Docket: 2008-3556(IT)G

BETWEEN:

BARRINGTON LANE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion determined by Written Submissions

Before: The Honourable Justice F.J. Pizzitelli

Participants:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Deanna Frappier

ORDER

UPON motion in writing by the Appellant requesting that this Honourable Court reconsider its award of costs reflected in the Amended Judgment dated September 13, 2010, and Reasons for Judgment dated July 19, 2010, pursuant to Rule 147(7) of the *Tax Court of Canada Rules (General Procedure)*;

AND UPON reading the materials filed;

IT IS ORDERED THAT:

1. The taxing officer shall tax the Appellant's costs of the appeal in this matter on the following basis:

   (a) The Appellant is to be awarded normal tariff costs based on a Class C proceeding for a wholly successful litigant for the period up to 5:00 p.m. on Thursday, May 27, 2010; and

   (b) Thereafter, costs on the basis of 80% of fees and disbursements billed to the Appellant for final preparation for the hearing and conduct of the hearing, including preparation and review of submissions.

2. The Appellant shall also be awarded $600 for costs in respect of this motion.

Signed at Ottawa, Canada, this 20th day of September 2010.

"F.J. Pizzitelli"

Pizzitelli J.

Citation: 2010 TCC 476
Date: 20100920
Docket: 2008-3556(IT)G

BETWEEN:

BARRINGTON LANE DEVELOPMENTS LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Pizzitelli J.

[1] This is a motion by the Appellant brought pursuant to Rule 147(7) of the *Tax Court of Canada Rules (General Procedure)* seeking that this Court reconsider its award of costs in my judgment of July 19, 2010, pertaining to this matter (which has been amended for clarification not related to the issue of costs). In effect, I allowed the Appellant's appeal with costs without being aware of the Offer to Settle of the Appellant. The Appellant now seeks 100% of all fees and disbursements from May 20, 2010, being its alleged date of settlement offer. The Respondent's position is that it accepts the costs award as per the judgment and requests the costs and disbursements be taxed pursuant to Tariffs A and B as a Class C Proceeding even though the appeal was filed as a Class B proceeding, thus conceding more generous costs to the Appellant.

[2] Rule 147 of the *Tax Court of Canada Rules(General Procedure)* reads as follows:

> 147(1) The Court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them.

(2) Costs may be awarded to or against the Crown.

(3) In exercising its discretionary power pursuant to subsection (1) the Court may consider,

(*a*) the result of the proceeding,

(*b*) the amounts in issue,

(*c*) the importance of the issues,

(*d*) any offer of settlement made in writing,

(*e*) the volume of work,

(*f*) the complexity of the issues,

(*g*) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,

(*h*) the denial or the neglect or refusal of any party to admit anything that should have been admitted,

(*i*) whether any stage in the proceedings was,

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution,

(*j*) any other matter relevant to the question of costs.

(4) The Court may fix all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may award a lump sum in lieu of or in addition to any taxed costs.

(5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

(*a*) to award or refuse costs in respect of a particular issue or part of a proceeding,

(*b*) to award a percentage of taxed costs or award taxed costs up to and for a particular stage of a proceeding, or

(*c*) to award all or part of the costs on a solicitor and client basis.

> (6) The Court may give directions to the taxing officer and, without limiting the generality of the foregoing, the Court in any particular proceeding may give directions,
>
> (*a*) respecting increases over the amounts specified for the items in Schedule II, Tariff B,
>
> (*b*) respecting services rendered or disbursements incurred that are not included in Schedule II, Tariff B, and
>
> (*c*) to permit the taxing officer to consider factors other than those specified in section 154 when the costs are taxed.
>
> (7) Any party may,
>
> (*a*) within thirty days after the party has knowledge of the judgment, or
>
> (*b*) after the Court has reached a conclusion as to the judgment to be pronounced, at the time of the return of the motion for judgment,
>
> whether or not the judgment included any direction concerning costs, apply to the Court to request that directions be given to the taxing officer respecting any matter referred to in this section or in sections 148 to 152 or that the Court reconsider its award of costs.

[3] As this motion was brought August 18, 2010, it is within the 30-day period contemplated by subsection 147(7) of the above Rule.

