IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pan v. Dong,*
2024 BCSC 1464

Date: 20240813
Docket: S2010806
Registry: Vancouver

Between:

An Dong Pan

Plaintiff

And

Jia Hao Dong, Xu Dong Liu and Jing Cai

Defendants

And

Jia Hao Dong and Xu Dong Liu

Third Parties

Before: The Honourable Justice Hardwick

Reasons for Judgment
re Costs

The Plaintiff, on her own behalf:	A.D. Pan
Counsel for the Defendant Jing Cai:	J.P. Scouten D. Sue-A-Quan
Written Submissions Received from Counsel for the Defendant, Jing Cai:	June 5, 2024
Place and Date of Judgment:	Vancouver, B.C. August 13, 2024

Table of Contents

Introduction

[1] These are my reasons for judgment on the issue of costs, following the trial of this action. The trial was some 10 days in duration.

[2] My reasons for judgment following the trial in this matter were released on May 22, 2024. They are indexed at *Pan v. Dong*, 2024 BCSC 869 (the "Reasons").

[3] As the relevant facts are set out in them, I will not repeat them in detail. Rather, I will briefly summarize that the plaintiff, An Dong Pan ("Pan") and the Defendant, Jing Cai ("Cai") both unfortunately suffered financial losses at the hands of the defendants/third parties, Jai Hao Dong ("Dong") and Xu Dong Liu (Liu). Pan, to his credit, incurred his financial loss on behalf of his client to his personal detriment. This speaks to his character. Cai, as I addressed in the Reasons, continued involvement with Dong and Lui after she had suffered financial losses and ought to have facilitated, arranged or organized other dealings accordingly.

[4] As to the issue of costs, I concluded that Cai was the substantially successful party at trial and that she was presumptively entitled to her costs as ordinary costs in accordance with the *Supreme Court Civil Rules*, subject to the following proviso in my order:

a) In the event that there have been formal offers which require the Court's consideration, the party seeking to rely upon the formal offer shall file written submissions within 14 days of these reasons for judgment and the responding party shall respond within seven days thereafter.

b) Upon receipt of any written submissions, the Court reserves the right to require the parties to attend at a mutually agreeable date for one hour of oral submissions. Failing receipt of written submissions within this time frame, or such other time frame as might be agreed upon in a consent order of the parties to address counsel availability, the presumptive order that the plaintiff is entitled to her costs shall govern.

[5] Submissions were received from Cai; however, no submissions were received from Pan. The other parties, Dong and Liu, remain unengaged in the proceedings. Pan does have default judgment as against Dong and nothing in these reasons impacts Pan's right to collect costs under that judgment—though it is recognized there is faint hope of recovery of any further sums.

Relief Sought

[6] Cai seeks an Order for payment of double costs from the date that a formal offer to settle was made to Pan on Thursday, January 4, 2024 (the "Formal Offer").

Pleadings Summary

[7] The following is a high-level overview of the procedural history of the trial of this matter:

a) On October 26, 2020, the plaintiff filed a notice of civil claim.

b) on November 30, 2020, the notice of civil claim was amended.

c) On January 11, 2021, Pan's list of documents was produced;

d) On August 4, 2021, Cai's list of documents was produced;

e) On January 17, 2022, the examination for discovery of Cai was conducted.

The Formal Offer

[8] There was a prior offer to settle made by Cai to Pan. Between that offer and the Formal Offer, the following additional steps in the action had taken place:

a) On July 7, 2023, the second amended notice of civil claim was filed;

b) On September 27, 2023, the examination for discovery of the plaintiff was conducted;

c) On October 4, 2023, a trial management conference was held;

d) On October 26, 2023, the response to second amended civil claim was filed;

e) On November 14, 2023, the trial was scheduled to commence but was adjourned due to lack of a judge;

f) On December 5, 2023, a second trial management conference was held before Justice Gropper;

g) Further lists of documents were exchanged by both parties.

[9] The terms of the Formal Offer were, I accept, quite straightforward. They involved, in general terms, an an-inclusive offer to pay the sum of $50,000 to Pan within two business days of acceptance in exchange for a release including a confidentiality clause and a consent dismissal order. The latter terms were likely acceptable, I surmise after having presided over the trial, but financial component was not.

