claim by Mr. McMorrow involved a difficult issue pertaining to non-competition clauses. The issue was important to both parties. I accept the submission of Frost Insurance that its counsel docketed 8 hours for trial preparation. Indeed, counsel for Mr. McMorrow was equally prepared and obviously spent considerable time in trial preparation. The trial took place over a period of two days. Frost Insurance was successful both in its claim and in its defence of the defendant's claim, which was a serious counterclaim as shown in the reasons for judgment.

13 Notwithstanding my observations relating to the costs issue, I am bound by the doctrine of *stare decisis* to follow the Divisional Court decisions in *Peacock* and *Schaer* . In *Fisken v. Meehan* (1877), 40 U.C.Q.B. 146 (Ont. H.C.), at 149, Harrison C.J. stated:

> It is not for a subordinate Court to disregard the decisions of a Court of Appeal; but, on the contrary, it is the duty of the subordinate Court to give full effect to such decisions, whatever its views may be as to their intrinsic wisdom.

See also Lange, D.J., *The Doctrine of Res Judicata in Canada* (LexisNexis Butterworths, 2nd ed. 2004), Ch. 8, Section 3: "The Doctrine of *Stare Decisis*," at 414-423.

14 In my opinion, there was no conduct by the parties that would warrant the application of the penalty provision of s. 29. I am limited to Rule 19.04 in an award of costs.

15 There was an offer to settle made by Mr. McMorrow to withdraw his counterclaim if Frost Insurance withdrew its claim, each party bearing their own costs, This offer has no impact on the award of costs. Prior to the commencement of this action, W.B. White Insurance Limited made an offer to pay Frost Insurance one time the commission earned on the book of business in dispute. This offer was in evidence at trial. W.B. White Insurance Limited was the insurance broker where Mr. McMorrow took a commissioned position after leaving Frost Insurance. I find that this offer to settle was not made by Mr. McMorrow personally. Further, the offer to settle was a pre-litigation offer and Rule 14 does not apply. See *Scanlon v. Standish* (2002), 57 O.R. (3d) 767 (Ont. C.A.) at par. 8 addressing the similar provision in the Rules of the Superior Court of Justice. I, therefore, find that the offer to settle made by W.B. White Insurance Limited has no impact on the award of costs.

16 Frost Insurance was a successful party in the claim it put forward as plaintiff in the Small Claims Court. Pursuant to Rule 19.04, I order a counsel fee of $300.00 to Frost Insurance for its claim. In *Schaer* , the Divisional Court interpreted Rule 19.04 to apply to a successful defendant after a trial where the claim was dismissed against that defendant. Mr. Morrow's counterclaim is a defendant's claim under Rule 10. Pursuant to Rule 10.05 (1), a defendant's claim is to be treated as if it were a plaintiff's claim and a defence to a defendant's claim is to be treated as if it were a defence to a plaintiff's claim. The counterclaim was a separate and distinct cause of action which, although related to the subject matter of the main action, could have been launched separately in the Small Claims Court. Pursuant to Rule 19.04, I order a counsel fee of $300.00 to Frost Insurance for its defence of the defendant's claim. The total counsel fee is, therefore, $600.00.

17 There was an issue relating to the amount of disbursements. Frost Insurance claimed $455.00 plus $31.85 in GST for a total of $486.85. In the amount of $455.00, Frost claimed $216.00 for service of four summonses to witness. Mr. McMorrow submits that Rule 19.01 (3) sets assessable disbursements for service not to exceed $20.00 for each person served. I agree. The disbursements are reduced to $319.00. There is no GST paid on the court costs. The amount of the disbursements is, therefore, fixed at $319.00.

18 Accordingly, the total award of costs is $919.00 with post judgment interest from July 14, 2004 pursuant to the *Courts of Justice Act*.

Order accordingly.

Footnotes

[1] The 1998 decision in *Peacock* was not referred to in the later decisions in *Sabo* and *Janatco Inc.* .

[2] *Weiss* was not referred to.

[3] The decision in *Janatco Inc.* was released May 6, 2003. The decision in *Schaer* was released December 12, 2003. *Schaer* made no reference to authority.

[4] Par. 2 of the decision.

[5] The reference must be to Rule 19.04.

Citing References (3)

Treatment	Title	Date	Type	Depth
Followed in	**1. Scott v. Paradoski** 2005 CarswellOnt 6398 (Ont. S.C.J.) **Judicially considered 1 time**	Aug. 30, 2005	Cases and Decisions	
Referred to in	**2. McAllister v. Wiegand** 2009 CarswellOnt 1529 (Ont. S.C.J.) **Judicially considered 1 time**	Mar. 16, 2009	Cases and Decisions	
—	**3. CED Costs I.5.(g), §166-§167**	2009	CED	—

