IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liivam v. MacKay Contracting Ltd.,*
2025 BCSC 1401

Date: 20250723
Docket: S229834
Registry: Vancouver

Between:

Kristopher Kenneth Liivam

Plaintiff

And

MacKay Contracting Ltd. and Sherritt International Corporation

Defendants

Before: The Honourable Justice Veenstra

Reasons for Judgment Re Costs

Counsel for the Plaintiff:	D.D. McWhinnie R. Sissons
Counsel for the Defendants:	J.T.E. Gelber
Written Submissions Received from the Plaintiff:	May 29, 2025
Written Submissions Received from the Defendant, Sherritt International Corporation:	May 30, 2025
Written Submissions Received from the Defendant, MacKay Contracting Ltd:	June 26, 2025
Place and Date of Judgment:	Vancouver, B.C. July 23, 2025

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Introduction

[1] By reasons for judgment issued March 31, 2025, and indexed at 2025 BCSC 582 (the "Trial Judgment"), I granted the plaintiff's claims against MacKay Contracting Ltd. but dismissed his claims against Sherritt International Corporation. I granted leave for the parties to make submissions as to costs if they were unable to resolve the matter. They have now done so. The plaintiff claims costs against MacKay, while Sherritt claims costs against the plaintiff. Both claims are disputed.

Positions of the Parties

The Plaintiff

[2] The plaintiff says that he was successful in his action against MacKay, and so is entitled at the very least to party and party costs.

[3] The plaintiff made an offer to settle the claim for an all-inclusive amount of $65,000. The offer was made a month before trial and remained open until the commencement of trial. It was addressed to both defendants. The plaintiff says that the judgment granted is valued at more than $111,000, not including costs.

[4] The plaintiff says that the offer to settle is one that ought reasonably to have been accepted, and thus in accordance with Rule 9-1 of the *Supreme Court Civil Rules*, he should be awarded double costs. He says that had MacKay accepted the offer, it would have been in a better position than it now finds itself. He says that MacKay should have realized during the time the offer was open to it that it had no witnesses with direct evidence of matters at issue to support the claims it intended to make, and instead unreasonably compelled the plaintiff to incur the time, cost and stress of going to trial. He notes as well that the plaintiff is an individual who, the evidence indicates, was unemployed for about five months after being terminated, while MacKay is a substantial business with between 100 and 300 employees at any given time.

[5] In the alternative, the plaintiff seeks special costs, arguing that MacKay persisted in making unsubstantiated allegations of misconduct throughout trial, even

though it knew it had no witnesses to provide admissible evidence of those allegations. The plaintiff submits that MacKay's persistence in those allegations was tactical and intended to dissuade the plaintiff, rather than being based on any consideration of a position the defendant could legitimately advance at trial.

[6] With respect to special costs, the plaintiff references the range of circumstances giving rise to orders for special costs as summarized in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at paras. 8-11.

[7] In the further alternative, the plaintiff seeks uplift costs against MacKay, arguing that ordinary tariff costs would be grossly inadequate or unjust. It references *Allen v. Ainsworth Lumber Co. Ltd.*, 2012 BCSC 213, in which an employer's litigation conduct that did not meet the level of reprehensible conduct resulted in unusual circumstances that would make an award on the ordinary scale grossly inadequate or unjust, and was awarded costs at 1.5 times the normal value. [See also *Wong v. Rashidi*, 2011 BCSC 66 at paras. 35-37.]

[8] With respect to Sherritt, the plaintiff acknowledges that he was not successful because Sherritt was not found to be a common employer; however, the plaintiff says that the court has discretion to decline to award costs in any event, citing *Tisalona v. Easton*, 2017 BCCA 272 at paras. 70-74. The plaintiff says, citing *St. George Transportation Ltd. v. Sawicky*, 2004 BCSC 1488, that that discretion is properly exercised in a case like this in which both defendants were represented by the same legal counsel and relied on largely duplicative preparation. The plaintiff argues that there were no legal costs to Sherritt that would not have already been incurred by counsel defending MacKay. The plaintiff notes that, although Sherritt had a separate list of documents, the 13 documents it included were all on MacKay's list of documents. The plaintiff notes as well that the two parties filed a joint trial brief, and there was only one examination for discovery of the plaintiff by the counsel who represented both defendants. Finally, the plaintiff says that Sherritt was, or ought to have been, aware that the lawyer representing it was intending to maintain unsubstantiated allegations throughout trial.

