IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kulla v. Chiu,*
2024 BCSC 932

Date: 20240530
Docket: M170667
Registry: New Westminster

Between:

Eduard Kulla

Plaintiff

And

Ming Chiu and Ming's Recycling Company Ltd.,

Defendants

Before: The Honourable Justice Funt

Ruling on Costs

The Plaintiff, appearing in person:	E. Kulla
Counsel for the Defendants:	J.P. Adrian
Place and Dates of Hearing:	New Westminster, B.C. May 13 and May 28, 2024
Place and Date of Judgment:	New Westminster, B.C. May 30, 2024

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1. INTRODUCTION

[1] These costs reasons should be read with the trial reasons indexed as *Kulla v. Chiu*, 2024 BCSC 687 (the "Trial Reasons").

[2] On July 21, 2023, the defendants offered to settle the plaintiff's claim, and a related claim in the *Kulla v. Drita et al*. action (New Westminster Registry Action M1982280) (the "*Kulla v. Drita et al*. action"), for $175,000. For both actions, the plaintiff would also be entitled to his costs and disbursements at Scale B prior to and including July 21, 2023. The defendants would be entitled to their costs and disbursements at Scale B from July 21, 2023.

[3] At trial, the plaintiff was awarded $60,000 in non-pecuniary damages. All other claims were dismissed.

[4] For the reasons that follow, the defendants are awarded their costs and disbursements at Scale B from August 31, 2023, and the plaintiff is awarded his costs and disbursements at Scale B prior to September 1, 2023. No costs are awarded to any of the parties with respect to the May 13 and 28, 2024 costs hearings.

2. THE RELEVANT RULES

[5] The relevant *Supreme Court Civil Rules* applicable to the case at bar are Rules 9-1(5)(d) and 9-1(6)(a) to (d), which read:

> Cost options
>
> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
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> […]
>
> (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.
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> Considerations of court
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> (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.

3. DOUBLE COSTS ARE NOT AVAILABLE

[6] In *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, leave to appeal ref'd [2015] S.C.C.A. No. 136, Justice Goepel, writing for our Court of Appeal, stated:

> [91] I am of the same opinion. I do not believe that R. 37B intended to change the long-standing practice concerning the circumstances when double costs could be awarded. A plaintiff who obtains a judgment for less than an offer to settle is already subject to sanctions: R. 9-1(6)(a) allows the court to deprive the successful plaintiff of costs to which it would otherwise be entitled. Rule 9-1(5)(d) provides an even more punishing outcome as the plaintiff is not only deprived of costs he or she would otherwise receive, but must also pay the defendant's costs subsequent to the offer to settle. To also allow a defendant double costs would skew the procedure in favour of defendants and unfairly penalize and pressure plaintiffs. I would adopt in that regard the comments of Madam Justice Adair in *Currie* [*v. McKinnon*, 2012 BCSC 1165]:
>
> > [18] I think it certainly can be argued that if a defendant who has made an offer to settle in an amount higher than the amount awarded to the plaintiff at trial (and that is what has been done in this case) was then awarded double costs, this would skew the procedure in favour of defendants and unfairly penalize and pressure plaintiffs. This is because a plaintiff who rejected an offer to settle would potentially risk a triple cost penalty if he or she were to win at trial an amount less than the offer. The plaintiff would suffer loss of the costs that he or she would normally receive on obtaining judgment at trial, and face double costs payable to the defendant.
> >
> > [19] In my view, there is a good reason to apply Rule 9-1 in a way that is even-handed, or more even-handed, as between plaintiffs and defendants. I would say for this reason one would expect to see double costs awarded to a defendant, using the offer to settle procedure, in exceptional circumstances only, such as a situation where the plaintiff's claim was dismissed all together after a plaintiff rejected an offer to settle.
>
> [92] In the result, I find that it was not open for the trial judge to award double costs to the defendant. It was an error in principle to do so. The decision in *Minhas* [*v. Sartor*, 2014 BCSC 47] which made a similar order was also wrongly decided and should not be followed.

[7] *C.P*. is binding authority. The rule is that double costs are not available to a defendant where the plaintiff has obtained judgment.

[8] In the case at bar, the defendants are not entitled to double costs given that the plaintiff has achieved an award, albeit for less than that offered in the July 21, 2023 offer to settle.

4. COSTS FOR THE DEFENDANTS

a) Jurisprudence

[9] In *C.P*., Justice Goepel also stated:

> [95] A plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs. To do otherwise would undermine the importance of certainty and consequences in applying the Rule: *Wafler v. Trinh*, 2014 BCCA 95 at para. 81. The importance of those principles was emphasized by this Court in *A.E. Appeal* [*A.E. (Litigation Guardian of) v. D.W.J.,* 2011 BCCA 279] at para. 41:
>
> > [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

[10] In *Hartshorne v. Hartshorne*, 2011 BCCA 29, our Court of Appeal stated:

> [25] […] 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" (*A.E. v. D.W.J.,* 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks,* 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry,* 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* [*v. Westminster Savings and Credit Union*, 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": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
> - [T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
> - [E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
> - [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 "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.

