“Police ordered to pay client’s legal costs after client successfully sued police for rights violations.” [COMMENTS BY RICHARD NEARY]

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K (Guardian ad litem of) v. E

Between
W K, an infant, By her Guardian Ad Litem
T K, Plaintiff, and
M E, P B, R O, Brian
A and The City of Victoria, Defendants

[2008] B.C.J. No. 2385

173 A.C.W.S. (3d) 66

2008 BCSC 1684

Docket: 05 5258

Registry: Victoria

British Columbia Supreme Court
Victoria, British Columbia

J.W. Williams J.

Heard: June 24, 2008 (by video) and September 29, 2008.
Judgment: December 5, 2008.

(64 paras.)

Civil Litigation — Civil procedure — Costs — Particular orders — Punitive — Special orders — For reprehensible or inefficient conduct — Offers to settle — Bullock or Sanderson order — Determination of costs — Costs of the plaintiff allowed at scale c from the city and police officer defendants and costs of the defendant E allowed at scale b from the city and police officer defendants — Plaintiff was successful against the city and defendant police officers — Plaintiff's claim for double costs dismissed — Plaintiff's offer to settle was a global offer which was not lawful as the defendants were not being sued jointly — Plaintiff's claim for special costs dismissed — The conduct of the city and police officer defendants throughout the litigation was not reprehensible deserving of reproof or rebuke — Costs on scale c were appropriate as the case was of more than ordinary complexity — Defendant E was entitled to costs at scale b given that she was successful in defeating the claims against her, her conduct was not such so as to deprive her of costs and there were no special considerations — As it was reasonable and necessary for the plaintiff to join the custodial staff defendants to the action, costs of the custodial staff defendants should be paid by the city and police officer defendants — In the circumstances of the case, a Sanderson order was appropriate.

Determination of costs. The plaintiff was brought an action for damages against the City of Victoria, two police officers, O and A, and two members of the jail custodial staff, Band E. The plaintiff, aged 14, had been arrested by the police for being intoxicated in a public place. She was kept in police lock-up. After kicking off her shoe, which struck the defendant E, she was physically taken to the ground by the two officers, tethered and left in the cell in a tethered state for approximately four hours. The plaintiff was successful after an eight day jury trial in her claim against the City of Victoria and the two defendant police officers and was awarded damages in the amount of $60,000. The claim against B was discontinued and the claim against the E was unsuccessful. The plaintiff sought an order for double and/or special costs against the city and police officer defendants and argued that although her action did not succeed against E, E should be deprived of her costs because of her pre-trial conduct and her evidence at trial.

HELD: Costs of the plaintiff allowed at scale c from the police defendants. Costs of the defendant E allowed at scale b from the police defendants. As the plaintiff was successful against the city and the defendant police officers, she should was entitled to her costs against them. The plaintiffs claim for double costs was dismissed. Although the plaintiff made an offer to settle, the offer was not in compliance with Rule 37. The plaintiff's offer was a global offer which was not lawful in that the defendants were not being sued jointly given that not all of the defendants were implicated in all of the alleged wrongful acts. The plaintiff's claim for special costs was dismissed. The conduct of the city and the police officer defendants throughout the litigation was not reprehensible deserving of reproof or rebuke. An order of costs on scale c was appropriate as the case was of more than ordinary complexity given the types of claims made, that the litigation was hard fought and the importance of the issue of the manner in which police personnel dealt with a youthful and vulnerable member of the community. The defendant E was entitled to her costs at scale B given that she was successful in defeating the claims against her, her conduct was not such so as to deprive her of costs and there were no special considerations. As it was reasonable and necessary for the plaintiff to join the custodial staff defendants to the actions, the costs of the custodial staff defendants should be paid by the City and police officer defendants. In the circumstances of the case, a Sanderson order was appropriate.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Rules of Court,

Rule 11(6.1), Rule 37, Rule 37A, Rule 37b, Rule 37(31), Rule 57, Appendix B, Appendix B s. 2

Counsel:

Counsel for Plaintiffs: R. Neary.

Counsel for Defendants R O, B A and City of Victoria: B. Jordan - June 24, 2008 and G. McDannold - September 29, 2008.

Counsel for Defendants M E and P B: M. Hunt.