[9] Finally, the plaintiff points out that the defendants' presumably joint decision not to call witnesses that were listed in its trial brief – and in particular, Mr. Bleier whose documents indicated ongoing liaison with Sherritt in respect of decisions being made with respect to the plaintiff's employment – affected the plaintiff's ability to develop his case against Sherritt. Sherritt's involvement was averted to in communications discussed at paras. 45 and 50 of the Trial Judgment, but the absence of witnesses left the plaintiff unable to further develop that evidence.

[10] Alternatively, the plaintiff seeks a *Sanderson* or *Bullock* order that would lead to MacKay ultimately paying Sherritt's costs – either directly or indirectly. The plaintiff says, relying on *Equustek Solutions Inc. v. Jack*, 2024 BCCA 104 at paras. 193-194, that it was reasonable for the plaintiff to have joined the successful defendant, and that it would be just and fair for the unsuccessful defendant to have paid those costs. The plaintiff notes that:

a) Sherritt's policy, that was relied on by MacKay, was incorporated into the plaintiff's employment agreement;

b) MacKay relied on Sherritt to conduct the training;

c) MacKay's own emails to the plaintiff indicated that it was Sherritt conducting the investigation that led to his termination, even though the exact role of Sherritt's in the plaintiff's termination was ultimately unclear on the evidence actually tendered at trial.

Sherritt

[11] Sherritt says that it was entirely successful at trial as the claim against it was dismissed. It says that it should be awarded ordinary costs. Sherritt relies on *Grassi v. WIC Radio Ltd*., 2001 BCCA 376 at para. 24 and *Rossmo v. Vancouver Police Board*, 2003 BCCA 677 at para. 62 for the propositions that:

a) The person who seeks to displace the usual rule that the successful party is entitled to costs has the burden of persuading the judge that the rule should be displaced,

b) That discretion ought to be exercised on a principled basis; and

c) To the extent the discretion is exercised in respect of a party's conduct, it must be based on conduct within the litigation itself.

[12] Sherritt says that, notwithstanding the joint representation of the defendants by one lawyer, there were costs that were specific to its defence. Sherritt says that it filed a separate Response to Civil Claim. It says that the claim against it gave rise to "separate legal and factual issues". It submits that those issues required "separate case law" and that arguments in respect thereof "consumed a significant portion of the trial".

[13] Sherritt further says that if the plaintiff required the attendance of any particular witness at trial in order to make out his claim, it was the plaintiff's obligation to compel attendance of that witness.

[14] With respect to whether a *Sanderson* or *Bullock* order should be granted, Sherritt advances the same two-factor test as advanced in the plaintiff's authorities – that is (per *672047 B.C. Ltd. v. Johal*, 2024 BCSC 995 at para. 65):

(a) The threshold question is whether it is reasonable for the plaintiffs to have joined the successful defendant in the action; and

(b) if satisfied that the threshold question has been met, then the question becomes whether it would be just and fair in the circumstances for the unsuccessful defendant to pay the successful defendant's costs.

[15] Sherritt submits, based on *Johal* at para. 67, that the making of either a *Sanderson* or *Bullock* order requires some conduct on the part of the unsuccessful defendant to justify the award.

[16] Sherritt notes the conclusions at para. 144-145 of the Trial Judgment with respect to Sherritt's lack of day-to-day control of the plaintiff, and says that the plaintiff could have determined that issue in advance of trial.

