

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Miller v. Cox*,  
2023 BCSC 1058

Date: 20230620  
Docket: S1912654  
Registry: Vancouver

Between:

**Jordan David Miller**

Plaintiff

And

**Karl Cox**

Defendant

Before: The Honourable Madam Justice W.A. Baker

## Reasons for Judgment on Costs

Counsel for Plaintiff:	S. Wheeldon
Counsel for Defendant:	C. Cordick
Written Submission of Plaintiff:	April 11 and 17, 2023
Written Submissions of Defendant:	April 12, 2023
Place and Date of Judgment:	Vancouver, B.C. June 20, 2023

[1] This was an application for costs brought by the successful plaintiff, following my decision rendered March 9, 2023, indexed as 2023 BCSC 349.

[2] The plaintiff seeks double costs at Scale B from the date of an offer made to the defendant Karl Cox on November 7, 2022. In addition, the plaintiff seeks an order that the defendant is liable to pay the costs of certain other defendants and third parties who settled before trial.

[3] The defendant submits that costs of this action must be determined pursuant to Rule 15-1(15)-(17), and costs should be capped at \$11,000 pursuant to that Rule. The defendant submits that the other defendants and third parties were kept in the litigation by the plaintiff, and by no actions of the defendant. As such, he submits that he should not be held liable to pay any costs of such parties. He also notes that the other parties have not made submissions on this issue, and should be heard before a decision is made.

#### **Double costs and Rule 15-1**

[4] Pursuant to Rule 14-1, the ordinary costs rules apply to an action unless the relief granted is money valued at \$100,000 or less or the trial was completed in three days or less. If either of these factors are in place, costs are payable in accordance with Rule 15-1(15)-(17).

[5] Under Rule 15-1(15) and (16), costs, exclusive of disbursements, for this proceeding would be capped at \$11,000, but the court may consider an offer to settle when making an award for costs.

[6] In *Costello v. ITB Marine Group Ltd.*, 2012 BCCA 154 at para. 48 the court held that in fast track litigation, departing from the fixed amount of costs set out in Rule 15-1(15) should only occur in exceptional circumstances. The court emphasized that an objective of Rule 15-1(15) was to avoid the additional time and expense in calculating tariff costs, and that litigants should be able to reliably assess their potential costs liability.

[7] The plaintiff submits that Rule 14-1(1)(f) is not applicable because the trial was originally set for seven days, and the award was slightly over \$100,000. However, Rule 14-1(1)(f) speaks to the actual time taken at trial. It requires costs to be assessed pursuant to Rule 15-1(15)-(17) where “the trial of the action was completed within 3 days or less” unless the court orders otherwise. Rule 14-1(1) looks to the outcome at trial, i.e. the amount of the award, or the time taken at trial. Therefore, I find that this trial falls within Rule 14-1(1)(f), notwithstanding the original trial estimate was for seven days.

[8] The plaintiff submits that this was not a simple claim. Five discoveries were conducted over three days, and a number of third party proceedings had to be commenced. The defendant submits that the discoveries were short, and the issues were not complicated.

[9] I find that, in the case at bar, while the facts were unusual, they were not complicated or difficult in the sense that difficult expert evidence was required. The case was determined, essentially, on the basis of the evidence of the witnesses to the event. All of the discoveries were completed in three days. I am not satisfied that exceptional circumstances exist which would make it unfair for costs to be determined in accordance with Rule 15-1.

[10] I find that the costs in this case will be determined in accordance with Rules 14-1(1)(f) and Rule 15-1(15)-(17). As such, the starting point for my determination of costs is that the plaintiff is entitled to \$11,000 for his costs, plus disbursements and taxes.

**Double Costs**

[11] I will now consider whether double costs ought to be awarded to the plaintiff as a result of the offer he made on November 7, 2022.

[12] The trial of this matter began November 14, 2022.

[13] On November 7, 2022 the plaintiffs made an offer to settle on the following terms:

- a) The defendant Cox would pay the plaintiff \$85,000 in new money, excluding settlement costs.
- b) The defendant Cox would pay the plaintiff ordinary costs and disbursements to the date of the offer, and double costs after the date of the offer.
- c) The offer would expire at 4 pm on November 10, 2022.

[14] At the time the offer was made, the parties had agreed to a quantification of damages in the amount of \$100,000 plus health care costs in the amount of \$3,764.11.

[15] No mention was made in the offer of the payment of costs in relation to other third parties or defendants.

[16] The court has the discretion to award double costs for all or part of a proceeding if it determines that the offer was one that ought to have been accepted.

[17] If the court considers an offer to settle, it may assess the following factors:

- (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.

[18] The reasonableness of the offer is to be determined at the time the offer was made, not with the benefit of hindsight following the trial decision: *Bailey v Jang*, 2008 BCSC 1372 at para. 24. The court is entitled to consider why an offer was not accepted, when determining the reasons to refuse the offer are objectively reasonable: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27-28.

[19] In the case before me, the offer was open for a very short period of time. However, I am satisfied that it was enough time for the defendant to fairly assess the offer. The real issue is whether the offer was one which the defendant ought reasonably to have accepted. Was an offer which provided the plaintiff with 82-85% of the agreed award (depending on whether to include the agreed to health care costs) was an offer the defendant ought to have accepted.