[4] The Appellant basically relies on the fact a settlement offer was made on May 20, 2010, wherein the Appellant offered to settle the matter by payment of $50,000 to the Respondent with both sides responsible for their own costs. On the same date, the Respondent's counsel wrote to the Appellant's counsel and advised that as the basis of payment was an unsubstantiated amount, they could not agree to the offer as submitted but also advised it would be prepared to reconsider their position if, and I quote:

> … Should you be able to provide some factual or legal basis for the $50,000 figure offered, …

[5] On May 27, 2010, the Appellant's counsel faxed a letter of reply to the Respondent's counsel reiterating the above offer and identifying the substantive issue in the appeal with great clarity and setting out the precedents relied upon to

support its position, including *Krauss v. R.*, 2009 TCC 597, 2009 DTC 1394, and *Trom Electric Co. v. Canada*, 2004 TCC 727, 2005 DTC 62, which were considered with approval in my judgment.

[6] On May 31, 2010, the Respondent replied to the above second letter and stated:

> … As the offer does not contain any legal or evidentiary basis for settling on the terms proposed by the appellant, we cannot agree to the terms proposed.

[7] Counsel for the Respondent also took the position the case law quoted by the Appellant was quoted out of context, although did not explain why, and suggested it did not stand for the general principle suggested in the proposal letter, which of course I disagreed with in my judgment.

[8] No counter offer was contained in the above reply and the Respondent's counsel enclosed a revised partial agreed statement of facts with only minor changes to that earlier proposed by the Appellant itself as well as an Amended Reply to the Notice of Appeal, later consented to by counsel.

[9] On June 2, 2010, counsel for the Appellant advised counsel for the Respondent by telephone that the revised partial agreed statement of facts was unacceptable and that there would be no agreed facts. There was no written position given by counsel for the Respondent as to why the minor changes to the suggested statement were unacceptable.

[10] It should also be noted that a significant amount of time at the beginning of the trial was spent on the issue raised by the Appellant as to whether the notice of assessment for 2004 was mailed within the normal assessment period or whether it was statute barred, which of course was considered before the second issue. The Appellant was unsuccessful on this issue at trial.

[11] The Appellant's position is based entirely on the fact its settlement offer was turned down, without the Respondent making any offer or counter-offer, or inviting a settlement discussion and having regard to the fact the Appellant succeeded on the main issue even beyond its settlement offer then it should be granted its request for 100% costs and disbursements from the date of the offer. The Appellant has drawn the Court's attention to the decision of Boyle J. in *Langille v. The Queen*, 2009 TCC 540, 2009 DTC 1351, wherein Boyle J. awarded 80% of invoiced fees and disbursements billed for the period following the making

of the settlement offer. In that case, the settlement offer was made only a few days before the hearing and its terms specifically matched the ultimate result of the appeal. Boyle J. noted, however, that since the offer was made only a few days before trial, most of the preparation would have been done before the date of the offer and hence did not award 100%.

[12] In the case at hand of course, the settlement offer was made only a short period before trial as well. In fact, I find that the Respondent was more than reasonable in requesting on May 20, 2010, an explanation of the basis for the settlement amount in its reply to the first letter, which the Appellant in fact provided in its letter of May 27, 2010, one week later. I would contend the relevant date for settlement purposes should be May 27, 2010, which of course was just a few days before the hearing which took place over June 3 and 4, 2010, much along the lines of *Langille* above.

[13] There is no disputing that while a settlement offer is only one of the factors to consider under Rule 147(3)*(d)* above, it has taken on the role of one of the more important factors, as alluded to in the decisions of this Court in *Langille*, *Donato v. R.*, 2010 TCC 16, 2010 CarswellNat 44, 2010 DTC 2788, and *Campbell v. R.*, 2010 TCC 323, 2010 CarswellNat 1701, 2010 DTC 3619, all of which refer to the practice in many jurisdictions to award costs on a solicitor/client basis where the unsuccessful party rejects a settlement offer which is at least as favourable as the outcome of the hearing. In addition, the growing importance of the settlement offer is mentioned by both Woods J. and Boyle J. in *Donato* and *Langille* respectively, where reference was made to the recent endorsement of the Rules Committee of the Court of an increase in costs when a written settlement offer has been made that is no less favourable than the actual outcome and the new Practice Note 17 issued by Rip C.J. of this Court stressing the importance of settlement and the awarding of solicitor/client costs to encourage settlement.