MacKay

[17] MacKay acknowledges that it was unsuccessful at trial. However, it submits that much of the evidence and submissions at trial involved the nature of the relationship between MacKay and Sherritt. It says that the plaintiff was unsuccessful on that issue. It submits that in the circumstances it would be appropriate that MacKay be responsible for one half of the costs (payable to the plaintiff) and that the plaintiff be responsible for one half of the costs (payable to Sherritt).

[18] With respect to the claim for double costs, MacKay makes a number of submissions:

a) McKay says that it was unable to properly evaluate the plaintiff's claim due to the plaintiff's non-production of corporate financial records. MacKay relies for this argument on *TCF Ventures Corp. v. The Cambie Malone's Corporation*, 2016 BCSC 2133 at paras. 26-27, in which the fact that a plaintiff had not yet disclosed their financial records at the time the offer was open for acceptance was found to "materially inform" the issue of whether the offer ought reasonably to have been accepted.

b) MacKay also argues that, because the offer was made to both defendants jointly, it was not an offer that it can be said MacKay ought reasonably to have accepted. MacKay says that it was not in a position to compel Sherritt to accept the offer, and that in order for Sherritt to participate in accepting the offer, it would necessarily have had to renounce its separate claim for costs. MacKay relies on *Brook v. Tod Estate*, 2013 BCSC 330 at para. 27; *Aspen Enterprises Ltd. v. Quiding*, 2009 BCSC 50 at para. 17; and *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 1435 at para. 19. I note that this issue is also canvassed in some detail in *Johal* (cited by Sherritt on another issue) at paras. 34-43.

c) Thirdly, MacKay says that the wording of the offer, which says that the plaintiff "would consent to the dismissal of his claim with each party bearing its own costs throughout and would provide a release on standard terms" is uncertain, and thus not unreasonably declined. MacKay relies on comments in *Degen v. British Columbia*, 2019 BCSC 1216 at paras. 32-33. That was a case of a dismissal of an action against some, but not all, defendants, in which the action would have continued against the remaining defendants. Justice Harvey noted that in the absence of details as to the release that was to be granted, "the plaintiff had no opportunity to consider … possible impact on the action as a whole".

d) MacKay says that the question of liability in this case was not simple, and that it was reasonable for MacKay to think that it might succeed at trial. MacKay re-advances some of the arguments it made at trial, and says that these positions ground "an honest subjective belief in the strength of its position", such that it would be inappropriate to burden it with an order of double costs.

e) With respect to financial disparity, MacKay says that it would be inappropriate to rely on the fact that the plaintiff was unemployed for five months following termination when he has not provided disclosure of his company's financial statements.

[19] With respect to special costs, MacKay denies that any of its conduct was reprehensible. It repeats its arguments about its honest subjective belief in the strength of its position at trial, and its views as to the conduct and character of the plaintiff. It says that as a corporate defendant, it had no direct knowledge of what was happening in Cuba; rather, it made a personnel decision on the basis of the statements provided to it by personnel in Cuba.

[20] With respect to uplift costs, MacKay says:

a) The need for uplift costs is sometimes measured by the degree of disparity between costs on Scale B and actual legal fees incurred. It notes that there has been no bill of costs produced here, nor any evidence as to the plaintiff's actual legal costs. It says that the Court should be wary of ordering uplift costs without such evidence.

b) While misconduct may also be a basis for finding "unusual circumstances", the misconduct involved will typically reflect such things as disobedience of court processes, incivility, frivolity, actions taken in bad faith, or impertinence. MacKay relies on comments in *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 57 and *Gurney v. Gurney*, 2007 BCSC 1745.

c) Other factors cited in the case law as justifying uplift costs – such as the serious nature of the allegations, the complexity or difficulty of the issues, or the importance of the issues to the parties or the development of the law generally – are, in MacKay's submission, not of relevance to this case.

d) Its litigation conduct was civil, proportionate, and in conformity with court processes. MacKay says the only misconduct in this case was a failure of the plaintiff to produce corporate financial records.

Analysis

[21] Before I address the specific issues raised, I note that to the extent there are to be award(s) of tariff costs, I would see this as a matter of ordinary difficulty, and thus Scale B would apply. None of the parties suggested that either Scale A or Scale C would be applicable.

