
CANADA / JUDGMENT

Canuck Security Services Ltd. v. Gill

2015 BCSC 43

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 43 Canuck Security Services Ltd. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Canuck Security Services Ltd. v. Gill,

2015 BCSC 43

Date: 20150114

Docket: S134777

Registry: New Westminster

Between:

Canuck Security Services Ltd.

Plaintiff

And

Sukhpal Singh Gill

Defendant

And

Canuck Security Services Ltd. and

Express Security Services Ltd.

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment re Costs

Counsel for the Plaintiff and Defendants by Counterclaim:

G. Pyper

Counsel for the Defendant:

D. Jarrett

Place and Date of Hearing:

New Westminster, B.C.

May 20, 2014

Place and Date of Judgment:

New Westminster, B.C.

January 14, 2015

Background

- [1] These reasons concern applications by the parties for costs following my trial decision issued May 22, 2013 (*Canuck Security Services Ltd. v. Gill*, 2013 BCSC 893).
- [2] The defendant was a former employee of Canuck Security Services Ltd. ("Canuck") and Express Security Services Ltd. ("Express"). The plaintiff, Canuck, had launched a defamation action against the defendant as a result of allegations made by the defendant in two letters, one dated January 2011 and the other March 2011, concerning the circumstances of his employment with the plaintiff and his subsequent termination. The defendant counterclaimed against the plaintiff and Express, seeking damages for wrongful dismissal and unpaid wages.
- [3] In my reasons, I concluded there was no evidence the defendant had sent the January 2011 letter. The defendant did not contest the allegation he had sent the March 2011 letter and I concluded that, except for the allegation that Mr. Gill had been fired without cause, the allegations in the March 2011 letter were essentially true. On the basis that the latter statement was untrue, I awarded the plaintiff \$1,000 in damages.
- [4] In the result, I concluded that the defendants by counterclaim, Canuck and Express, had breached their contractual duty to pay Mr. Gill wages due to him for work performed on their behalf. I also concluded that the counterclaim defendants had acted inappropriately and I awarded Mr. Gill punitive damages in the sum of \$5,000.
- [5] I rejected the suggestion at trial that either party was entitled to special costs; the parties were given leave to make further application on the question of costs and these reasons will address the application and cross-application for costs of the trial. The plaintiff seeks special costs for the trial. The defendant seeks to be awarded costs at Scale C and double costs for all steps taken after its offer to settle was delivered on May 24, 2012.

Facts

- [6] This action was commenced by Canuck on May 5, 2011 against the defendant for general, punitive, aggravated, and special damages resulting from an alleged defamation contained in two letters written by the defendant. The letters, one dated January 2011 and the other March 2011, asserted that the defendant had not been paid his wages owed to him by the plaintiff and that the plaintiff had dismissed him from their employment without cause.
- [7] The defendant responded to the claim on July 11, 2011 and advanced a counterclaim against Canuck and Express. The counterclaim sought general, punitive, aggravated and special damages for unpaid wages and wrongful dismissal.
- [8] The defendant had worked for Canuck and Express from October 2009 until October 16, 2010. After his employment ended, the defendant filed a complaint under the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA] alleging that he had not been paid holiday pay, overtime pay, minimum daily pay and other entitlements under the ESA.
- [9] The defendant's ESA complaint was subject to a limitation requiring an aggrieved employee to file a complaint within six months of the employer's breach of the statute. Thus, the Employment Standards Branch ("ESB") could not deal with the defendant's claims extant before April 16, 2010; this remained a live issue in the trial.
- [10] An agent of the ESB, Jaspaul Uppal mediated the dispute concerning the defendant's wages from the period April 16, 2010 to October 16, 2010. He performed calculations which were the basis of the settlement for that time period. Mr. Uppal also performed calculations of the amounts the plaintiff had failed to pay the defendant from December 1, 2009 to April 15, 2010 and from April 15, 2010 until October 2010. His calculation for the period December 2009 to April 2010 of \$11,548.42 later formed the basis for judgment against the plaintiffs.
- [11] After some protracted negotiations, on May 31, 2012, the parties reached a compromise on the defendant's ESA complaint (April 2010 to October 2010), requiring Canuck to pay \$13,130.55 in full settlement of Mr. Gill's claims for unpaid wages, overtime and termination pay. The settlement expressly excluded claims for unpaid wages and overtime from December 1, 2009 to April 15, 2010. The ESA confirmed on April 4, 2012 that the plaintiff had deposited the required amount but the terms of agreement were not settled until May 31, 2012.
- [12] Until this settlement was finalized, Mr. Gill's claims for unpaid wages for the entire interval between October 2009 and October 2010 were live issues in the litigation.
- [13] Prior to trial, both parties made settlement offers intended to trigger costs consequences provided for in the Supreme Court Civil Rules, B.C. Reg. 168/2009. On May 24, 2012, the defendant offered to settle the action in its entirety upon acceptance of the following terms:

