

COURT OF APPEAL FOR ONTARIO

CITATION: Bowen v. JC Clark Ltd., 2023 ONCA 181

DATE: 20230317

DOCKET: M53929 (C69373)

Feldman, George and Copeland JJ.A.

BETWEEN

James Bowen and Jonathan Wiesblatt

Plaintiffs (Moving Parties/Appellants)

and

JC Clark Ltd.

Defendant (Responding Party/Respondent)

Sara J. Erskine and Fraser Dickson, for the moving parties

James G. Knight and Laura J. Freitag, for the responding party

Heard: In writing

REASONS FOR DECISION

[1] In reasons released on August 29, 2022, this court allowed the appeal by appellants¹, in part, and granted judgment to each appellant in the amount of \$115,000, plus pre- and post-judgment interest: *Bowen v. JC Clark Ltd.*, 2022 ONCA 614, 473 D.L.R. (4th) 555. The amounts awarded to the appellants on appeal were a fraction of the amounts they had sought, both at trial and on appeal.

¹ The appellants are the moving parties on this motion. For ease of reference, I refer to the parties as “the appellants” and “the respondent”.

The current motion relates to the order made by this court with respect to trial costs. In light of the mixed success on appeal, rather than award trial costs to the appellants, the court reduced the award of trial costs that had been made to the respondent in the Superior Court, from just over \$320,000 to \$160,000.

[2] The appellants now bring a motion to set aside, amend, or vary this court's order regarding trial costs and seek an order that trial costs of \$160,000 be awarded to them. In support of the motion, the appellants rely on rules 59.06(1) and (2)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] The panel directed that the motion be heard in writing.

[4] The appellants argue that this court's order with respect to trial costs was made in a procedurally unfair manner, that the trial costs order is inconsistent with the principles of the law of costs in Ontario (i.e., that it is wrong), and that the court gave insufficient reasons for its order on trial costs.

[5] The respondent argues that the stated grounds for the appellants' motion do not bring them within the ambit of rule 59.06(1) or (2)(d). Rather, the appellants are attempting to reargue issues previously raised before the court. The appropriate means to seek that relief was to seek leave to appeal the judgment.

[6] We are of the view that the motion must be dismissed. The relief sought by the appellants is not available under rule 59.06(1) or (2)(d).

[7] Pursuant to rule 61.16(6.1), “[s]ubject to rules 37.14 and 59.06, an order or decision of a panel of an appellate court may not be set aside or varied under these rules.”

[8] This court’s authority under rule 59.06 is limited, and will be exercised “sparingly” and only “where it is clearly in the interests of justice”: *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 840, at para. 6.

[9] Rule 59.06(1) is not applicable in the circumstances of this motion. The motion does not raise an issue of an accidental slip or omission or seek an amendment on a particular on which the court did not adjudicate: *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 512, at paras. 7, 9. In their Notice of Appeal and their appeal factum, the appellants sought trial costs. This court adjudicated on trial costs. There was neither an accidental slip or omission nor a failure to adjudicate.

[10] With respect to rule 59.06(2), the appellants rely on subrule (d), which permits a party to bring a motion in a proceeding to “obtain other relief than that originally awarded” (emphasis added). Rule 59.06 cannot be read as being so broad as to apply to any request by a moving party for a different order than that made by the court. If that were sufficient to invoke rule 59.06(2)(d), finality of judgments would be illusory. The appellants are not seeking relief other than that originally awarded. The nature of the relief they seek is the same as what the court

ordered – costs. What the appellants challenge is to whom the costs are payable. This is not relief other than that originally awarded. Rather, the appellants are seeking relief that this court considered and declined to grant: *Render*, at para. 8.

[11] The substance of the appellants' motion is a challenge to the appropriateness of this court's discretionary order with respect to trial costs, the procedural fairness of the manner in which this court made its order regarding trial costs, and the adequacy of the court's reasons for the order in relation to trial costs. That relief is appropriately sought by seeking leave to appeal to the Supreme Court of Canada: *Mullings v. Robertson*, 2020 ONCA 369, at paras. 4 and 6.

[12] The appellants also, belatedly, raise issues with respect to how the order was settled, relying on rule 59.04. We see two problems with the appellants' submissions in this regard.

[13] First, the appellants did not raise any issue with the procedure followed for settling the order when they could have done so earlier. Following the issuing of the court's judgment on August 29, 2022, the parties were unable to agree on the form of the order. The appellants requested an appointment before the panel that heard the appeal to settle the form of the order. The parties were advised by court staff that a dispute about the terms of the order would be addressed, first, by an appearance before the Registrar, and if necessary, would be escalated to the panel. We note that this is consistent with rules 59.04(9), (10), and (11). The parties

appeared before the Registrar on November 10, 2022. The Registrar suggested that the parties prepare their respective versions of the order, which the Registrar would then put before the panel. The two draft orders were largely identical, with the exception of the issue of trial costs. The two versions of the order were placed before the panel and the panel advised the Registrar of which order reflected the order in the judgment (the respondent's version). On November 24, 2022, the parties were advised of this.

[14] At the time that the Registrar suggested to the parties to provide their respective versions of the order, and that the two versions would be put before the panel, the appellants raised no objection to this procedure.

[15] Second, the issue raised by the appellants – who is entitled to an award of trial costs – is not an issue of the *form* of the order; rather, it is an issue of the *substance* of the order made by this court in relation to trial costs. The panel advised, through the Registrar, which draft order was consistent with its August 29, 2022 judgment. Again, the proper avenue to seek redress is a motion for leave to appeal to the Supreme Court of Canada.

[16] The appellants' Notice of Motion also made reference to rule 37.14; however, no submissions were made on that rule in the appellants' factum on the motion. Rule 37.14 has no application to this motion. The issue raised on the motion does not involve an order obtained on a motion without notice, a failure to

appear on a motion, or an order of the Registrar: *Liu v. Qiu*, 2022 ONCA 544, at para. 3; *Mullings*, at para. 3.

[17] The motion is dismissed with costs to the responding party on the motion fixed at \$5,000, inclusive of disbursements and applicable taxes.

“K.Feldman J.A.”

“J. George J.A.”

“J. Copeland J.A.”