IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gray v. Lanz,*
2023 BCSC 331

Date: 20230307
Docket: M1813306
Registry: Vancouver

Between:

Kevin Troy Gray

Plaintiff

And

Alexandra Janet Lanz

Defendant

Before: The Honourable Mr. Justice Gomery

Supplementary Reasons to *Gray v. Lanz*, 2022 BCSC 2218.

Reasons for Judgment Concerning Costs

Counsel for the Plaintiff:	N. Hartney
Counsel for the Defendant:	T. More
Written submissions from the Plaintiff:	January 10, 2023
Written submissions from the Defendant:	January 31, 2023 (resubmitted February 21, 2023)
Place and Date of Judgment:	Vancouver, B.C. March 7, 2023

Introduction

[1] The plaintiff sued the defendant for damages in this personal injury action. Liability was admitted. The issue was the size of the award of damages. The trial began on October 24, 2022 and lasted for seven days. I reserved judgment and, on December 20, 2022, issued reasons for judgment in which I awarded the plaintiff $1,077,731.34. At paragraph 131 of my reasons, indexed at 2022 BCSC 2218, I stated:

> [131] Unless there are matters that must be brought to my attention, Mr. Gray is entitled to costs. If the parties wish to make submissions as to costs, they may do so in writing. Their submissions should not exceed five pages in length (excluding appendices) and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

[2] The plaintiff applies for double costs of the trial on the basis that, prior to trial, he offered to settle for $900,000 plus taxable costs and disbursements. That offer was made on October 14, 2022 and was open for acceptance until 4 p.m. on October 19. The plaintiff says that the offer was one that should reasonably have been accepted by the defence, and the time and expense of trial avoided. He relies on *Supreme Court Civil Rule* 9-1.

[3] The defendant says that double costs are not payable for two principal reasons. First, the offer that was made by the plaintiff on October 14, 2022 did not qualify as an offer to settle as defined in *Rule* 9-1. Second, the defendant's rejection of the offer was not unreasonable because the plaintiff had not completed document production when the offer was made and outstanding.

Legal framework

[4] An order for double costs involves the exercise of discretion where a condition precedent – service of an offer to settle as defined in *Rule* 9-1(1)(c) – is satisfied. There must be strict compliance with the service requirement; *BCI Bulkhaul Carriers Inc. v. Wallace,* 2015 BCSC 107 at para. 22. An offer must be made in writing and contain the language stipulated in subrule 9-1(c)(iii).

[5] Where the condition precedent is satisfied, *Rule* 9-1(6) sets out matters I may consider in the exercise of my discretion. It states:

> (6) In making an order under subrule (5), the court may consider the following:
>
> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

[6] The first consideration is whether the offer to settle was one that ought reasonably to have been accepted. The reasonableness of an offer is to be assessed under subrule 9-1(6)(a) at the time it was made without regard to the result of trial because a comparison to the result is carried out independently under subrule 9-1(6)(b); *Hartshorne v. Hartshorne*, 2011 BCCA 29, at para. 27; *Kobetitch v. Belski*, 2018 BCSC 2247, at para. 22.

[7] The consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it; *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26, at paras. 30 to 31.

[8] Sometimes the court may find that an offer was not one that ought reasonably to have been accepted, but it is nevertheless appropriate that the offeror be awarded costs in the case of a defendant, or double costs in the case of a plaintiff from the date of the offer. This was the outcome in *Bailey v. Jang*, 2008 BCSC 1372; in *Kobetitch*; and in *Lotimer v. Johnston*, 2020 BCSC 119.

Analysis

Service of an offer to settle

[9] The plaintiff relies on an offer contained in an email sent by the plaintiff's counsel to the defendant's counsel on the morning of October 14, 2022. It states:

> I have instructions to settle for **$900,000 new-money plus taxable costs and disbursements.**
>
> This offer expires at 4pm on October 19, 2022.
>
> The plaintiff reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.
>
> [Emphasis in original.]