Ruling on Costs

1 J.W. WILLIAMS J.:— This Ruling relates to the matter of costs following a jury trial which extended over eight days.

2 Briefly, the circumstances giving rise to this matter are these. In May, 2005, the plaintiff, then aged 14, was arrested by members of the Victoria Police Department for being intoxicated in a public place and was lodged in the police cells. Some hours later, it was decided that she was fit to be released. She was taken to her home by the two defendant officers. They were unable to gain entry to the apartment where she lived. As a consequence, they elected to return her to the police lock-up. She was unhappy with that turn of events and at one point, while being booked back into cells and surrendering her effects, she kicked her shoe off. It struck Ms. E, the matron (custodial guard) who was dealing with her. The defendant officers then physically took her to the ground, and applied a restraining tether. She was left in the cell in that tethered state for approximately four hours, and then released.

3 She brought an action against the two defendant officers and two members of the jail custodial staff, as well as the City of Victoria. In these reasons, I will refer to the two officers and the City collectively as the police defendants

4 It is my understanding that initially, all of the defendants were represented by the same lawyer. At some point, well prior to the commencement of trial, the custodial guards secured their own legal representation. In the result, for a time prior to trial and at trial, the two custodial guards were represented by one lawyer; the police defendants were represented by another.

5 Initially, the plaintiff framed her action to include a claim for general damages, including emotional or psychological injury, but prior to trial amended the pleadings and withdrew that claim. The actual trial process took eight days. In the course of that, the plaintiff elected to discontinue against one of the named guard defendants; the other remained in the action to the point the verdict was rendered.

6 In its verdict, the jury found liability against the police defendants in respect of a number of the allegations and awarded damages of $60,000. The jury dismissed the plaintiff's action against the custodial guard who remained in the action, Ms. E.

7 Counsel made submissions with respect to the matter of costs. I will attempt to summarize their positions.

8 The plaintiff seeks an order of enhanced costs against the police defendants. She submits that she tendered an offer to settle this action for the sum of $40,000 plus costs on April 24, 2008 but there was no response whatever received from the defendants. That, she contends, entitles her to an award of double costs from the time of the making of the offer. She says as well that the manner in which the police defendants conducted this litigation was improper and such as to warrant awarding costs in excess of the standard tariff.

9 With respect to the costs of the custodial guard against whom the action did not succeed, the position of the plaintiff is that she should be deprived of her costs because of her pre-trial conduct and her evidence at trial.

10 The custodial guard seeks a conventional award of costs at the standard tariff. With respect to the issue of whether those costs should be paid by the plaintiff or the police defendants, she takes no position, nor does she make submissions as to whether this ought to be dealt with by way of a Sanderson order or a Bullock order.

11 The police defendants contend that the plaintiff should be entitled to an award of costs at Scale B and no more. They also take the position that the plaintiff should not be permitted to recover the costs of the custodial guard defendant from them.

DISCUSSION

12 The starting point is that, in the ordinary course of events, the successful litigant is entitled to recover costs from the unsuccessful party. In the present case, the plaintiff should have her costs against the police defendants, that is, the two officers and the City of Victoria. She was successful in her action against them.

13 With respect to the other defendant, the custodial guard Ms. E was successful in that the jury found no liability against her. Accordingly, she seeks to recover her costs. As noted, the plaintiff has argued that she should, on account of her conduct, in the litigation, be denied her costs. It will therefore be necessary to decide whether she should receive her costs, and if so how responsibility for paying them should be assigned.

14 The determination of the appropriate awards of costs in this case will be governed by an application of Rule 57 and other relevant Rules of Court together with applicable case authority. There are a number of discrete issues raised, and I propose to address each individually.

Claim for Double Costs

15 On April 24, 2008, the plaintiff delivered to all the defendants a global offer to settle the proceeding for the payment of $40,000. Specifically, the body of the offer was as follows:

> TAKE NOTICE that the Plaintiffs, WILLOW KINLOCH, an infant by her Guardian Ad Litem TAMMY KINLOCH, offer to settle this proceeding on the following terms: in the amount of $40,000.00, new money, and costs in accordance with Rule 37.

16 There was never any response made to that offer.

17 It is the contention of the plaintiff that the fact of this offer should entitle her to an award of double costs from the date it was made, since the offer was not accepted and the damages that the jury awarded to her exceeded the amount stated in the offer to settle.

18 Where there has been an offer to settle, that consideration can inform the determination of costs. Rule 37B, enacted July 2, 2008, is the relevant Rule. In transitional cases, such as this (where a portion of the proceedings took place prior to that date), the predecessor Rules 37 and 37A will also have to be considered.

