IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lebourdais v. British Columbia (Public Guardian and Trustee),* 2025 BCSC 785

Date: 20250428
Docket: S55068
Registry: Kamloops

Between:

Corine Lebourdais

Plaintiff

And

The Public Guardian and Trustee, Administrator of the Estate of Carlo Rupert Eugene Asquini, otherwise known as Carlo Asquini, His Majesty the King in Right of the Province of British Columbia as represented by The Ministry of Transportation and Infrastructure

Defendants

Before: The Honourable Justice Hori

Reasons for Judgment on Costs

The Plaintiff, appearing in person:	C. Lebourdais
Counsel for the Defendant, The Public Guardian and Trustee:	S.A. Besanger
Place and Date of Hearing:	Kamloops, B.C. August 12-16, 2024
Written Submission Received from the Plaintiff:	February 7, 2025
Written Submissions Received from the Defendant, The Public Guardian and Trustee:	January 15, 2025 and February 25, 2025
Place and Date of Judgment:	Kamloops, B.C. April 28, 2025

Introduction

[1] On December 27, 2024, I dismissed the plaintiff's action on a summary trial application brought by the plaintiff. In dismissing the plaintiff's action, I granted the parties leave to make written submissions on costs if they could not agree.

[2] The parties filed their submissions on costs between January 15, 2025, and February 25, 2025. Unfortunately, the parties' submissions did not come to my attention until April 4, 2025.

[3] These are my reasons on the issue of costs.

[4] The plaintiff sought damages against the Public Guardian and Trustee ("PGT") arising from the flooding of her property. The flooding of the Plaintiff's property occurred during an unusually high flow event in which the watercourse flowing through the plaintiff's property, known as Cherry Creek, overflowed its banks and changed direction.

[5] The plaintiff claimed that the flooding of her property was the result of the PGT:

a) negligently installing and maintaining a culvert on its property; and

b) creating a nuisance when the PGT's culvert became dislodged in Cherry Creek.

Costs Follow the Event

[6] Rule 14-1(9) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], establishes the usual rule that the costs of a proceeding follow the event. In other words, unless the court orders otherwise, the successful party in a proceeding is entitled to its costs.

[7] In this proceeding, the PGT was successful in having the plaintiff's action dismissed. The plaintiff has presented no reason to deprive the PGT of its costs of the proceedings.

[8] Therefore, I award costs of this proceeding to the PGT, subject to the terms of any award of costs made in prior applications.

[9] Where costs are payable to a party, Rule 14-1(1) provides that those costs must be assessed as party and party costs in accordance with Appendix B of the *Rules*. Appendix B establishes three levels of costs. Those levels are:

(a) Scale A is for matters of little or less than ordinary difficulty;

(b) Scale B is for matters of ordinary difficulty;

(c) Scale C is for matters of more than ordinary difficulty.

[10] The PGT claims costs at Scale C and double costs based on various offers to settle it made pursuant to Rule 9-1.

Scale C Costs

[11] Costs at Scale C are for actions that are of more than ordinary difficulty. In fixing the appropriate scale of costs, s. 2(3) of Appendix B provides that the court may consider:

(a) whether a difficult issue of law, fact or construction is involved;

(b) whether an issue is of importance to a class or body of persons, or is of general interest;

(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[12] In *Slocan Forest Products Ltd.* v. *Trapper Enterprises Ltd.* 2010 BCSC 1494 [*Slocan Forest Products Ltd*.], the court considered the following factors in determining whether a matter was of more than ordinary difficulty:

(a) Length of trial;

(b) Complexity of issues;

(c) Number and complexity of pre-trial applications;

(d) Whether or not the action was hard-fought with little or nothing conceded along the way;

(e) The number and length of examinations for discovery;

(f) The number and complexity of expert reports;

> (g) The extent of the effort required in the collection of and proof of the facts.

[13] After considering the factors from *Slocan Forest Products Ltd.,* there is nothing about these proceedings that justifies an award of costs at the elevated level of Scale C.

[14] The parties scheduled trial dates for this action three times. However, the trials did not proceed on those dates for various reasons. Therefore, the length of the trial is not a significant indication of the difficulty of the matter. Part of the reason for the anticipated length of the trial was the involvement of three defendants who had differing interests and defences but the defences alleged by the PGT were the usual defences raised in cases of negligence and nuisance.

[15] The parties attended three separate summary trial applications but one of those was an application brought by a co-defendant, the Thompson Nicola Regional District, for a dismissal of the action as against it. I would expect that the PGT had little involvement in that application. The second summary trial was an application brought by the PGT for dismissal of the action which I dismissed. The third summary trial was the application of the plaintiff in which I dismissed her action.

[16] There may have been a number of pre-trial applications but I am not satisfied that those applications involved complex matters.

[17] The PGT submits that the matter was of more than ordinary difficulty because the action was hard-fought with little or no concession made by the plaintiff. It is difficult to rely on this factor because the PGT has not provided any details of what concessions it sought in the action and what difficult or complex steps it had to take to overcome the absence of those concessions.

[18] I have no evidence of the length or number of examinations for discovery conducted in this action. Therefore, I have not considered this factor.

[19] The parties each relied upon one expert in the field of hydrology. The PGT's expert prepared an initial report dated January 17, 2022. The plaintiff's expert

prepared a report dated August 28, 2023, and the PGT's expert submitted a rebuttal report dated October 12, 2023. The reports were not difficult to understand and the testimony of the experts further clarified their conclusions.