[10] The Formal Offer, by its terms, was open for acceptance until the first day of the trial scheduled to commence on Monday, January 8, 2024.

General Overview of the Rules Regarding Formal Offers

[11] The issue of costs is always at the discretion of the trial judge. This includes application of the *Rules* as it relates to formal offers to settle.

[12] Specifically, Rule 9-1 of the *Rules* governs offers to settle and, where a formal offer to settle complying with the requirements of the rule has been made, gives the trial judge discretion to make costs orders of the sorts set out in subrule 9-1(5).

[13] As I stated in *Gatti v. Savin*, 2022 BCSC 1306 commencing at para. 9:

> [9] *Supreme Court Civil Rule* 9-1(5)(b) sets out that in a proceeding in which an offer to settle has been made, the court may do one or more of the following: “award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle”.
>
> [10] *Supreme Court Civil Rules*, R. 9-1(6), sets out the considerations that the court may consider:

- 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 on any later date;
- The relationship between the terms of settlement as offered and the final judgment of the court;
- The relative financial circumstances of the parties; and
- Any other factors the court considers appropriate.

[11] In the 2011 decision of *Aujila v. Kaila*, 2011 BCSC 466, Mr. Justice Harris, as he then was, at paragraph 7, sets out the rationale for the double costs rule by quoting from the Court of Appeal decision in *Hartshorne v. Hartshorne*, 2011 BCCA 29:

> ***ii) The double costs rule and its guiding principles***
>
> [25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should reasonably have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" [citations omitted]. In this regard, Mr. Justice Frankel's comments in *Giles*, [2010 BCCA 282] are apposite:
>
> > [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
> >
> > > "[D]eterring frivolous actions or defences": [citations omitted];
> > >
> > > "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": [citations omitted];
> > >
> > > "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: [citations omitted]
> > >
> > > [T]o have a winnowing function in the litigation process by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourage[ing] the continuance of doubtful cases or defences": [citations omitted].
>
> [26] Rule 37B(6) of the *Rules of Court* (which is now R. 9-1(6) of the *Supreme Court Civil Rules* and remains the same as its predecessor) lists the following factors to be

considered in making an award for double costs under R. 37B(5)(b):

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 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.

[27] The first factor - whether the offer to settle was one that ought reasonably to have been accepted - is not determined by reference to the award that was ultimately made. Rather, in considering that factor, the court must determine whether, at the time that the offer was open for acceptance, it would have been reasonable for it to have been accepted: [citations omitted]. As was said in *A.E. v. D.W.J.*, "The reasonableness of the plaintiff's decision not to accept the offer to settle must be assessed without reference to the court's decision" (para. 55). Instead, the reasonableness is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.

Application of the Law Regarding Formal Offers to Settle

[14] Applying the foregoing law to the circumstances of this case and having regard to the decision by Pan to not file written submissions regarding the Formal Offer, there are no other factors which have been specifically identified for the Court to consider in assessing costs beyond those detailed herein.

[15] Of the possible cost orders set out in subrule 9-1(5), the one that applies most obviously would appear to apply in this situation, namely where a claim has been dismissed in its entirety, is subparagraph (b), which is to "award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle".

[16] Turning to the law, I refer to the decision in *Nassim v.Healey*, 2022 BCSC 728, wherein the Court concluded that a formal offer to settle should have been accepted and awarded double costs after a second formal offer was made. In coming to this conclusion, the Court found that the fact the second offer was made after all examinations and documentary discovery had been concluded, such that the party receiving the offer had "the opportunity to consider the evidence, the authorities and [the parties] legal positions", supported the Court's conclusion that the offer was one that ought reasonably to have been accepted. Paragraphs 33 and 34 are the crux of the analysis:

> [33] Turning to my assessment of the offers themselves, I find that they were of sufficient magnitude such that they were not simply "nuisance offers". However, given the timing of the First Offer, I conclude that it was reasonable for Laila and Hanay to refuse it in January 2021. In light of that offer's temporal proximity to the decision of Sharma J. to the effect that a trial may be necessary to resolve the issue of the will's validity notwithstanding the lawyers' affidavits, it was understandable that Laila and Hanay still wished to pursue the litigation at that point.
>
> [34] On the other hand, by the time the Second Offer was presented six months later in July 2021, the situation was different. The parties had by then had a further opportunity to consider the evidence, the authorities, and their legal positions. Most significantly, counsel for Laila and Hanay had completed cross-examinations of the estate lawyers, and their strong evidence had not been undermined in any material way. In my view, it was then no longer reasonable for Laila and Hanay to refuse to settle and thereby force the parties to continue to incur further litigation costs, even if the doctors' evidence had not yet been finalized.

