IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chernichen v. Mundy,*
2023 BCSC 187

Date: 20230208
Docket: M56134
Registry: Vernon

Between:

Kyla Marie Chernichen

Plaintiff

And

Darin Keith Mundy and Darin's Plumbing Ltd.

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons on Costs

Counsel for Plaintiff:	M. Yawney, K.C.
Counsel for Defendants:	D. Patterson
Place and Date of Hearing:	Kelowna, B.C. February 1, 2023
Place and Date of Judgment:	Vernon, B.C. February 8, 2023

[1] The trial of this matter took place over four days, beginning June 22, 2022. I issued reasons for judgment on October 3, 2022. I awarded Ms. Chernichen damages as follows:

Non-pecuniary damages	$110,000
Past loss of income	$16,500
Loss of future earning capacity	$450,000
Cost of future care	$62,016
Special damages	$3,600

[2] The parties were given leave to address the issue of costs. Ms. Chernichen brought this application, seeking double costs pursuant to Rule 9-1.

Legal principles

[3] Rule 9-1(5) provides authority for the court to make an order for double costs of some or all of the steps taken after an offer to settle has been served. Rule 9-1(6) sets out the considerations of the court when exercising its discretion to award costs where an offer to settle was made. The considerations which are relevant on the application before me are: whether the offer was one that ought reasonably to have been accepted, and the relationship between the terms of the settlement and the final judgment.

[4] Both parties agree that the leading case addressing the principles of the double costs rule is *Hartshorne v. Hartshorne*, 2011 BCCA 29:

> [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 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" (*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* 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.

…

> [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: *Bailey v. Jang*, 2008 BCSC 1372, 90 B.C.L.R. (4th) 125 at para. 24; *A.E. v. D.W.J.* at para. 55. 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.

The offers to settle

[5] Before trial, on May 17, 2022, the parties attended mediation. The mediation was not successful. On June 7, 2022, the defendants served a formal offer to settle. Ms. Chernichen responded to that offer by email dated June 9, 2022. In his June 9,

2022 email, counsel for Ms. Chernichen disagreed with the defendants' position on loss of earning capacity. Counsel for Ms. Chernichen set out five cases which, he argued, supported a significant award for loss of earning capacity. In the June 9 email, Ms. Chernichen offered to settle the case for $279,000 plus costs and disbursements, and advised that the offer may be brought to the attention of the trial judge on the issue of costs.

[6] On June 15, 2022, counsel for Ms. Chernichen sent a letter offering to settle the case for $250,000 plus costs and disbursements, which offer would remain open until the start of trial.

[7] On June 15, 2022, at the end of the day, the defendants withdrew all of their prior offers.

[8] The defendants raise an issue with respect to the June 9 email. Counsel says it is not compliant with Rule 9-1 for two reasons. First, he says it was sent to his personal email, not his professional email, and therefore was not served within the meaning of the rule. Next, he says it does not contain the phrase required by Rule 9-1(1)(c)(iii), namely: "The [party] reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

[9] In reviewing the correspondence between counsel contained in the affidavits filed in support of this application, it is clear that counsel for the defendants routinely used his personal email to communicate with counsel for Ms. Chernichen. Counsel for the defendants did not submit before me that he did not receive the June 9 email, but merely points out the technical non-compliance with the Rule. I am not prepared to conclude that counsel for Ms. Chernichen has failed to substantially comply with Rule 9-1 because he used a method of communication that had been accepted by counsel for the defendants routinely in the past.

[10] The June 9 email contains the sentence, "Please note that this offer may be brought to the attention of the court in relation to the issue of costs." While this

sentence may not track the language in the Rule word for word, there can be no doubt of what was intended to be communicated. The email was sent in response to an offer to settle from the defendants. Both counsel are experienced lawyers and would have no misunderstanding about what was intended by this sentence. Indeed, there was no affidavit evidence submitted to the effect that the defendants were caught by surprise, or did not understand what was being communicated. I am not prepared to conclude that Ms. Chernichen's failure to track word for word the language set out in Rule 9-1(1)(c)(iii) is fatal to the June 9 email being accepted as an offer within the meaning of Rule 9-1.

