

Document:Spek v. Van Alten, [2005] O.J. No. 613

 **Spek v. Van Alten, [2005] O.J. No. 613**

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Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

K.N. Feldman, E.A. Cronk and H.S. LaForme JJ.A.

Heard: February 16, 2005.

Oral judgment: February 16, 2005. Released: February 21, 2005.

Docket: C42505

[2005] O.J. No. 613 | 194 O.A.C. 189 | 7 C.P.C. (6th) 140 | 137 A.C.W.S. (3d)
699 | 2005 CanLII 3941

Between Cornelis Spek, Idsche Spek, Andrew Spek and Judith Spek, (plaintiffs (appellants)),
and Hendrik Van Alten and Hyndman Transport [1972] Limited, (defendants (respondents)),
and Hyndman Transport [1972] Limited, (plaintiff (respondent)), and Cornelis Spek, Litigation
Administrator of the Estate of Steven Spek, (defendant (appellant))

(8 paras.)

Case Summary

Appeal by the plaintiffs, Spek, from the costs order made by the trial judge. The trial proceeded only on the issue of liability. The parties had agreed to damages prior to the trial in the amount of \$125,000. Prior to reaching an agreement regarding damages, Spek had served an offer to settle the case for \$85,100. The trial judge held that because Spek failed to specify that this offer remained open for acceptance after the parties agreed to the quantum of damages, the initial offer of \$85,100 was invalidated by the agreement regarding the damages. At trial, the judge awarded the agreed amount of damages to Spek.

HFI D: Appeal allowed.

The trial judge erred. There were no words in Spek's acceptance of the offer to settle the damages that indicated that their original offer to settle the entire case for \$85,100 was withdrawn or had expired. Therefore, Spek was entitled to costs on a partial indemnity scale prior to the date of the \$85,100 offer and substantial indemnity costs thereafter. The determination of costs was referred back to the trial judge.

Statutes, Regulations and Rules Cited

Ontario Rules of Civil Procedure, Rule 49.10.

Appeal From:

On appeal from the costs order of Justice Johanne Morissette of the Superior Court of Justice dated May 25, 2004.

Counsel

Richard C. Halpern and Aleks Mladenovic for the appellant

Robert B. Ledgley for the respondent

ENDORSEMENT

The following judgment was delivered by

THE COURT (oral endorsement)

- 1 The appellants appeal the costs disposition made by the trial judge.
- 2 The trial proceeded only on the issue of liability, the parties having agreed on the quantum of damages at \$125,000. Following the trial, the trial judge found the defendants liable to the plaintiffs and awarded the agreed upon \$125,000 damages.

3 Prior to reaching the agreement as to the quantum of damages, the plaintiffs had served an offer to settle the case for \$85,100. When considering costs, the trial judge concluded that because the plaintiffs failed to specify that their \$85,100 offer to settle the case remained open for acceptance when the parties agreed to the quantum of damages, the agreement on the quantum of damages "invalidated" that initial offer. The trial judge, therefore, concluded that the costs consequences of rule 49.10 of the Rules of Civil Procedure were not applicable and ordered partial indemnity costs throughout.

4 In our view, the trial judge erred in that conclusion. There were no words in the plaintiffs' letter accepting the offer to settle the quantum of damages that indicated that their original offer to settle the entire case for \$85,100 was withdrawn or had expired. Furthermore, in that letter, counsel for the plaintiffs specifically noted that the issue of costs remained outstanding.

5 The respondent argues on the appeal that, as a matter of principle, where parties have agreed on the quantum of damages no pre-existing offer under rule 49.10 would continue to operate because the quantum of damages was no longer in dispute. We reject this argument. Rule 49.10 was intended to impose costs consequences on the decision of either side to proceed to trial in the face of an existing offer.

6 Accordingly, we would allow the appeal on the costs issue and order partial indemnity costs to the date of the \$85,100 offer and substantial indemnity costs thereafter. The agreed damages in this case were \$125,000. The appellants' costs bill on the substantial indemnity scale is \$122,000 net of a claimed premium i.e. the costs claimed almost equal the value of the action. In light of those circumstances, we would refer the determination of the amount of costs back to the trial judge to be determined in accordance with the recent jurisprudence from this court that the basis for an order of costs is to be what is a fair and reasonable amount that should be paid by the losing party in the circumstances of the particular case.

7 The appellants also appeal the trial judge's refusal to award a premium to them to compensate for the risk of the trial. The issue of a premium is part of the determination of costs and was considered and rejected by the trial judge. We see no basis to interfere with her exercise of discretion on that issue.

8 The appeal is therefore allowed in part. The appellants are entitled to costs of the appeal, fixed in the amount of \$15,000, inclusive of disbursements and G.S.T.

K.N FELDMAN J.A.
E.A. CRONK J.A.
H.S. LaFORME J.A.

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