19 In order to determine whether this offer to settle entitles the plaintiff to succeed in her claim to double costs, it is first necessary to examine it carefully to see if it actually qualifies as an offer to settle.

20 The position taken by the police defendants is that the offer that was made by the plaintiff does not comply with the requirements of the rules, and so it cannot have the effect of entitling her to double costs. Specifically, they say there are two bases upon which this Court should find non-compliance.

21 The first of these is that service was ineffective because the fax form that was used to communicate the offer was not precisely in the format of Form 9, which is prescribed by Rule 11(6.1).

22 Because I find the more substantive issue of whether this is in fact an offer to settle to be dispositive, I decline to rule upon this argument.

23 At the time this offer was made, Rule 37 and 37A were in force. Their successor, Rule 37B took effect on July 2, 2008. For the purpose of the present discussion, the relevant provision is this:

> 37B(1) In this rule, "offer to settle" means
>
> (a) an offer to settle made and delivered before July 2, 2008 under Rule 37, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,
>
> (b) an offer of settlement made and delivered before July 2, 2008 under Rule 37A, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, ...

24 This means that the determination in this case will be made in accordance with the new rule, Rule 37B, but that the analysis of whether there was in fact a valid offer made will be decided by reference to Rules 37 and 37A.

25 The plaintiff argues that the offer was made globally in reliance on Rule 37(31), which provides as follows:

> (31)
>
> Other than in an action for defamation, if several defendants are sued jointly, a plaintiff may not make an offer to settle except jointly to all defendants, and a defendant may not make an offer to settle except jointly with all other defendants.

26 She says that there were several defendants being sued jointly, and so she was acting in accordance with the mandatory direction of the rule.

27 In this case, there were a total of five defendants, including two members of the guard staff and two police officers who dealt with the plaintiff from the time she was driven to her home, through the continuation of her detention and then through the subsequent events back at the cell-block. As noted, at some stage of the pre-trial proceedings, the two guards decided to retain counsel other than the lawyer who had to that point been acting for all the defendants. What is critical to the analysis of this issue is to recognize that, because the allegations of wrongdoing extended to a number of different acts, and because all of the defendants were not implicated in all of those acts, it cannot be said that all of the defendants were sued jointly: Brown v. Lowe, 2002 BCCA 7, at para 157.

28 Because this is not a case where the defendants were being sued jointly, a global offer of the sort proffered was not a lawful one that should be held to have required the offerees to respond (with the corollary that a failure to respond will be at their peril or jeopardy).

29 The plaintiff also says that if the offer was not in compliance with Rule 37, it should be concluded that there was no means for her to make an offer under Rule 37, and so she is entitled to rely on Rule 37A. The relevant part of that rule is this:

> 37A(1) In any circumstances to which Rule 37 does not apply, a party to a proceeding may deliver a written offer of settlement, in any form, of one or more of the claims in the proceeding if that offer of settlement includes a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in the proceeding.

30 In my view, this argument cannot succeed.

31 Firstly, I do not accept that that it was impossible to make an offer to the defendants other than globally. Certainly it may have been difficult to craft offers that would have been comprehensive in the circumstances of the case, but nevertheless, that is what the rule requires: Canadian Forest Products Ltd. v. B.C. Rail Ltd., 2005 BCCA 460.

32 Secondly, and critically, if it is accepted that the plaintiff was unable to make her offer under Rule 37 and was therefore required to have made it in accordance with Rule 37A (1), then she has not satisfied the obligation of including "a statement that the party delivering the offer of settlement reserves the right to bring it to the attention of the court for consideration in

relation to costs after the court has rendered judgement on all other issues in the proceeding." To my mind, that is a clear and unequivocal requirement that must be met under the rule, and so the offer as tendered is materially deficient. It does not qualify as a proper and lawful offer under Rule 37A.

33 In conclusion, I find that the offer that the plaintiff made to the defendants is not an offer of settlement, and so the plaintiff is not able to bring herself within the benefit of Rule 37B.

34 There is no doubt this outcome is frustrating and disappointing for the plaintiff. She has argued quite passionately that the new regime is a triumph of substance over form, and appears to be a recognition that the prior rules were unduly complicated and technical, sometimes resulting in unjust outcomes. She submits that the rule change "obviates any need for concern about the technicalities of the Plaintiff's earlier offers to settle and puts the focus squarely on whether those offers ought reasonably to have been accepted. More fully, it is respectfully submitted that it is appropriate to consider the overall reasonableness of the unsuccessful defendant's conduct throughout this litigation in determining whether it is appropriate to award double costs after the date of delivery [of the offer]."

