IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Annable v. Devencore Company Ltd.,* 2025 BCSC 2015

Date: 20250611
Docket: S-188380
Registry: Vancouver

Between:

Mark Graham Annable

Plaintiff

And

Devencore Company Ltd.

Defendant

And

Mark Graham Annable

Defendant by Counterclaim

Before: The Honourable Justice Majawa

Oral Reasons for Judgment

Appearing in person:	M. Annable
Counsel for the Defendant:	A. Render
Place and Date of Trial/Hearing:	Vancouver, B.C. May 27, June 3 and 9, 2025
Place and Date of Judgment:	Vancouver, B.C. June 11, 2025

[1] **THE COURT:** There were originally two post-trial applications before me. The first is the defendant's, Devencore Company Ltd. ("Devencore"), application for costs and double costs of the proceeding from after May 25, 2020, or

alternatively after January 3, 2024. The second is Mr. Annable's application that Devencore disclose any insurance policy under which an insurer may be liable to satisfy all or part of a judgment and an application that Devencore verify its fourth amended list of documents by way of affidavit. Mr. Annable also sought other relief that is contingent upon his success on the aforementioned relief. During the course of the hearing of the applications, Mr. Annable withdrew his application.

[2] The trial of this matter took place over two weeks in January 2024. My reasons for judgment are indexed at 2024 BCSC 1503 and should be read in conjunction with these reasons. Mr. Annable's claim arose out of his employment as a real estate broker with the defendant. Mr. Annable claimed for amounts he said were due under his written contract of employment, including --

[Technical Issues]

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

[3] … including commission, bonus, and contractual termination pay and he also alleged that Devencore had breached a statutory trust.

[4] By any measure, Devencore was entirely successful in defending Mr. Annable's claim at trial. Although its counterclaim was dismissed, that counterclaim was only pursued as a setoff if Mr. Annable had been successful on his claim.

[5] Given that Devencore was successful at trial, it would normally be entitled to its costs of the entire proceeding at Scale B. As will be discussed, Devencore provided two offers to settle to Mr. Annable, the first on May 25, 2020, and the second on January 3, 2024. Devencore relies on R. 9-1 in support of its request for double costs from the date of these offers.

[6] Mr. Annable takes the position that Devencore is not entitled to any costs of the proceeding on the basis that Devencore did not comply with the *Rules of Court* requiring it to disclose relevant insurance policies. Alternatively, if Devencore is entitled to costs, Mr. Annable says that they should not be entitled to double costs because Devencore failed to produce the relevant insurance policies in and of

itself, and he originally suggested that the failure to disclose deprived him of the ability to meaningfully assess the settlement offers.

[7] Given this background, the following three issues must be decided:

a) did Devencore fail to comply with its obligation to disclose certain insurance policies as required by R. 7-1(3);

b) if Devencore did fail to comply with its disclosure obligation, does that conduct deprive it of its entitlement to costs as the successful party at trial; and

c) if Devencore is entitled to costs as the successful party, are they entitled to double costs under R. 9-1?

[8] I will deal with each in turn.

Did Devencore Fail to Comply with its Obligation to Disclose under R. 7-1(3)?

[9] Rule 7-1(3) requires a party to include in its list of documents any insurance policy under which an insurer may be liable to satisfy the whole or any part of a judgment in the particular action or a policy which indemnifies or reimburses a party for amounts paid by that party in satisfaction of the whole or any part of a judgment.

[10] The plaintiff filed the notice of civil claim in this proceeding on July 31, 2018. As detailed in the reasons for judgment, the plaintiff claimed for amounts he said were due under his written contract of employment, including commission, bonus, contractual termination pay, and an allegation that Devencore had breached a statutory trust.

[11] Reasons for judgment were issued on August 16, 2024, and on September 13, 2024, Devencore sent a letter to the plaintiff's then counsel offering to settle the costs of this proceeding. Following the receipt of this letter, Mr. Annable made a formal request for an insurance policy.