[20] In *Pinch (Guardian ad litem of) v. Morwood*, 2016 BCSC 1907 the court held:

[27] The Alberta Court of Appeal voiced the principle that the offer must be genuine and not for the sole purpose of attracting double costs in *Allen (Next Friend of) v. University Hospitals Board*, 2006 ABCA 101 at para. 16 (*Allen*). The parties had agreed on the quantum of damages, which was the amount included in the trial award. Before the appeal occurred, the respondents had offered to settle for approximately 5% less than the agreed damages at trial. The court looked to whether the offer was genuine in the sense that it was reasonable and realistic in all of the circumstances current at the time that the offer was served (*Allen* at para. 14). There must be an element of compromise, although an offer may nevertheless be reasonable in the circumstances (*Allen* at para.15). An offer that does not realistically reflect the relative merit of the parties' positions at the time that it is made is not genuine because it is not made with a reasonable expectation that it will be accepted. Rather, it is made as a no-risk litigation strategy or tactic for the sole purpose of invoking the double costs sanction (*Allen* at para. 16). The court continued at para. 16:

[16]... If such an offer were held to justify a double costs penalty if not accepted, a litigant with a *bona fide* perception of the facts or the law, or both, different than that of his adversary could only pursue the matter to trial or appeal at an unjustifiable financial risk, thus potentially impeding the access of deserving litigants to the courts and aggravating the inherent advantage enjoyed by litigants with the deepest pockets.

At the end of the day, all of the surrounding circumstances existing at the time that the offer was served must be considered.

[21] Liability in this case was hotly contested. There was a real risk to the plaintiff that he would not succeed. There were conflicts in the evidence of the witnesses. Liability for sports injuries is not found as a matter of course. While the plaintiff ultimately did succeed, this was not a case where the defendant took an obstinate position in the face of an obvious legal outcome.

[22] A double costs award has been described by the court of appeal as a punitive measure against a litigant who fails to accept a reasonable offer to settle. One of the purposes of the rule is to encourage parties to make a careful assessment of their case, and winnow issues before the court. The parties had taken the reasonable step before trial of settling on the amount of damages which would be awarded, if liability was determined in favour of the plaintiff. That resulted in a significant savings of court time. The only issue left for trial was liability, and the parties had very different, and not unreasonable, perspectives on how liability should be determined.

[23] The discount proposed by the plaintiff in his offer did not represent an objectively reasonable compromise of the risk he took in bringing the case to trial. I do not find the defendant's failure to accept the plaintiff's offer ought to result in a punitive measure. Rather, I find the offer of the plaintiff was more in line with the "no-risk litigation strategy or tactic for the sole purpose of invoking the double costs sanction" described by the court in *Pinch v. Morwood*.

[24] I decline to exercise my discretion to order double costs in this matter. As such, the plaintiff is awarded \$11,000, plus disbursements and taxes, as his costs in this action.

**Liability of defendant for costs of other parties**

[25] The plaintiff commenced this action on November 7, 2019. In addition to the defendant Karl Cox, the plaintiff included as defendants Millar's Soccer League, and Andrew Windross operating as Millar's Soccer League.

[26] The plaintiff added Randy Crighton as a defendant on December 17, 2020.

[27] Mr. Cox filed a third party notice against Mr. Crighton on July 3, 2021. Mr. Cox filed no other third party notices.

[28] A notice of trial was filed by the plaintiff on June 1, 2021.

[29] Millar's Soccer League filed a third party notice against all other defendants on August 23, 2021.

[30] Mr. Crighton filed a third party notice on August 25, 2022 against all other defendants, and Roger Bassam.

[31] On June 16, 2022 counsel for Mr. Crighton sent offers to settle to both Mr. Cox and the plaintiff, offering to waive costs in exchange for a dismissal of the claims against him.

[32] On July 21, 2022 plaintiff's counsel advised the parties that because Mr. Cox was unwilling to let the other defendants out of the litigation, he would proceed against all parties.

[33] On October 6, 2022, plaintiff's counsel confirmed to the other parties that he had instructions to offer a waiver of costs to Randy Crighton and Millar's League. He stated that if Mr. Cox would not agree to the proposed settlement, they would look to him for any award of costs regarding the league at the end of trial.

[34] On October 12, 2022, counsel for Mr. Crighton wrote to all counsel setting out the parties' agreement that the plaintiff would file discontinuances against all defendants except Mr. Cox, and would amend the claim to strike out all allegations against the defendants other than Mr. Cox, and "we will adjourn the costs determination to a mutually convenient time for all counsel with a view to resolving either by agreement, or, if not agreement, before the Registrar".

[35] The plaintiff seeks an order that the costs of the other defendants and third parties ought to be paid by the defendant Cox pursuant to the law as set out in *Moore v. Wienecke*, 2008 ONCA 162.

[36] None of the other parties have filed materials in response to the plaintiffs' application.

[37] Given the statement by counsel for the Millar's League defendants, and apparent agreement of the remaining parties, that the issue of costs would be adjourned to a venue where all parties could participate, I am concerned about proceeding in the absence of submissions from counsel for the other defendants.

[38] As such, in the event the parties are unable to reach a settlement on costs, I order that all parties obtain a date to appear before me on the issue of payment of the costs of the discontinued parties. I reserve my decision on this issue until such time as I have heard from all parties.

“W.A. Baker J.”