[11] In *Norris v. Burgess*, 2016 BCSC 1451, I wrote:

> [41] I emphasize that R. 9-6(1)(a) uses the word, ought. "Ought" is defined in The Oxford English Dictionary, 2d ed. as follows:
>
> > b. In present sense: = Am (is, are) bound or under obligation: *you ought to do it* = it is your duty to do it; *it ought to be done* = it is right that it should be done, it is a duty (or some one's duty) to do it. (The most frequent use throughout. Formerly expressed by the pres. t., OWE v. 5.)
>
> [42] The use of the word "ought" in R. 9-6(1)(a) evinces a legislative intent that the court may consider whether the offer was one that the offeree should have accepted. Where the offeror is the plaintiff, this wording encourages an offer that falls at the low end of the range of potential trial awards the plaintiff is anticipating. Where the offeror is the defendant, it encourages an offer that falls at the high end of the range of potential trial awards the defendant is anticipating. In short, the word "ought" brings the respective positions of the parties closer, with the object of reaching an agreement and conserving judicial and other resources.

b) Application to the Case at Bar

[12] I find that the plaintiff "ought" to have accepted the defendants' $175,000 offer to settle by no later than August 31, 2023.

[13] As noted, the offer also encompassed the plaintiff's claim in the *Kulla v. Drita et al*. action. The within action and the *Kulla v. Drita et al*. action were to be heard together.

[14] On August 9, 2023, the plaintiff unilaterally filed a notice of discontinuance for the *Kulla v. Drita et al*. action. On September 19, 2023, Master Nielsen ordered that the defendants "are entitled to have their costs assessed in any event of the cause".

[15] With the plaintiff's discontinuance of his claim in the *Kulla v. Drita et al*. action, the defendants' July 21, 2023 $175,000 offer to settle plus costs and disbursements became even more favourable. If accepted, all or virtually all of the defendants' costs and disbursements in the *Kulla v. Drita et al*. action would have been covered by the offer, and the plaintiff would have recovered his costs and disbursements in the *Kulla v. Drita et al*. action up to the date of the offer.

[16] By August 31, 2023, the plaintiff had received all of the expert reports the defendants intended to rely on at trial, along with all the relevant surveillance video, and had sufficient time to consider all of the foregoing.

[17] I agree with the defendants' submission that there were no surprises at trial with respect to the defendants' witnesses or materials.

[18] Having particular regard to the surveillance video, the plaintiff ought to have accepted the defendants' $175,000 offer to settle.

[19] At trial, I found that the plaintiff attempted to deceive the Court "by deliberate falsehood or gross exaggeration": Trial Reasons at para. 109. The plaintiff knew that he would not be coming to trial in good faith and was taking the risk that the Court would recognize his deception and award him nothing or an amount that would fall far short of the July 21, 2023 $175,000 offer.

[20] Finally, with respect to Rule 9-1(6)(c), in *Wormald v. Chiarot*, 2015 BCSC 1671, I wrote:

> [28] I have considered that ICBC, unlike the insurer in *C.P.*, is a public insurer serving as an agent of our provincial government*: Insurance Corporation Act*, R.S.B.C. 1996, c. 228, s. 13. The Court does not view the fact that the defendants are insured by ICBC as a relevant consideration. To consider such a factor *simpliciter*, the Court would be making a policy decision that should be left to the Legislature or ICBC as an agent of the provincial government. In the case at bar, ICBC did not use its financial strength in an untoward manner. As a result, this is not an appropriate situation for a consideration of the plaintiff's financial circumstances to those of the defendants' insurer, ICBC.

[21] In the case at bar, there is no evidence that the Insurance Corporation of British Columbia ("ICBC") used its financial strength improperly. Accordingly, ICBC's engagement is not a relevant aspect in considering the relative financial circumstances of the parties.

c) Timing

[22] I realize that the offer to settle was delivered on July 21, 2023 and that some time for reflection is often required. On August 16, 2023, the plaintiff was served with the surveillance video.

[23] I find that the plaintiff had the opportunity to reflect fully on the merits of his case and the approach he planned to take before September 1, 2023. This is especially so, given that the plaintiff knew that the defendants could play the surveillance video at trial.

[24] I find that the approximate five weeks' time from July 21, 2023 to the end of August 2023 was sufficient for the plaintiff to have changed his approach for trial. He had tried during this time to unilaterally file his notice of discontinuance in the *Kulla v. Drita et al*. action.

[25] In sum, the plaintiff ought to have accepted the defendants' $175,000 offer to settle before September 1, 2023. Master Nielsen's September 19, 2023 order made the defendants' $175,000 offer even more compelling.

5. CONCLUSION

[26] The Court awards the defendants their costs and disbursements at Scale B from August 31, 2023 and the plaintiff his costs and disbursements at Scale B prior to September 1, 2023.

[27] No costs are awarded to any of the parties with respect to the 55-minute May 13 and 28, 2024 costs hearings.

"Funt J."