[12] Devencore's counsel investigated and advised the plaintiff's then counsel on December 30, 2024, there was no policy disclosable under R. 7-1(3). An

extensive exchange of communication between counsel followed which consisted of requests and refusals to provide further documents and attempts by Devencore to set down the costs hearing. By the end of April 2025, Mr. Annable was no longer represented by counsel. On May 13, 2025, Mr. Annable filed his application for disclosure and the hearing commenced before me on May 27, 2025.

[13] Although Devencore takes the position that there is no policy disclosable under R. 7-1(3), on May 22, 2025, Devencore emailed the plaintiff a copy of an insurance policy, (the “Insurance Policy”). Devencore says it provided the Insurance Policy only because it believed that arguing about this matter was not productive. It still took the position that the policy was irrelevant.

[14] The Insurance Policy appears to cover the costs of defending certain actions. However, importantly, it contains numerous express exclusions, including exclusion of coverage for amounts due under a written contract and for unpaid salary, wages, or bonuses. Of course, that was the main subject matter of the plaintiff's action. The Insurance Policy also excludes claims based on committing any wilful violation of any statute, rule, or law or claims based on giving profit, remuneration, or advantage to which such insured was not legally entitled. These exclusions address Mr. Annable's remaining claim of breach of statutory trust.

[15] At the costs hearing, counsel for Devencore accepted the Insurance Policy may cover three weeks of common law notice for wrongful dismissal. Devencore says that, if the insurer would be liable for such coverage, the amount to be paid by the insurer would have been very minimal compared to Mr. Annable's overall claim.

[16] Clause 17 of the amendments to the Insurance Policy provide that certain losses of the insured will be covered in respect to the wrongful termination of an employee. The amounts that may be covered are only the amounts which exceed the minimal amount payable under the applicable employment standards law and the amount the insurer has offered to pay or has paid the claimant in respect to the wrongful termination claim.

[17] Mr. Annable's action encompassed more than a wrongful termination claim. However, in my view, that does not lead to an inescapable conclusion that the

policy does not apply. It is arguable that it may apply to the portion of the claim that is in respect of wrongful termination.

[18] In my view, the fact that Devencore had not offered an amount at the time the May 2020 offer was made does not mean that the policy was not disclosable. The purpose of the disclosure provision in the *Rules* is so that an opposing party as part of its settlement negotiation strategy can assess the likelihood of the other side being able to pay a judgment. Thus, while no amount was offered in May, the policy might provide coverage had Devencore offered an amount which it ultimately did in January 2024. Of course, whether the amount eventually offered would be indemnified by the insurer is not a sure thing given the multifaceted nature of the plaintiff's claim.

[19] I accept that if the policy did provide coverage as a result of Clause 17, that it would likely only be for a relatively small amount of Mr. Annable's claim. The plaintiff claimed a total of six weeks' notice as provided for in his written employment contract. If coverage had applied, it would be the value of three weeks of common law notice in excess of the mandatory three weeks under the *Employment Standards Act,* R.S.B.C. 1996, c. 113, given Mr. Annable's length of employment with Devencore.

[20] Mr. Annable points out that R. 7-1(3) requires insurance policies be disclosed "under which an insurer may be liable" [emphasis added]. He argues that this language means that any doubt about coverage should be resolved in favour of disclosure. I agree. The fact that the Insurance Policy may have covered even a small portion of the judgment granted against Devencore means that the Insurance Policy should have been disclosable under R. 7-1(3).

[21] I accept that Devencore understood that the exclusions applied to the plaintiff's claim against Devencore and that it was their good faith view that Devencore was not and had never been required to disclose the policy. Given the nature of the claim and the way it was framed, the failure to disclose this document was inadvertent.

Should Devencore be Deprived of their Entitlement to Costs?

[22] Mr. Annable argues that Devencore's failure to disclose the insurance policy should result in some sort of sanction. As I first understood it, his position was that

Devencore should be deprived of their costs for not disclosing the Insurance Policy. This position seemed to evolve during the hearing to an argument that Devencore's entitlement to costs should be diminished by some amount for reason of this conduct.

[23] Mr. Annable points to no prejudice to him from Devencore's failure to disclose. In fact, during the hearing before me and, as will be disclosed briefly below, Mr. Annable acknowledges that he would have done nothing different in prosecuting this litigation had the Insurance Policy been disclosed to him at an earlier date.