- (a) if the parties had entered into a full and final settlement of the ESB complaint, then the plaintiff would accept \$9,000 (representing the defendant's claim for unpaid wages and overtime from December 1, 2009 to April 15, 2010) plus costs on a solicitor-client full indemnity basis (the "Defendant's Offer").
- (b) If the parties had not settled the ESB complaint then the defendant was prepared to accept \$21,500 for unpaid wages, overtime, and termination pay and his costs on a solicitor-client basis.
- [14] I interpret this offer to have included a term that the plaintiff to abandon its claim for damages for defamation. The offer to settle "this action in its entirety" is a clear statement that the defendant intended his May 24, 2012 offer to fully and finally resolve the litigation.
- [15] Subsequently, the defendant's counsel advised plaintiff's counsel that, up to May 24, 2012, his full indemnity costs were \$37,915.
- [16] On May 28, 2012, the plaintiff subsequently offered to settle the defendant's counterclaim for \$22,200 all-inclusive in settlement of the defendant's wages and overtime claims but without an offer to settle the defamation claim (the "Plaintiff's First Offer"). The plaintiff specifically excluded in the offer to pay the defendant's costs or to abandon its claim for defamation damages.
- [17] Following the ESA settlement, the Plaintiff's First Offer was withdrawn and on June 1, 2012 the plaintiff offered to pay the defendant \$12,000 in settlement of his wages and overtime claims for the period December 1, 2009 to April 15, 2010 (the "Plaintiff's Second Offer"). This offer did not include a reference to costs. On June 4, 2012, the plaintiff made a formal offer to settle its defamation claim for \$2,000 and costs (the "Plaintiff's Third Offer"). Throughout, the plaintiff reserved its right to bring any offers it delivered to the attention of the Court.
- [18] At trial, the defendant was awarded \$11,548 for unpaid wages and \$5,000 in punitive damages. Canuck was awarded \$1,000 in nominal damages for defamation.
- [19] Curiously, during the testimony of Mr. Gurpreet Lidder, one of the principals of Canuck, he testified that Canuck was aware of the ESB calculations concerning the defendant's unpaid wages from December 2009 to April 2010 and was ready to pay the defendant \$11,548 "right now"; later he used words to the effect that Canuck did not have a legal obligation to pay that amount but was prepared to pay the amount calculated by the ESB.

Positions of Canuck and Express

- [20] Canuck and Express contended that the issues concerning Mr. Gill's claim for unpaid wages were resolved in part, before the trial commenced, and as a result of Mr. Lidder's assertions during his testimony that Canuck would pay the amount calculated by the ESB. They argue that Mr. Gill unreasonably pursued the issues regarding his unpaid wages and that this strategy should result in an award of costs against him.