[11] I accept that both the June 9 email and the June 15 offer are offers to settle within the meaning of Rule 9-1. In any event, given the close proximity in time between the offers, Ms. Chernichen submits that she is content to rely on the June 15 offer for the purposes of this application, and the real value in the June 9 email is to demonstrate the reasoning behind the offer, which reasoning continued to inform the June 15 offer. As held by the court in *ICBC v Patko*, 2009 BCSC 578 at para. 33-36, an earlier offer may be considered along with the second offer for the purposes of determining costs.

Is the June 15, 2022 an offer which ought to have been accepted?

[12] The parties agreed that the primary issue for me to determine is whether Ms. Chernichen's offer ought to have been accepted by the defendants. The assessment of reasonableness is an objective one, from the perspective of the litigation at the time the offer was made.

[13] On June 15, 2022, the defendants were clearly in a position to evaluate the Ms. Chernichen's offers. The parties were on the eve of trial, and had just completed a mediation. The pleadings were closed, discoveries were complete, and expert reports had been served.

[14] The defendants made the initial offer, which then prompted the June 9 offer. The June 9 offer set out Ms. Chernichen's rationale on loss of earning capacity, which was the biggest point of difference between the parties. Six days later,

Ms. Chernichen sent the June 15 offer. After receiving the June 15 offer, the defendants revoked all their prior offers. I agree with Ms. Chernichen that the defendants were able to and did evaluate the offers, and provided their own response by way of their revocation of their offers.

[15] The defendants assert before me that the opinion of the occupational therapist, as I set out in my decision at para. 81, could be reasonably be understood to support a finding that, at most, Ms. Chernichen would lose one to two years of income over her lifetime, as their counsel argued at trial. This submission of the defendants is difficult to understand, given that the opinion of the occupational therapist, which he refers to, expressly states:

> The mismatches between her demonstrated abilities and the strength and positional requirements for work as a Therapist Assistant are likely to, in my opinion, reduce her endurance for full-time work – without accommodations; in turn, this can translate into a lower-than-expected work-life expectancy in her chosen profession."

[16] Counsel for the defendants argues that reasonable counsel can disagree on the value of a loss of earning claim, and it is not unreasonable for the defendants to have a different opinion of the value of the claim from Ms. Chernichen which prevented the defendants from accepting Ms. Chernichen's offer. In the case before me, I have to disagree.

[17] The opinion of the occupational therapist cannot be reasonably said to support a limitation of Ms. Chernichen's future earning loss to an amount equivalent to two years earnings. On the eve of trial, the defendants ought to have know that. The defendants called no evidence in this case. As such, there was no defence evidence to contradict the evidence called by Ms. Chernichen.

[18] Further, counsel for Ms. Chernichen points out to defendants' written submissions on this application where the defendants argue the appropriate trial award ought to have been approximately $257,000. Counsel for Ms. Chernichen submits this calculation is based on a two-year income loss as the defendants

argued at trial. Counsel for the defendants did not disagree. Ms. Chernichen submits that this position underscores the reasonableness of the June 15 offer of $250,000.

[19] I find the June 15 offer is one that ought reasonably to have been accepted. Ms. Chernichen's expert evidence clearly supported a finding that Ms. Chernichen would not be able to continue working full time. No contrary evidence was marshalled by the defendants. Therefore, a reasonable assessment would have acknowledged the very real risk that a significant loss of earning capacity award would be made at trial. The defendants asserted before me that $257,000 represents an award reflecting two years lost income, which is what he argued for at trial. This is good evidence that the June 15 offer of $250,000 ought reasonably to have been accepted.

Relationship between the June 15 offers and the judgment

[20] I awarded Ms. Chernichen $647,116. This amount has been reduced, by agreement, to reflect adjustments for tax on the pre-trial income loss award, and s. 83 deductions. After these deductions, the award will be in the range of $600,000. This is still more than twice the amount of the June 15 offer of $250,000.

Is Ms. Chernichen entitled to double costs?

[21] If the defendants had accepted the reasonable offer made by Ms. Chernichen on June 15, the cost of the trial, and all the subsequent interactions post trial, would have been avoided. The cost to both parties would have been reduced, and judicial resources would have been freed up for other cases. I find the defendants did not make a realistic assessment of the lack of strength in their defence, as they ought to have done, which resulted in a doubtful defence being advanced through trial. I am satisfied that Ms. Chernichen is entitled to double costs in this litigation for all steps taken after June 15, 2022.

"W.A. Baker J."