35 It may well be that issues of costs and the effect of offers to settle will be considered differently under the new regime. No doubt, reasonable conduct in the resolution of litigation is to be encouraged. However, it is to my mind important to realize that parties are permitted to conduct themselves in accordance with the rules as they are at the time. In the present case, when the offer was tendered, the defendants were properly entitled to assess its propriety and it legal effect, and to conclude that it was deficient. They cannot now be penalized for having elected to ignore it as they did.

36 The plaintiff advances the view that there should be consequences for the police defendants failing to make efforts to have settled the action. In her written submissions, she says, with respect to her claim for double costs, ". . . it is of course important to remember that the unsuccessful Defendant's [sic] never in fact made any offers to settle at all. This was the case despite the fact that this matter came to trial just over three years after the date of the incident that gave rise to the litigation, that the bulk of the relevant events were captured on videotape, and that after the November 2007 examinations for discovery the Defendants were forced to made admissions that obliterated any hopes they might have had of justifying the treatment that the Plaintiff received." With respect, that view reflects a degree of frustration and misunderstanding of the process. Parties are not obligated to make offers, and to impose penal consequences for merely engaging in conduct that is lawful would in my view be improper.

37 In the result, the plaintiff's claim for double costs from the time that the offer was made is dismissed.

Claim for Special Costs.

38 The plaintiff has also submitted that the circumstances of the litigation and the defendants' conduct should warrant the imposition of an order awarding special costs. In support of that, she points to a number of specific matters.

(a)

In the course of discovery, the defendant police officers indicated that the watch commander played a significant role in decisions about when the plaintiff would be released from restraints. Plaintiff's counsel sought production of the identity of the watch commander during the relative times. Counsel for the police defendants responded by identifying a single individual. Counsel for the plaintiff sought clarification, expecting that there would be more than one watch commander during the relevant time, and further, requested notes from those individuals. Counsel for the police defendants refused to provide that information. When it was determined that there had in fact been two different individuals acting as watch commander at the relevant time, and those persons were identified through other means, counsel for the police defendants refused to accept service of subpoenas for those officers.

(b)

At some time subsequent to the commencement of the action, plaintiff's counsel proposed to amend the statement of claim to delete the claim for general damages (psychological and emotional injury), and to remove one defendant (P B). Although the proposed amendment for the damage claim would actually have the effect of reducing or limiting the liability of the City of Victoria, counsel for the police defendants refused to consent, and as a consequence the plaintiff brought an application. That was heard by Master Baker, who allowed the amendment and ordered costs against the police defendants in any event of the cause. A Bill of Costs was prepared and served on the police defendants on April 24, 2008; as of September 29, 2008, there had been no response to that request for payment.

With respect to the plaintiff's proposal to remove Mr. B as a defendant, the police defendants refused their consent. As a consequence, that too was subject of the application before Master Baker. Counsel for the police defendants succeeded in resisting the removal of Mr. B as a defendant, as there was a procedural deficiency in the manner in which the plaintiff had brought that application. However, it should be noted that counsel for Mr. B was unopposed to the removal of Mr. B as the defendant, and a basis for the resistance of the police defendants to the application is not readily apparent.

(c)

In the course of pre-trial investigations, it seems the police defendants unearthed copies of entries posted on the social networking website "Facebook". These apparently depicted the plaintiff in an unflattering light and suggested that she had on occasion engaged in drug use. It is not clear how the police defendants came into possession of that information; but there is certainly some reason to believe that it may have been in a less than entirely straightforward fashion, although that is not anything with which the Court will concern itself with at this time. The photographs that were obtained were listed on a supplemental list of documents, and classified as privileged. When plaintiff's counsel sought clarification as to the basis of the claim, counsel for the police defendants replied that the photos had been obtained by defendants' counsel in order to prepare for the litigation and therefore the claim of both litigation privilege as well as lawyer's brief privilege were asserted.

On the last business day before the commencement of trial, shortly before 3:00 p.m., counsel for the police defendants transmitted the three photos by fax to plaintiff's counsel, indicating that privilege was being waived. The police defendants subsequently sought to have those photos adduced in evidence at trial; that application was dismissed.