[20] In my view, this action required the PGT to meet a fairly straight forward case of negligence and nuisance. It did so by retaining one expert who eventually prevailed in the summary trial application. The facts on which the expert based his opinion were available by searching historical water flow records, making observations at the scene of the flooding and reviewing historical aerial photographs. Therefore, the task of collecting the evidence should not have been difficult.

[21] Based on the foregoing, I find that this action did not raise matters of more than ordinary difficulty. Therefore, an award of costs at Scale C is not justified. Accordingly, the PGT will have its costs of this proceeding at Scale B.

Double Costs

[22] The PGT claims double costs in accordance with Rule 9-1(5)(b) which provides that the court may award double costs to a party for all or some of the steps taken in a proceeding after the date on which that party delivers an offer to settle.

[23] The PGT made the following offers to settle:

a) October 4, 2018, an offer to pay $5,000 inclusive of costs;

b) October 9, 2019, an offer to pay $7,500 inclusive of costs;

c) May 5, 2020, a restatement of its offer to pay $7,500 inclusive of costs;

d) April 18, 2023, an offer to pay $150,000 plus costs;

e) January 19, 2024, an offer to pay $200,000 plus costs.

[24] The PGT seeks double costs from October 4, 2018, the date of its first offer to settle.

[25] The Court of Appeal in *Hartshorne* v. *Hartshorne*, 2011 BCCA 29 [*Hartshorne*], at para. 25, described an award of double costs as a punitive measure against a litigant for that party's failure, in all of the circumstances, to accept an offer to settle that should have been accepted. The Court went on to remind litigants 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".

[26] In considering whether to award double costs, the court may consider the following factors under Rule 9-1(6):

> (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.

[27] The first question is whether the plaintiff ought reasonably to have accepted any of the offers made by the PGT. In *Hartshorne*, the Court of Appeal considered the factors set out in Rule 11-1(6) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009 which is identical to Rule 9-1(6) of the *Rules*. The Court held that the first factor—whether the offer ought reasonably to have been accepted—is not determined by reference to the eventual award made by the court. After citing *A.E. v. D.W.J.,* 2009 BCSC 505, the Court held:

> [27] … "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.

[28] In my view, it would not have been reasonable for the plaintiff to have accepted offers from the PGT until after she was aware of the strengths and

weaknesses of her case. She would not have had the information necessary to assess any offers to settle until after the PGT delivered the reports of its expert to the plaintiff.

[29] Further, the offers made by the PGT did not provide any analysis in support of its position or to justify the settlement amount.

[30] October 12, 2023, is the date of the rebuttal report prepared by the PGT's expert. I am not aware of the date on which the PGT delivered that rebuttal report to the plaintiff. However, once she received the rebuttal report, the plaintiff would have been in a better position to assess the liability risks associated with proceeding to a trial. However, to assess whether the plaintiff ought to have accepted an offer also requires an assessment of the quantum of the potential damages.

[31] The plaintiff assessed her damages at over $2,000,000. I do not know if this is a realistic assessment because the issue of damages was not before me in the summary trial. However, if the damages suffered by the plaintiff were $2,000,000, then the $200,000 offer was only 10% of the claim. On this analysis, I cannot conclude that the plaintiff ought reasonably to have accepted the PGT's offer of $200,000 plus costs.

[32] The second consideration is the relationship between the terms of the settlement offer and the final judgment of the court. The difference between the PGT's January 19, 2024 offer to pay $200,000 plus costs and the dismissal of the plaintiff's action is a significant difference. There is no question that the plaintiff would have been much better off accepting the offer than proceeding with the summary trial application. However, I am not satisfied that this factor alone is sufficient to justify the imposition of double costs on the plaintiff.

[33] The third consideration is the relative financial circumstances of the parties. The PGT is the defendant in this action as the administrator of the estate of Carlo Asquini. Accordingly, the financial circumstance of the plaintiff must be measured against the value of the deceased's estate. The PGT has presented no evidence of

the value of the estate and the plaintiff has presented no evidence of her financial circumstances. As a result, it is not possible to compare the relative financial circumstances of the parties.

[34] The final consideration is whether, in all the circumstances of this case, the plaintiff should be penalized with double costs because she declined to accept the PGT's settlement offer.

[35] I have concluded that the circumstances of this case do not warrant an award of double costs against the plaintiff. The settlement offer of January 19, 2024, is the only offer that the plaintiff received after she had all of the reports from the experts. The plaintiff had an assessment of damages in excess of $2,000,000. If that is a realistic assessment, the January 19, 2024 offer amounted to only 10% of the potential damages. In these circumstances, I am not prepared to penalize the plaintiff with double costs for failing to accept the PGT's settlement offers.

Summary

[36] The plaintiff will pay costs of these proceedings to the PGT at Scale B after an assessment of those costs by the Registrar. The costs payable by the plaintiff will be subject to the terms of any award of costs made in prior applications.

[37] The PGT's application for costs at Scale C and for double costs are denied.

Costs of the Application for Costs

[38] The parties achieved divided success on this costs application in that the PGT did not succeed on the increased costs and the double costs aspects of the application.

[39] Therefore, there will be no costs for this application.

"D.K. Hori J."

HORI J.