- [21] Canuck and Express submit that the defendant unreasonably refused the three offers advanced by Canuck before the trial. Though the Canuck's First Offer was revoked and replaced with the Second Offer on June 1, 2012, the plaintiff invites the Court to consider it as an offer that should reasonably have been accepted.
- [22] The plaintiff submits that the Plaintiff's Second and Third Offers were in effect when the trial commenced. He argues that both Offers were reasonable in the circumstances and given the finding that the defendant did defame the plaintiff and that damages of \$1000 were awarded, costs should be ordered in the plaintiff's favour. If the defendant had accepted the Plaintiff's Second and Third Offer, the entire case could have been settled on the first day of trial.
- [23] Although Mr. Lidder agreed that the plaintiff would be willing to pay the defendant \$11,548, he did not admit that Canuck owed a legal obligation to pay this amount. Since the issue of whether unpaid wages remained outstanding was critical in addressing the defamation claim, his statements were not in the nature of an admission that permitted the Court to make an order by consent.
- [24] The plaintiff submits that the ESB had settled the totality of the wage claim, and since the defendant was not claiming Wallace damages on the basis of the manner in which the plaintiff handled the dismissal, the defendant should not have proceeded with the counterclaim. The plaintiff also argues that the defendant misrepresented the nature of the claim being pursued at the outset of trial when defendant's counsel stated that "he was only there to defend the defamation claim". The plaintiff argues that the defendant was reminded throughout the trial that the plaintiff was seeking special costs with specific reference to these alleged misrepresentations.
- [25] The plaintiff also contends that the defendant acted reprehensibly and should be met with special costs. The plaintiff argues that the defendant's expectations in this litigation were unrealistic and that, having warned the defendant of its intention to seek special costs because the defendant's position was without merit, it should be entitled to special costs.
- [26] In the alternative, the plaintiff seeks double costs (or at least 75%) because most of the trial time was spent on wage calculations and cross-examinations on the wage issue. He contends that the defendant's conduct during the trial can be considered as a factor in awarding double costs, citing *Martin v Lavigne*, 2010 BCSC 1610.
- [27] Finally, the plaintiff submits that Rule 9-1(5) permits the court to order costs as a penalty, relying on *Canadian Imperial Bank of Commerce v. Marples*, 2008 BCSC 590.

Position of Mr. Gill

- [28] The defendant contends that he was the successful party in this proceeding notwithstanding the nominal damage award to Canuck. But for this proceeding and his complaint to the ESB he would likely never have received his unpaid regular and overtime wages. Citing Rule 14-1(9) which states that costs must be awarded after the event to the successful party, the

defendant asserts that this rule is based on the proposition that successful litigants should not be exposed to the financial burden of litigation only to lose any amount recovered to litigation costs: *Glase v. Glase*, 2008 BCSC 887 at para. 6.

- [29] The defendant contends that costs should be awarded to him based on several factors including the fact Mr. Lidder suggested Canuck was willing to pay \$11,548 during the trial, thus accepting the calculation of the ESB. Nevertheless, Canuck did not pay the ESB complaint amount until May 31, 2012 and it remained an issue in this action until that date. The defendant also points to the plaintiff's failure to produce documents regarding other settlements previously ordered to be produced by the Court; the defendant argues this is a factor that impaired his ability to defend the plaintiff's claim and advance his counterclaim.
- [30] In the reasons for judgment, I concluded that Mr. Lidder had been evasive, was untruthful in some instances, had failed to produce important records, had produced contradictory records, was either incompetent, unprofessional or dishonest, and revealed a callous and reprehensible approach to his responsibilities to his employees. I concluded that Canuck and Express had embarked on a pattern of paying employees from two separate companies most likely for the purposes of avoiding their overtime obligations. The defendant argues the factors underlying a claim for special costs as described in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 are apposite to the circumstances, and in particular the conduct of Canuck and Express. The defendant submits that based on this Court's observations about the plaintiff's conduct in the reasons for judgment, the Court should exercise its discretion to award costs in order to sanction the improper conduct of the plaintiff.
- [31] In the alternative, if the Court concludes that the defendant is not entitled to costs, the defendant submits that the plaintiff's conduct during the litigation disentitles them to any award of costs: *British Columbia Teachers' Federation v. Thorne*, 2011 BCSC 1119 at para. 31.
- [32] The defendant seeks costs at Scale C based on the complexity of the case and the difficulty of the issues. The case was hard-fought and required interrogatory applications to achieve trial preparedness. Finally, the plaintiff's failure to produce records as ordered by Voith J. and relating to scanning points on the defendant's worksites made this a more difficult case to litigate.
- [33] The defendant also relies on Rule 9-1(5)(b) to seek double costs from May 24, 2012 when he served an offer to settle. The defendant contends that the Defendant's Offer was reasonable in the circumstances and the plaintiff should have accepted it. The plaintiff had accepted the ESB calculations of the wages due to the defendant from December 2009 to October 2010, yet the plaintiff had refused to settle the first part of the complaint until a few days before trial and then did not make an offer until the parties were in the midst of trial.