39 In addition, there were a number of other positions that were taken by counsel for the police defendants which are not-unreasonably described as uncooperative and difficult. There is good reason to conclude that the police defendants quite ardently pursued a strategy of seeking to put in issue the plaintiff's character and to lead evidence unflattering to her, although ultimately they were not permitted to do so.

40 In order for this Court to impose an award of special costs against a party, it is necessary that the conduct of that party be characterizable as reprehensible, which is described as misconduct deserving of reproof or rebuke, even though it may fall short of scandal or outrage: Garcia v. Crestbrook Forest Industries Ltd., 119 D.L.R. (4th) 740.

41 There is certainly a basis upon which one can understand why the plaintiff would feel that the conduct of the police defendants has crossed the line into the realm of reprehensible deserving of reproof or rebuke. On careful reflection, it is my view that the standard has not been met such as to warrant the imposition of special costs. There is no doubt that these three defendants have taken a very hard-nosed approach to the defence of the case, but I decline to find that the case has been made which would warrant the imposition of special costs.

Appropriate Scale of Costs

42 Another issue to be considered is the scale at which costs should be assessed. Appendix B of the Rules deals with the fixing of the appropriate scale of party and party costs.

2(1) Where a court has made an order for costs, it may fix the scale, from Scale A to Scale C in subsection (2), under which the costs will be assessed, and may order that one or more steps in the proceeding be assessed under a different scale from that fixed for other steps.

(2) In fixing the scale of costs the court shall have regard to the following principles:

(a) Scale A is for matters of little or less than ordinary difficulty;

(b)

Scale B is for matters of ordinary difficulty;

(c) Scale C is for matters of more than ordinary difficulty.

(3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

(a) whether a difficult issue of law, fact or construction is involved;

(b) whether an issue is of importance to a class or body of persons, or is of general interest;

(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

43 There have come to be accepted a series of criteria that can properly be considered in assessing the level of difficulty of a proceeding. These were helpfully set out by Wilson J. in Mort v. Saanich School Board No. 63, 2001 BCSC 1473 at para 6:

(a)

the length of the hearing on the substantive point;

(b)

the "complexity of the issues involved";

(c)

the number and complexity of pre-trial or hearing applications;

(d)

whether the proceeding was "hard-fought", with little or nothing having been conceded along the way;

(e)

the "number and length of examinations for discovery";

(f)

the "number and complexity of experts' reports"; and

(g)

the extent of the effort required in fact gathering and proof.

44 Obviously not all of these factors will be present in every case. As well, there may be other considerations.

45 In this instant case, I have concluded that it is appropriate that the costs payable by the police defendants to the plaintiff should be fixed at Scale C. In reaching that conclusion, I have taken into account in particular three considerations.

46 With respect to complexity, this case featured issues of more than ordinary complexity or difficulty. While not excessively so, it involved dealing with the concurrency or relationship between acts of force by police officers, both as intentional torts and as negligence, and the effect of the Canadian Charter of Rights and Freedoms as giving rise to claims of tort. It involved as well issues of justification including self-defence and the lawful use of force by peace officers, matters that are not simple or straightforward. All in all, this case presented matters of some significant complexity, certainly more than average.

47 Another consideration is whether the litigation was hard fought. There is no doubt that this is a factor that weighs markedly in favour of fixing the scale of costs at a higher level.

48 Earlier in these reasons I made reference to certain aspects of the manner in which counsel for the police defendants dealt with the plaintiff's counsel. While I concluded that the conduct did not rise to a level that would warrant the imposition of special costs, it is nevertheless my staunchly held view that counsel for the police defendants took a particularly hard-nosed approach in his dealing with plaintiff's counsel. Each of the cited examples demonstrated that convincingly. Without delving into further detail, this was a case where the police defendants were defended in a way that gave absolutely no quarter. It was apparent that part of the strategy was to ensure that the plaintiff would recognize that the litigation process upon which she had chosen to embark was a rough ride indeed. One could be forgiven for thinking that the defence was eager to put the plaintiff's character on trial, and to put it in a most unfavourable light. Although they were not able to do that, it was not for a want of effort.

49 In short, the manner in which the police defendants conducted this action was clearly hard-nosed and that is a factor which can be properly considered by the Court in exercising its discretion with respect to the scale of costs to be applied.

50 Another criterion is the importance of the issue. In my view, this was an important case that raised a significant issue: the manner in which personnel of the Victoria Police Department dealt with a youthful and vulnerable member of the community. It was a case where a citizen commenced and prosecuted an action to prove that she had been badly treated, and to seek redress. In that sense, it had a dimension of interest and importance to other citizens of the community, and not just this individual plaintiff.