[10] The defendant submits that, while the offer satisfies the other requirements of *Rule* 9-1(c), it is not an "offer to settle" within the meaning of the rule because it was not served. It was emailed directly to the defendant's counsel rather than to the email address for service stated in the amended response to civil claim. *Rule* 4-2(2) makes provision for ordinary service by email to an email address for service, but not otherwise.

[11] In *BCI Bulkhaul* at para. 22*,* B.J. Brown J. cited the requirement of strict compliance and held that email delivery of an offer to plaintiff's counsel was ineffective where the plaintiff had not provided an email address for service. *BCI Bulkhaul* was followed on this point by Matthews J. in *Waters v. Michie,* 2022 BCSC 822 at para. 9.

[12] From the proposition that email service is ineffective in the absence of an email address for service, I think it follows that email service is equally ineffective if the email is sent to an email address that is not the email address for service. Accordingly, I must hold that the offer that was sent on October 14, 2022 did not qualify as an offer to settle under the rule, and the plaintiff's application for double costs fails.

Discretionary considerations

[13] In case I am wrong, I turn to a consideration of the factors listed in Rule 9-1(6) to determine whether, if the email of October 14, 2022 qualified as an offer to settle, an order for double costs would be warranted.

Whether the offers ought to reasonably have been accepted

[14] When the offer was made on October 14, 2022, the plaintiff had not provided clinical records in response to requests, some of which had been outstanding since March 2022. Subsequently he produced clinical records as follows:

a) 671 pages of records from five care providers on October 17, 2022;

b) 44 pages of records from a care provider on October 18, 2022;

c) 52 pages of records from four care providers on October 20, 2022; and

d) 214 pages of records from a care provider on October 21, 2022.

[15] In addition, the plaintiff provided a medical certificate pertaining to an application for EI benefits on October 17, and a record of employment from his employer.

[16] The plaintiff produced amended lists of documents on October 18, 20, and 21, 2022. As noted above, the trial began on October 24.

[17] I accept the defendant's submission that the last minute production of documents by the plaintiff compromised the defendant's ability to evaluate the claim and fully assess the extent of her exposure. In the short period (4 business days) while the offer was open for acceptance, from October 14 to 19, 2022, the picture was not yet complete and it was reasonable for her not to accept the offer.

The relationship between the terms of settlement offered and the final judgment of the court

[18] As it turns out, the offer of $900,000 would have yielded a more attractive result for the defendant than the $1.077 million judgment that resulted from the trial.

The relative financial circumstances of the parties

[19] The defendant is represented by the Insurance Corporation of British Columbia. That fact carries no weight unless the insurer used its financial resources

in a manner that distorted the litigation process; *Wepryk v. Juraschka,* 2013 BCSC 804 at para. 15. That did not occur in this case.

Any other factor the court considers appropriate

[20] The offer was reasonable in amount. It offered a genuine compromise and an incentive to settle.

Assessment and conclusion as to double costs

[21] The dominant discretionary consideration in this case is that, throughout the time that the offer was open for acceptance, the parties were not ready for trial, and the offer was not ripe for consideration. Document production was incomplete. During the week before the trial was to begin, slightly less than 1,000 pages of clinical records were produced, including 266 pages produced after the offer had expired.

[22] In his written submission, the plaintiff quotes from *Hartshorne* at para. 25, where the Court described an award of double costs as “a punitive measure against a litigant for that party’s failure, in all the circumstances, to have accepted an offer to settle that should have been accepted”. The defendant cannot be faulted for failing to accept this offer at the time it was presented, while substantial document production was continuing.

[23] Accordingly, if it were open to me to exercise the discretion conferred under *Rule* 9-1, I would not order the defendant to pay double costs.

Disposition

[24] The plaintiff is entitled to ordinary costs of this action, except that the defendant should have the costs of this application by written submissions under item 23 of the tariff in Appendix B.

“Gomery J.”