[14] The Respondent's relies on the decision of Bowman J. in *Continental Bank of Canada v. Canada*, 1994 T.C.J No. 863 (QL), in support of its position that the Appellant's request should be denied. In paragraph 10 of such decision, Bowman J. stated:

> 10 In the normal course the tariff is to be respected unless exceptional circumstances dictate a departure from it. Such circumstances could be misconduct by one of the parties, undue delay, inappropriate prolongation of the proceedings, unnecessary procedural wrangling, to mention only a few. None of the elements exists here.

[15] However, while I agree the misconduct of the parties is obviously another factor to consider in awarding costs beyond the Tariff amount, the *Continental Bank of Canada* decision long preceded the proposed changes to the Rules and Practice Note 17 which elevated the consideration of the settlement offer to a more prominent role.

[16] The settlement offer is, however, not the only factor to consider under Rule 147(3), notwithstanding its important role. The result of the proceeding in Rule 147(3)*(a)* is obviously a factor on its own, and here, while the Appellant was successful on the issue of the manner of taxation of the loan repayment, it was wholly unsuccessful on the issue as to whether the 2004 notice of assessment was statute barred as above mentioned.

[17] In addition, Rule 147(3)*(h)* provides that the denial or neglect or refusal of any party to admit anything that should have been admitted is another factor to consider. In this case, the Appellant himself initiated a draft agreed partial statement of facts yet refused to consider even minor changes to it after its settlement offer was rejected. There was in fact no real dispute as to the material facts in the trial and an agreed-upon statement of facts would have shortened the trial through the testimony of the various witnesses.

[18] As to the other factors to consider, clearly this case was not a complex one, having been heard over two days with the material facts not in dispute, and the parties during the hearing conducted themselves properly and astutely, save and except I might note for the Respondent's failure to have realized that the Federal Court of Appeal case of *Imperial Oil Ltd. v. Canada*, 2004 FCA 361, 2004 DTC 6702 (F.C.A.), on which it relied to support its position in law, had already been overturned by the Supreme Court of Canada.

[19] Having regard to all the relevant factors to consider above, I do not think that this is a case in which 100% of costs and disbursements should be given. As in the *Langille* case, since the offer to settle was only given a short time before trial, most of the preparation work must have been undertaken before the date of settlement offer. In addition, while the Appellant was successful beyond the terms of his generous settlement offer on the main issue at trial, the Appellant was unsuccessful on the statute-barred issue which occupied significant time and the Appellant could have shortened the trial by proceeding to further an agreed statement of facts, the process for which the Appellant commenced and abruptly ended. On balance, however, I am of the view that some form of enhanced costs should be awarded, and accordingly, I am directing the taxing officer to tax the Appellant's costs on the following basis:

(a) The Appellant is to be awarded normal tariff costs based on a Class C proceeding for a wholly successful litigant for the period up to 5:00 p.m. on Thursday, May 27, 2010; and

(b) Thereafter, costs on the basis of 80% of fees and disbursements billed to the Appellant for final preparation for the hearing and conduct of the hearing, including preparation and review of submissions.

[20] The Appellant shall also be awarded $600 as costs in respect of this motion.

Signed at Ottawa, Canada, this 20th day of September 2010.

"F.J. Pizzitelli"

Pizzitelli J.

CITATION:	2010 TCC 476
COURT FILE NO.:	2008-3556(IT)G
STYLE OF CAUSE:	BARRINGTON LANE DEVELOPMENTS LIMITED and HER MAJESTY THE QUEEN
DATE OF HEARING:	Motion determined by Written Submissions
REASONS FOR ORDER BY:	The Honourable Justice F.J. Pizzitelli
DATE OF ORDER:	September 20, 2010

PARTICIPANTS:

Counsel for the Appellant:	Bruce S. Russell, Q.C.
Counsel for the Respondent:	Deanna Frappier

COUNSEL OF RECORD:

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