51 It is my conclusion that these particular factors warrant the fixing of the scale of costs that the plaintiff should recover from the police defendants at Scale C, and I so order.

Costs for the Defendant E

52 The defendant E seeks to recover her costs. As a defendant who succeeded at trial, in the ordinary course of events, she is entitled to do so. However, in this case, the plaintiff submits that the court should exercise its discretion to deny costs to her because she has "knowingly given evidence, both in the course of discovery and at trial, that reveals either a deliberate intention to mislead or, at best, a flagrant disregard for the importance of being truthful."

53 In support of that position, plaintiff's counsel has set out the specifics of a number of instances that he says justify that conclusion.

54 I have examined carefully the argument advanced. While I agree that there are discrepancies, that is, to some extent, attributable to the process that is litigation. Persons often have their own recollection and particular perspectives of and on events. It cannot be reasonably expected that a court will analyse every single conflict between versions of events to which witnesses testify and assign a characterization to each. The litigation process has a degree of imperfection about it, and that must be accepted.

55 While I agree that there are aspects of her testimony that are capable of raising a concern, on balance, I am not prepared to embrace the conclusion that plaintiff's counsel urges. The defendant Ms. E is entitled to be awarded her costs in this action.

56 I am unaware of there being any special considerations that would apply, and so those costs should be assessed at Scale B.

57 With respect to these costs, there is another issue. That is, who should bear responsibility for those costs? The plaintiff contends that it ought to be the police defendants; the police defendants dispute that, and say that it is not for their account.

58 The determination of that issue will be based upon deciding whether or not, in the circumstances of the case, it was reasonable for the plaintiff to have named the custodial guards as defendants.

59 In Robertson v. North Island College Technical And Vocational Institute et al (1980), 119 D.L.R. (3d) 17, Lambert J.A., in considering the issue of costs in a matter not entirely dissimilar in this respect to the case at bar, spoke of the reasonableness of having joined a defendant who was ultimately successful in defending the claim. He concluded that the plaintiff had acted properly, and that it had been reasonable to join that defendant, as it was part of enabling the matter to be "thoroughly threshed out in the proceedings".

60 I consider that analysis to be entirely apt in the present case. In order for the events of May 7, 2005 to be fully aired and examined, it was not only reasonable to join the custodial staff; it was in fact necessary. There is no question that the custodial staff was inextricably involved in the actions that gave rise to the allegations. In those circumstances, I cannot accept that the plaintiff unnecessarily joined the custodial guards as defendants. That being the case, I conclude the responsibility for the costs of the custodial guard defendants must be visited upon the police defendants.

61 That leaves one further issue to be addressed, namely whether this is an appropriate case for this Court to make a Sanderson or Bullock order.

62 A Sanderson order requires a defendant against whom judgment in an action has been obtained to pay the cost of the second defendant against whom the action has been dismissed, directly to that successful defendant. The term derives from an English decision, Sanderson v. Blythe Theatre Company, [1903] 2 K.B. 533. The concept is firmly established in the jurisprudence of this jurisdiction. Whether to grant the order is a matter for the discretion of the trial judge, depending on the circumstances of the case.

63 In my view, the case at bar is a proper one for the making of such an order. As I have found, the actions of the plaintiff in pursuing the custodial staff defendants was proper and above reproach. Additionally, the plaintiff here is a young woman, an unemployed single mother attempting to complete her high school equivalency. She is in difficult financial circumstances. Furthermore, the police defendants have demonstrated a pugnacity in their approach to the litigation that has put considerable pressure on her and leads to a legitimate concern that further resistance may be expected. As a specific example, I refer to the fact that, as mentioned earlier, in dealing with an application before him on April 3, 2008, Master Baker ordered costs against the police defendants in any event of the cause. On April 24, 2008, a draft Bill of Costs was sent to counsel for the police defendants. As of September 29, 2008, there had been no response provided to that correspondence. Given that course of conduct, I am not prepared to put the plaintiff in a position where she will be obligated to pay the costs of the successful defendant, and at the same time, to contend with the intransigence of the police defendants.

SUMMARY

64 In the final result, it is the decision of this Court that the plaintiff shall recover from the police defendants her costs of this action at scale C. The defendant Ms. E shall recover her costs from the police defendants at scale B. Those will be paid directly to her by those defendants.

J.W. WILLIAMS J.