[17] In this regard, Cai submits that Pan had no less ample of an opportunity, as compared to the plaintiffs in *Nassim*, "to consider the evidence, the authorities and [the parties'] legal positions" in assessing the risk of taking his action to trial and deciding whether or not to accept the final and Formal Offer.

[18] In *Tham v. Bronco Industries Inc.*, 2018 BCSC 240, the Court rejected the argument, made by a defendant who rejected a formal offer, that he should not be punished for failing to forecast the outcome that later ensued when the result, in light of the defences raised, could not be predicted with any certainty. Specifically, I refer to paras. 14 and 16–17:

> [14] The defendant submits, however, that given its several defences it should not be punished for its failure to correctly forecast the outcome. It says that in the circumstances of this case refusing the offer was not unreasonable. …
>
> [16] If one were to accept the defendant's submission, it is difficult to see how the double cost rule would ever be applied. It is not uncommon that neither side will know with certainty the outcome of the case in advance. Indeed, in this case notwithstanding the defendant's confidence in its position, it was prepared to offer $150,000 to settle the case. One can well imagine that if I had held for the defendant it would now be seeking double costs based on its offer, and the plaintiffs would be resisting the application using the same arguments the defendant is now putting forth.
>
> [17] It is to be remembered that while an award of double costs is said to be punitive, double costs are also intended to reward the party who puts forward a reasonable offer of settlement. The fact that it may have been reasonable from the defendant's perspective to go to trial is not determinative. The Court must also consider this matter from the perspective of the plaintiffs. They are not required to compromise their claim beyond their own objective assessment of the case in order to obtain the benefit of an offer to settle: *Domtar Inc. v. Univar Canada Ltd.*, 2012 BCSC 510 at para. 45.

[19] Ultimately, I accept that the claims for recovery of damages made by Pan against Cai in this case were "all-or- nothing" in nature. The possible outcomes in the case heading into the trial were either that Cai would be found "liable" or "not liable", without the possibility of an outcome falling somewhere "in between" those two results. Previous cases of this sort involving "all-or-nothing" potential outcomes have resulted in awards of double costs where a reasonable offer to settle was not accepted.

[20] In *Henderson v. Myler*, 2022 BCSC 1530, for example, a testator prepared a will leaving the residue of her estate to the SPCA which, at the time of her death, was valued at approximately $1.4 million dollars. The four plaintiffs, who were nieces and nephews of the deceased and who would benefit if there was an intestacy, alleged that the testator did not intend to gift the residue of her estate to the SPCA, but rather intended to only leave a specific bequest of $100,000 as evidenced by a handwritten note made by the testator. The Court dismissed the action holding that the handwritten note was not a proper testamentary document and upheld the gift of the residue of the estate to the SPCA.

[21] The SPCA made two offers to settle, the second of which provided $460,000 out of the residue to be divided equally between the four plaintiffs. This offer was made after the first week of trial and after the plaintiffs had called all of their evidence and two SPCA witnesses as adverse witnesses. The Court held that the offer ought to have been accepted and ordered double costs of the action, having regard to the fact that acceptance would have avoided further trial time, the "all-or-nothing" nature of the claim, and the fact that the amount offered did not constitute a "nuisance" offer. Specifically, at para. 78 the Court held that:

> [78] With respect to the terms of the January offer and the final judgment, as I have said, this was an all-or-nothing case. There was no prospect of partial success on the case as framed. Had the plaintiffs accepted the January offer, they would have been substantially better off than the result of the trial.

