

COURT OF APPEAL FOR ONTARIO

CITATION: Holmes v. Lerner LLP, 2012 ONCA 829

DATE: 20121128

DOCKET: C55537

Simmons, Cronk and Rouleau JJ.A.

BETWEEN

Scott Paul Holmes, The Scott Holmes Living Trust and the Corporation
Controlled by Scott Holmes

Applicants (Respondents)

and

Lerner LLP

Respondent (Appellant)

Liza C. Sheard and Andrea M. Hill, for the appellant

Marc A. Munro, for the respondents

Heard: November 13, 2012

On appeal from the judgment of Justice J.A. Ramsay of the Superior Court of Justice, dated April 27, 2012.

By the Court:

[1] The appellant solicitors appeal from the judgment of the application judge who directed the assessment of their legal accounts pursuant to the *Solicitors' Act*. The respondents seek leave to cross appeal from the application judge's decision denying them their costs of the application.

[2] Because the accounts had been delivered more than 12 months before the application was brought and the accounts had already been paid, the

respondents were required to show that special circumstances existed which warranted granting the application for an assessment. The application judge concluded that special circumstances existed because the bills were large, the delay in seeking an assessment order was relatively short, the bills had been paid by a court-appointed receiver rather than by the respondents themselves and, finally, any prejudice the appellant might suffer could be compensated by an appropriate direction for costs.

[3] The appellant argues that the application judge misapprehended material evidence, failed to apply the principles that should have guided his exercise of discretion and failed to give sufficient weight to the relevant considerations.

[4] We would not give effect to this submission. Sections 4 and 11 of the *Solicitors' Act*, R.S.O. 1990, c. S. 15 give the court a broad discretion to determine whether special circumstances exist such that an assessment ought to be allowed. As stated by Doherty J.A., at para. 4 of *Guillemette v. Doucet*, 2007 ONCA 743, "A finding of 'special circumstances' turns on a fact driven exercise of judicial discretion. This court will defer to that discretion absent an error in principle or a clearly unreasonable result." Although we agree with the appellant that certain parts of the application judge's reasons could have supported a conclusion that the assessment of the appellant's accounts was not justified, in the end, after weighing all the relevant factors, the application judge reached the conclusion that special circumstances existed in this case.

[5] The application judge's analysis and rejection of many of the grounds advanced by the respondents demonstrates that he was alive to all the arguments placed before him. This does not, however, take away from the application judge's conclusion that special circumstances existed. As he found, the amount of the accounts was very significant, a total of about \$650,000 in less than a year. In addition, although the accounts had been paid, they were paid by a court-appointed receiver who, in reviewing the accounts, would have had a different perspective and different concerns than those of the respondents.

[6] The appellant further argues that, by concluding that the absence of prejudice to the appellant was relevant and supported his conclusion that special circumstances existed, the application judge, in effect, imposed an onus on the appellant to demonstrate prejudice.

[7] We disagree. The application judge did not conclude that the absence of prejudice constituted special circumstances. It was simply one of a constellation of factors he considered in reaching his conclusion.

[8] With respect to the cross appeal on costs, the respondents argue that, since they were successful on the application, they ought to have been awarded their costs.

[9] The application judge exercised his discretion not to award costs to the respondents due in large part to his conclusion that a significant part of the

application was devoted to dealing with the respondents' numerous and serious allegations of bad conduct said to have been committed by the appellant. These allegations were all rejected by the application judge.

[10] These unfounded and serious allegations not only consumed an inordinate length of time at the hearing, they had previously been considered and rejected by a judge, as well as the Law Society of Upper Canada.

[11] Costs awards are entitled to a high degree of deference and, in our view, the application judge did not err in principle in fashioning his costs award. Nor is the costs award plainly wrong. See *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303. Finally, it was within the application judge's discretion to decline to award costs in the circumstances of this case.

[12] For these reasons, both the appeal and the cross appeal are dismissed.

[13] The respondents were successful on the appeal and are entitled to their costs. The amount awarded, however, needs to take into account the fact that they were unsuccessful on their cross-appeal. In the circumstances, therefore, we award the respondents costs on a partial indemnity scale fixed at \$8,500, inclusive of disbursements and applicable taxes.

“J.M. Simmons J.A.”
“E.A Cronk J.A.”
“Paul Rouleau J.A.”