IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20150204
Docket: M136081
Registry: New Westminster

Between:

Robert Paul Benson

Plaintiff

And

Kim Trina Marie Day and Dana Andrew Paynter

Defendants

Before: The Honourable Mr. Justice Skolrood

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	P.G. Kent-Snowsell
Counsel for the Defendants:	P. Bruce
Place and Date of Hearing:	Vancouver, B.C. January 28, 2015
Place and Date of Judgment:	Vancouver, B.C. February 4, 2015

[1] **THE COURT:** On November 27, 2014, I gave reasons for judgment in this matter in which I awarded the plaintiff, Mr. Benson, damages totalling $201,763.

[2] This amount reflected a 15 per cent reduction in the non-pecuniary, past wage loss and loss of future earning capacity damages that would otherwise have been awarded, due to a failure on the part of Mr. Benson to properly mitigate.

[3] My decision followed an eight-day trial that ran from October 20 to 24 and 27 to 29, 2014.

[4] At the conclusion of my reasons, I stated that Mr. Benson was entitled to his costs at Scale B unless there were circumstances that I was unaware of.

[5] The parties are now back before me to address the issue of costs. Specifically, the plaintiff seeks an order for double costs of one week of trial preparation in the week before the trial commenced by reason of an offer to settle presented to the defendants.

[6] There were, in fact, three offers to settle exchanged by the parties prior to trial as follows:

a) At approximately 1:53 p.m. on Friday, October 10, 2014 the plaintiff faxed an offer to settle to the defendants in the amount of $150,000 plus costs (the "first offer");

b) At 2:52 p.m. on the same day, Friday, October 10, the defendants emailed an offer to settle to the plaintiff in the amount of $112,000 plus costs;

c) At 4:54 p.m. on Thursday, October 16, 2014, the plaintiff sent a new offer to settle by email and fax to the defendants revoking his previous offer and substituting a new offer to settle in the amount of $250,000 plus costs (the "second offer").

[7] The plaintiff says that given his second offer was not delivered until after 4:00 p.m. on October 16 it must be taken to have been received by the defendants on

October 17. The defendants say that while this is the normal rule for determining the timing of service of documents, for the purposes of considering an offer to settle, for example, to determine whether the offeree had reasonable time to consider it, the actual time of receipt governs.

[8] In my view, nothing turns on this point, in that whether the plaintiff's second offer was delivered at the end of the day on Thursday, October 16 or at the beginning of the day on Friday, October 17, it is clear that the first offer was withdrawn prior to the start of business on October 17.

[9] The other point worth noting about timing is that October 10, the day on which the parties first exchanged offers, was the Friday before the Thanksgiving long weekend. Thus, the following week, during which the plaintiff seeks double costs for trial preparation, had only four business days.

Governing Principles

[10] Offers to settle are governed by Rule 9-1. Rule 9-1(5) sets out the options available to the court where an offer to settle has been made:

> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled 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;
>
> (b) 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;
>
> (c) award to a party, 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, costs to which the party would have been entitled had the offer not been made;
>
> (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.

[11] Rule 9-1(6) identifies a number of factors that the court may consider when making a costs award in the face of an offer to settle:

(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.

[12] These factors have been considered in numerous cases, for example, *Brewster v. Li,* 2014 BCSC 463, where Voith J. provides a very helpful and thorough analysis.

[13] These factors must also be considered in light of the fact that an award of double costs is a punitive measure to be awarded in circumstances in which a litigant fails to accept an offer to settle which should have been accepted, keeping in mind the objective of the costs rules to encourage early settlement of disputes. See *Hartshorne v. Hartshorne,* 2011 BCCA 29, at paras. 25 to 27.

The Parties' Positions

[14] The plaintiff submits that the first offer was one that the defendants ought reasonably to have accepted. He notes that the ultimate damages award exceeded that offer by about $51,000. He submits that when the parties exchanged offers to settle on October 10, 2014, both were clearly in a position to assess the strength and weaknesses of each other's cases and to consider the reasonableness of the two offers.