Sherritt's Claim for Costs

[22] I have re-read the "Submissions of the Defendants" provided to me by counsel for the two defendants at the end of trial. The document is entirely focused on two factual issues: the alleged misconduct of the plaintiff and the allegations of cause on the one hand, and issues of damages on the other hand. Of the

81 paragraphs in the written outline of submissions, zero deal with the common employer issue.

[23] At trial, as submissions came to an end, I asked counsel for the defendants if he intended to address the common employer issue. My handwritten note is that I was advised – in a summary fashion and without reference to authority – that the common employer doctrine applies only to related companies, and that in this case, the relationship between MacKay and Sherritt is defined by contract. In my view, there was no "separate case law" brought forward on behalf of Sherritt.

[24] Ultimately, in order to resolve the common employer issue, I reviewed and noted up the authority cited by the plaintiff (*Linza v. Metric Modular*, 2023 BCSC 1196). As noted at para. 143 of the Trial Judgment, I did not accept the characterization of the legal test cited summarily by counsel for the defendants. My decision to dismiss the claim, as stated at para. 144, flowed from my conclusions with respect to the lack of day-to-day control. That is not an argument advanced in the common closing submission of the defendants. Nor is it a question developed in the *viva voce* evidence at trial. Rather, it is a conclusion that arose primarily from inferences I drew from the written documents in evidence.

[25] For these reasons, I do not accept that questions of Sherritt's liability took any significant amount of trial time. I would assess that trial time as less than 10%.

[26] All of that said, it is my view that this is not a case in which it is appropriate to deny Sherritt its costs entirely. While I appreciate that the common employer doctrine is a developing area of law (as I noted at para. 143 of the Trial Judgment), I see there being merit to Sherritt's submission that if the plaintiff intended to provide a solid evidentiary basis for application of that doctrine in the present case, he should have ensured the existence of that base through the discovery process. He could then have relied on either read-in evidence from discovery or taken steps to compel attendance of an appropriate representative of Sherritt. Instead, the plaintiff took the case to trial without having ensured that he had that evidentiary foundation.

[27] I appreciate that there may well have been concerns about cost and efficiency given the nature of the case and the amount realistically in issue, but in my view, to the extent the plaintiff had concluded that those concerns militated against the extra steps required to fully advance the common employer claim, it should have made a decision in advance of trial whether to advance the claim or not.

[28] For these reasons, I would not exercise my discretion to make a *Sanderson* or a *Bullock* order.

[29] Rather, it is my view that the fairest order in this case is for the minimal level of involvement of Sherritt in advancing the litigation, and the very minimal portion of the trial that was spent on common employer issues, to be recognized in assessment of Sherritt's costs. Sherritt is not entitled to any costs for any effort it expended in joining with MacKay to advance MacKay's defence to the claims against it.

[30] In light of my comments above with respect to the content of the defendants' joint closing submission at trial, and of my comments above with respect to the time at trial dedicated to this issue, it is my view that Sherritt should be restricted to 10% of its tariff costs related to the trial itself – a proportion that is in my view generous to Sherritt. Its costs in respect of document production should be reflective of the fact that all 13 of the documents it listed were already listed by MacKay. To the extent it seeks to claim for examinations for discovery, any claim would have to account for the fact that an examination for discovery by counsel for MacKay was going to have to be undertaken in any event.

Costs Payable by MacKay

[31] It should be clear from the above analysis that I view nearly the entirety of the trial as having been focused on the plaintiff's claims against MacKay and MacKay's allegations of misconduct it said justified its summary termination of the plaintiff's employment. In my view, this is an appropriate case for the plaintiff to recover costs as a successful party.

[32] I begin by noting that I see no merit to the repeated complaints in MacKay's submission about the plaintiff's failure to disclose financial records. At no time did MacKay seek an order for production of those records. MacKay chose to go to trial without those records, and as is apparent from the Trial Judgment, they were not required for assessment of damages.