[22] In *Tang v. Chan*, 2015 BCSC 752, the Court also considered the situation of an "all-or-nothing" claim in which the case would either wholly succeed or wholly fail. In that case, the plaintiffs sought judgment in the amount of $490,000 alleging that the funds advanced were a loan, not an investment. The defendants alleged, and the Court found, that the funds advanced were indeed an investment and dismissed the action.

[23] In its decision as to costs, the Court held that the plaintiffs' failure to accept a $5,000 offer and a waiver of costs (which the Court valued at $45,000 taking into account the quantum of costs to the end of trial) warranted an order for double costs on the basis that a relatively small offer to settle does not permit the offeree to dismiss it out of hand or even discount it automatically. Rather, the receipt of a formal offer is a triggering event calling for a cold, hard look at the case (see para. 7).

[24] In terms of timing, offers made on the eve of trial should not necessarily be discounted simply because a short time for acceptance was provided. Although that is a valid consideration: see *Stevens v. Creusot*, 2020 BCSC 1263 at paras. 46-47 and *Bevacqua v. Yaworski*, 2013 BCSC 29.

[25] Further, in *Rising Star Learning (Kingsway) Ltd. v. Kandola*, 2018 BCSC 2180 the Court held that offers made on the eve of trial in commercial cases are not unusual. At para. 8 the Court noted that:

> [8] I recognize that the second offer was made at the eve of trial. Offers made on the steps of the courthouse are not unusual. The plaintiff's offer was readily understandable without need for further analysis. The defendants ought reasonably to have accepted it.

Conclusion

[26] The Formal Offer, while made close to the trial date and with a limited period of time for acceptance, was more favourable to Pan than the offer previously made. I choose to not outline the terms of that prior offer as it is not specifically relied upon and I consider it would be inappropriate in the circumstances to do so other than the fact that the existence of this offer supports my conclusion that the Formal Offer was not a mere nuisance offer. It was made in good faith and could have saved the parties time and the usual psychological stress involved in having proceed with a complex trial.

[27] Balanced against that is my findings, as set out in the Reasons, that Pan did nothing untoward in this unsuccessful currency exchange. He would have received a commission on the underlying real estate transaction, but as a licensed agent he was entitled to receive same. That is how he earns his livelihood. The greatest fault, I conclude, that can be attributed to Pan is that he was too trusting and, moreover, did not have the most effective litigation strategy in pursuing the default judgment against Dong. The latter point is articulated in the Reasons.

[28] I further cannot overlook that while Pan is a sympathetic plaintiff who was not pursuing a meritless or vexatious claim, with the crystallization of the evidence by way of documentary discovery, oral discovery, and will-say statements from all of the non-party witnesses being exchanged in advance of the Formal Offer, Pan had the requisite understanding of the evidence that would be presented and the arguments that would be made by Cai at the trial. Thus, I conclude Pan had sufficient

opportunity to assess the risk of bringing his case to trial and having the case be dismissed.

[29] Pan also previously had counsel and, as I noted in the Reasons, Pan capably represented himself at trial. This confirmed to me that he is an intelligent individual who had a more sophisticated appreciation of the legal process than do some self-represented parties. This is far from determinative but is, in my view, is "another factor" the court can consider in determining the issue of costs.

[30] I further accept the submission that the possible outcome of taking the case to trial, based on the causes of action pleaded, was "all-or-nothing" insofar as it pertains to the remaining parties, Pan and Cai. This was not a case in which a "range" of possible damages might be awarded. Pan claimed the full amount of his loss in the amount of $431,000 against Cai.

[31] Lastly, having regard to the particular nature of the proceeding, there is quite limited evidence before the Court as to the parties' respective financial circumstances other than that they were involved in currency exchange transactions regarding significant sums of which I find renders this a neutral factor in the analysis.

Summary of Orders

[32] Having regard to the foregoing, I order that:

a) Pan shall pay Cai's costs and disbursements, as assessed pursuant to Scale B of the *Supreme Court Civil Rules* until January 7, 2024; and

b) Pan shall pay Cai's costs and disbursements as double costs at Scale B pursuant to R. 9-1 of the *Supreme Court Civil Rules* from January 8, 2024 onward.

[33] The signature of Pan is dispensed with on this order, having regard to the failure to provide written submissions on the issue of costs.

"Hardwick J."