[15] The plaintiff submits further that much of the main trial preparation work was done in the week following service of the first offer, which was the week before the trial commenced. He submits that a reasonable costs award is double costs for that preparation.

[16] The defendants submit that because the first offer was made on Friday, October 10 before the Thanksgiving long weekend, there was no real opportunity to assess the offer or to get instructions until the following Tuesday.

[17] They say further that there were significant reliability issues with respect to the evidence going to the plaintiff's wage loss claim and claim for loss of future earning capacity and as such this was not a case in which the defendants could easily assess the likely range of damages.

Analysis

[18] The plaintiff's application is somewhat unique in that I am being asked to consider an offer to settle that was subsequently replaced by an offer in a greater amount. Neither party addressed directly the effect of the withdrawal of the plaintiff's first offer.

[19] In *Bains v. Indo-Canadian Times Inc.* (1995), 38 C.P.C. (3d) 53, the Court of Appeal heard an appeal from a decision in which the trial judge had awarded double costs based on an offer to settle that had been subsequently replaced by an offer in a lower amount. The Court of Appeal varied the award of double costs. Donald J.A., speaking for the court, said at para. 39:

> On reflection, I have reached the opinion that that approach cannot be sustained. Neither the fundamental rules of contract formation nor the language of *Rule 37* support it. There can only be one valid offer at a time. As I read sub-rule 23, an offer is either extant, expired, withdrawn, or accepted. In this scheme of costs, one offer cannot logically or practically co-exist with another offer; otherwise, the defendant will not know to which offer he or she should respond. The award of double costs to cover the period beginning 11 June 1993 is tantamount to a holding that the offer made on that date remained operative even though it was replaced by a lower offer on 29 December 1993.

[20] He went on to say at para. 40:

> There is much to be said for the notion that previous offers to settle for amounts equal to, or less than, the judgment should be taken into account on the question of double costs; however, I think that would require an amendment to the *Rules*.

[21] *Bains* was decided under former Rule 37, and as alluded to by Donald J.A., that rule only contemplated an award of double costs based on an offer to settle that had not expired or been accepted or withdrawn.

[22] *Bains* was, however, applied in the context of an application for double costs under Rule 9-1 in *Dhillon v. Jaffer,* 2014 BCSC 83, where Melnick J. held that he could only consider the last offer to settle in a series of offers and that all earlier offers had either expired or been superseded by the last offer.

[23] On a slightly different issue, in *Bartel v. Milliken,* 2012 BCSC 971, Gerow J. granted an order of double costs of a trial under Rule 9-1 based on an offer to settle made by the plaintiff that was for less than what she was ultimately awarded. The defendant opposed the order for double costs on the basis that the plaintiff had withdrawn her offer to settle after the trial completed but before judgment was rendered. Gerow J. held that the withdrawal of the offer to settle was not a factor that weighed against an award of double costs.

[24] While Gerow J. did not address the point specifically, it was open to her to consider an offer to settle that had been withdrawn because the language of Rule 9-1 differs from former Rule 37, in that the possible costs consequences are not limited solely to offers to settle that have not expired or been accepted or withdrawn.

[25] The present case, of course, differs from *Bartel,* in that the plaintiff is not seeking an award of double costs for the trial based on an offer to settle that was withdrawn. It also differs from *Dhillon,* where again Melnick J. held that a party could not rely on an offer to settle in support of an application for double costs of trial where the offer was replaced by a different offer prior to trial.

[26] Here, what the plaintiff claims, is double costs for trial preparation time that occurred between the time of the first offer and the second offer. I have not been provided with any cases in which this somewhat unique claim has been considered.

[27] It is well established that the court has a wide discretion when considering an appropriate costs award (see for example, *Brewster v. Li*, at para. 14). Where the parties or a party have made an offer to settle pursuant to Rule 9-1 the exercise of that discretion is informed by the factors set out in Rule 9-1(6).