[33] I have reviewed the various authorities cited with respect to joint offers to settle where the offeror was successful against one but not the other party. There is a comprehensive review of the authorities in *Johal* at paras. 34-44 as well as in one of the cases cited there, *0956375 B.C. Ltd. v. Regional District of Okanagan-Similkameen*, 2021 BCSC 1849 at paras. 33-44. In light of the different interests of MacKay and Sherritt in the action, and in light of the fact that the plaintiff's offer required acceptance by both, I am unable to conclude that this is an offer that MacKay should have (or even could have) accepted.

[34] Although the two defendants jointly retained one lawyer, nothing in the evidence before me indicates that they were not acting independently. If this was a case in which there was an agreement that MacKay would have conduct of the defence of any claim against Sherritt, I might well have come to a different conclusion. But on the record before me, it is not appropriate to order double costs given the nature of the offer that was made.

[35] The question of whether special costs are justified in the circumstances of this case is not a simple one. The trial itself was efficiently run and, other than the questions of alleged misconduct by the plaintiff that were in issue, nothing about the trial can be said to be reprehensible.

[36] The allegations that were at the root of the plaintiff's dismissal related to significant misconduct. That said, when I review the Trial Judgment, it does seem to me that the claim for wrongful dismissal ultimately turned on the issues discussed at paras. 109-111 – those being MacKay's failures in terms of investigating the matters reported to it and providing a proper assessment of the plaintiff's suitability.

[37] In my view, MacKay's conduct in continuing to inquire into the underlying allegations at trial, while significant, does not rise to the level of reprehensible conduct. I would not award special costs.

[38] I turn finally to the question of uplift cost. They are provided for in s. 2(5) of Appendix B to the *Supreme Court Civil Rules*:

> If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

The applicability of this provision turns on whether there are "unusual circumstances" that make an award of costs under the tariff either "grossly inadequate" or "unjust".

[39] In my view, there is much in common between the circumstances of this case and those in *Ainsworth*, in which Justice Holmes (as she then was) concluded that unusual circumstances making ordinary costs unjust were established:

> [15] In all the circumstances, I do not find Ainsworth's conduct in the litigation itself to reach the level of reprehensible conduct that should attract an order of special costs. However, Ainsworth's conduct does, in my view, result in "unusual circumstances" which would make an ordinary Scale B award of costs "grossly inadequate or unjust" in the language of s. 2(5) of Appendix B of the Rules of Court. Mr. Allen has been put to the considerable expense of this litigation to enforce the without-cause termination provisions in the employment contract he and Ainsworth negotiated to address precisely the situation that followed not long afterwards. He was confronted with a vigorous defence which tried to stray beyond the proper boundaries of admissible evidence, and which included unsupported suggestions of deficient performance and dishonourable conduct on his own part.

[40] Similarly, in *Wong*, misconduct was alleged but not proven (see paras. 23-31). Justice Grauer (as he then was) concluded that the circumstances did not meet the test for special costs; however, at paras. 35-38, he concluded that the "whiff of fraud that arose … even though fraud was not pleaded, required more than the usual amount of effort", and this constituted "unusual circumstances that would

make it unjust to award costs at scale B without an uplift for at least some of the steps taken".

[41] In the present case, the plaintiff has been put to considerable expense, delay and stress of litigation – particularly in comparison to the amount in issue. He was confronted with a vigorous defence, jointly mounted by MacKay and Sherritt, which included allegations of dishonourable conduct that neither of the defendants was able to support with admissible evidence. Those allegations required a significant and unusual amount of effort to defend. An award of costs on the ordinary scale would be unjust. In my view, this is an appropriate case for an award of uplift costs.

Conclusion

[42] In my view:

a) The plaintiff is entitled to recover costs against MacKay on Scale B, but with each unit allowed for the proceeding to be assessed at 1.5 times the value that would otherwise apply; and

b) Sherritt is entitled to recover costs against the plaintiff on Scale B, but with such costs limited as noted above based on the relatively minor proportion of trial time and preparation involved in dealing with the common employer issue.

"Veenstra J."