[24] Mr. Annable has provided no authority in support of a proposition that a party's inadvertent failure to disclose a document should deprive them of all or some of their costs in the absence of some prejudice to the other party. In my view, there is no reason why Devencore's failure to disclose the Insurance Policy should deprive them of their entitlement to costs as the successful party.

Is Devencore Entitled to Double Costs?

[25] In certain circumstances, including where an offer to settle was made in accordance with the *Rules*, the court may award double costs to a party under R. 9-1(5). There is no doubt that Devencore's offers put Mr. Annable on notice that they would rely on R. 9-1 in a future costs application. There is no doubt that Mr. Annable was less successful at trial than both offers to settle. The first formal offer was made on May 25, 2020 (the “May 2020 Offer”). Devencore offered to abandon its counterclaim and potential costs claim against the plaintiff in exchange for a release and a consent dismissal order. An offer to waive costs if an offeree abandons his claim is an appropriate offer under Rule 9-1: *Riley v. Riley,* 2010 BCSC 822 at para. 16; *Mohamad v. Intransit BC Limited Partnership,* 2016 BCSC 321 at para.33.

[26] Devencore made a second formal offer to settle on January 3, 2024 (the “January 2024 Offer”). Devencore offered to pay the plaintiff $50,000 in exchange for a release and consent dismissal order. Mr. Annable was also clearly not this successful at trial.

[27] The May 2020 Offer was open for almost one month. Mr. Annable did not accept it. As of the May 2020 Offer, Mr. Annable had not set the proceeding down

for trial. For the next two years, he did not set the matter down for trial and, in my view, the May 2020 Offer was open for a reasonable period of time.

[28] The January 2024 Offer was open for only five days until January 8, 2024. However, the trial was imminent and was set to commence on January 15. I find that this was a reasonable period of time given the upcoming trial date and the need for the parties to make final preparations for trial.

[29] In assessing a formal settlement offer under R. 9-1, the court may consider the following factors under R. 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;
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> (b) the relationship between the terms of settlement offered and the final judgment of the court;
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> (c) the relative financial circumstances of the parties; [and]
>
> (d) any other factor the court considers appropriate.

[30] I will deal with these out of order. First, there is a close relationship between the terms of the settlement offer and the final judgment in the sense that the analysis set out in the May 2020 Offer is substantially the same as the case that Devencore advanced at trial and ultimately succeeded on.

[31] The May 2020 Offer also highlights the evidence that would be called regarding the Bullus Split, including that of Andy Schimmel, an independent witness who testified at trial. The issue of the Bullus Split is briefly mentioned in the trial reasons. The plaintiff conceded and abandoned his claim with respect to the Bullus Split in his reply submissions at the conclusion of the trial. He pointed to no new evidence that arose during the trial that explained this very late concession. A significant amount of time was spent dealing with the Bullus Split issue at trial.

[32] Little is known about the relative financial circumstances of the parties and Mr. Annable has not led any evidence on this point in response to the application. At the hearing, Mr. Annable suggested that there was evidence of Devencore's insolvency that he says was relevant to his ability to assess the reasonableness of the offer, or his ability to collect, from Devencore when the offer was made in May

2020. However, there is no evidence of such insolvency or bankruptcy on the record before me. The Internet article that Mr. Annable relies upon in support of his submission is dated in August 2021. At the hearing, Mr. Annable acknowledged that he was not aware of this article at the time he was considering the May 2020 Offer. In any event, I do not agree that the article raises issues with respect to Devencore's solvency. There is nothing to suggest that Devencore's financial state played any role in Mr. Annable's decision to proceed with this litigation.

[33] In my view, the May 2020 and January 2024 Offers ought to have been reasonably accepted. At the time the first offer was made, Mr. Annable's claim was almost two years old and discoveries were completed. Yet Mr. Annable had taken no steps to set the matter for trial. The matter was not set for another two years. This can be explained by Mr. Annable's choice to pursue his claim under the Real Estate Compensation Fund (the “Fund”) in a different proceeding. In that respect, he pursued two judicial reviews and was ultimately unsuccessful for the reasons provided by Justice Sharma indexed at 2022 BCSC 695.