[28] The first of these factors is, again, whether the offer in issue was one that ought reasonably to have been accepted. On this issue, it is apparent that both parties were sufficiently knowledgeable about the strengths and weaknesses of their own case and those of the opposing party to enable them to exchange offers to settle on October 10.

[29] While I agree with the defendants that there were a number of issues arising out of the evidence concerning the plaintiff's claim for past wage loss and loss of future earning capacity, even with those questions, it should have been apparent that the offer of $150,000 was well within the range of outcomes that could reasonably have been expected.

[30] Thus, I find that the plaintiff's first offer was one that ought reasonably to have been accepted. However, I also find that the defendants were entitled to a reasonable time to consider the offer. While, as I have indicated, the parties were both in a position to assess their cases on October 10, it is only fair that the defendants have an opportunity to compare the competing offers and determine whether they were prepared to increase what they were willing to pay from their offer of $112,000 to the plaintiff's offer of $150,000.

[31] Given that the offers were exchanged in the afternoon of the Friday before a Thanksgiving long weekend, I think that the defendants should have been in a position to accept the first offer by the end of the day on the first business day after the long weekend, being Tuesday, October 14.

[32] The second factor under Rule 9-1(6), the relationship between the amount offered and the damages awarded, is not to be given undue weight (see *Gonzales v. Voskakis*, 2013 BCSC 675 at para. 36). Nonetheless, this factor supports the position of the plaintiff.

[33] In terms of the third factor, the parties' relative financial circumstances, the plaintiff cites *Smith v. Tedford,* 2010 BCCA 302, where the Court of Appeal acknowledged that the role of ICBC in assuming the defence of a claim is a factor

that may be considered. I place minimal weight on this factor here given that the first two factors favour the plaintiff.

[34] The parties did not point to any other factors that should be considered in the exercise of my discretion.

[35] In sum, therefore, I am satisfied that the plaintiff is entitled to an award of costs that recognizes that his first offer was one that ought reasonably to have been accepted. The question then becomes what is the proper award?

[36] As noted, the plaintiff seeks double costs for trial preparation in the week before the trial commenced. However, the date on which possible cost consequences are triggered by the failure to accept an offer to settle is the date when that offer should have been accepted, which in this case I have found to be the end of the day on Tuesday, October 14. It is only the steps taken in the proceeding after that date that may attract an order of double costs.

[37] The challenge in awarding double costs for trial preparation time, which again is what the plaintiff seeks, is that it is difficult to determine what preparation was done before and what was done after the triggering date. Unlike trial costs under the tariff found in Appendix B to the Rules, which are assessed according to the number of days in trial, which days can be readily identified, trial preparation costs are simply assessed on the basis of five units for each day of trial regardless of when the preparation was actually done.

[38] In this case, in the normal course, the plaintiff would be entitled to 40 units for trial preparation based on an eight-day trial, pursuant to item 34 of the tariff. An award of double costs for trial preparation would therefore be 80 units. However, it is unrealistic and, indeed, would be unfair to the defendants to assume that all of the plaintiff's trial preparation took place in the few days between October 14, when the first offer should have been accepted, and October 20 when the trial commenced. That said, I do accept the plaintiff's submission that the final week before trial is when much of the heavy lifting is done to get ready for trial.

[39] In the circumstances, and exercising my discretion, I think a reasonable approach is to award the plaintiff 50 per cent of his double costs for trial preparation, in other words, an additional 20 units above his ordinary costs.

[40] The plaintiff submits that he should also receive double disbursements for that period. However, I would not accede to that request given the very short time period to which the award of double costs applies and the likelihood that, in any event, the vast majority of disbursements were incurred outside of that time period.

[41] While the plaintiff has had some success on this application, it was less than he was seeking, and I consider that success was largely divided. As such, the parties will bear their own costs of this application.

"Skolrood, J."