[34] As will be discussed later, at the hearing before me, Mr. Annable explained that he would have turned down the May 2020 Offer regardless of what information he had been provided with in respect to Devencore's insurance policies. At the time, he was focused on his claim under the Fund and it does not appear that he properly assessed the defendant's offer with respect to this litigation at that time. As I said, discoveries were completed and I also note that more than 90% of the documents ultimately disclosed had been disclosed at that time. The May 2020 Offer calls to attention the frailty of the plaintiff's memory of key events as contrasted to Mr. Bishop's clear recollection and contemporaneous notes which I highlighted in my reasons for judgment. The plaintiff knew or ought to have known what evidence would be given at trial on these points. He should have been in a good position to assess the likelihood of succeeding on his claim.

[35] Mr. Annable's conduct at trial leads me to conclude that he did not make a realistic assessment of the likelihood of success with respect to his claim at the time that the offers were made. As I stated in my reasons at para. 31, Mr. Annable persistently gave unsubstantiated and unqualified evidence about what was or was not said at meetings with the defendant's principal about matters that were fundamental to his case. Mr. Annable was impeached on a number of occasions. Moreover, he advanced an entirely new allegation at trial that had never been

advanced before in respect of his entitlement to an override on certain of Devencore's commissions. This is not the conduct of someone who realistically assessed the merits of his claim when considering the defendant's offers.

[36] Nonetheless, a party's failure to disclose an insurance policy under R. 7-1(3) may impact the other party's ability to make a realistic assessment of a settlement offer because it might permit the parties to be more informed when negotiating a settlement. In turn, this may be a relevant consideration in the court's determination of whether a double costs award is appropriate.

[37] In his application response, Mr. Annable took the position that Devencore's disclosure of documents after the settlement offers were made affected his ability to consider the reasonability of the offers because he did not have all the information needed to make a full assessment. As I understand it, the documents he is referring to is the Insurance Policy and less than 20 documents disclosed in January 2024.

[38] There is no evidence on the record before me that non-disclosure of these documents had any impact on Mr. Annable's ability to assess the reasonableness of the offers. Mr. Annable's affidavits filed in support of both applications simply attach various documents. There is not a single assertion made by Mr. Annable in the affidavits with respect to how non-disclosure of any documents affected his ability to consider the offers or prejudiced him in any way. That alone would be sufficient to dispose of his argument that the disclosure of these documents affected his ability to assess the offers. In any event, as discussed earlier, at the hearing before me, Mr. Annable acknowledged numerous times that he would have turned down both the offers regardless of whether he had been provided with the Insurance Policy. As he explained with respect to the May 2020 Offer, he wanted to proceed with his claim against the Fund. Clearly, the fact that he did not have the Insurance Policy at the time he had the offers had no effect on his ability to consider the offers and to ultimately reject them.

[39] Mr. Annable made some suggestion in submissions that he perhaps would not have proceeded with his claim against the Fund in separate legal proceedings had he been provided with the Insurance Policy earlier. However, there is no evidence of this on the record before me and, in any event, Mr. Annable acknowledged that this submission was purely speculation. He also acknowledged

in his submissions that, regardless, as I mentioned, he would have turned down both offers in this litigation.

[40] Upon consideration of the factors, I find that the May 2020 Offer ought reasonably to have been accepted. I see no significant change in any relevant material fact between then and when the second offer was made in January 2024. It, too, ought to have been reasonably accepted. As the successful party, then, Devencore is entitled to its costs of the proceeding on the usual tariff.

Conclusion and Disposition

[41] For the reasons given, Devencore's application for double costs is granted and Devencore is entitled to double costs for all steps taken in the proceeding after May 25, 2020.

[42] Devencore is also entitled to its costs for attendance and preparation in respect of this application for double costs.

[43] Mr. Annable withdrew his application for document disclosure. However, the application was not withdrawn until after Devencore had filed a response and an amended response. Thus, Devencore is entitled to its costs for preparation in respect of Mr. Annable's application. However, to be clear, it is only entitled to one set of costs for attendance at the hearing given the overlapping nature of the applications and the responses.

“Majawa J.”