- [34] The defendant contends his offer should be considered in light of the amounts awarded to him and the fact that the ESB complaint was settled on May 31, 2012. The total amount recovered through both procedures was \$29,678. He contends this amount exceeds any interpretation of the figures set out in either option of the Defendant's Offer.
- [35] The defendant argues the absence of an order for special costs at trial should not work against him in assessing whether he is entitled to an award for double costs. Without demanding payment of elevated costs (which were by then in the amount of \$37,915), at the time the offer was delivered, he could not have achieved an outcome that would not have resulted in all of his damages being exhausted by his costs. He submitted that there also needed to be a repayment of his legal costs to make any resolution worthwhile.
- [36] The defendant also contends that Canuck and Express were in a stronger financial position than he was. Their combined revenues in 2010 and 2011 were \$3,778,000 and \$4,405,000 respectively. He said there was a power imbalance that resulted in Canuck and Express evading their responsibilities to pay employees overtime and other wages when due in order to meet unrealistic commitments made to its customers. Although the defendant was awarded punitive damages of \$5000, he argues that this power imbalance can only be addressed by a significant costs award in his favour.
- [37] Finally, the defendant submits that double costs are necessary to deter the type of conduct demonstrated by Canuck and Express. He encouraged the Court to adopt the approach of Hinkson J. (as he then was) in comments he made in *Bailey v. Jang*, 2008 BCSC 1372:
- [18] While Rule 37B has brought about the reversion from a strict code to a reliance on judicial discretion with respect to costs, the use of costs to encourage or to deter certain types of conduct remains, albeit based upon the factors set out in subrule 37B(6).
- [19] I do not, however, accept the defendants' submission that the discretion must only be exercised in not awarding double costs in a case where the defendants' offer exceeds the plaintiff's recovery at trial, unless the case affords a sufficient basis for the court to exercise its discretion in a manner contrary to the outcome prescribed in Rule 37B(5). Such an interpretation would fetter what is clearly intended to be an unfettered discretion.

Law and Analysis

- [38] The starting point in this case is whether either party is entitled to costs against the other. The plaintiff enjoyed success on a small portion of its defamation claim. It failed to prove that the January 2011 letter was published by the defendant and Mr. Gill proved that most of the comments in his March 2011 letter were true save the allegation that he was fired without cause. Mr. Gill recovered judgment for his unpaid wages and punitive damages but failed to prove that he was dismissed without cause.

[39] In *Chaster (Guardian ad litem of) v. LeBlanc*, 2008 BCSC 47, Hinkson J. (as he then was), adopted the test for determining whether to award costs for substantial success as articulated by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, appeal ref'd 2002 BCCA 454. Hinkson J. said, at paras. 30-34 of *Chaster*:

30. Bouck J. then articulated a four step test to determine whether or not to award costs after a trial at para. 46:

Based on the above interpretation of Rules 57(9), 57(15) and Gold, a decision to award or not award costs after a trial might follow a four step inquiry.

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
 2. Second, by assessing the weight or importance of those "matters" to the parties.
 3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
 4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.
31. Ms. Murray for the plaintiff argued that while the approach articulated by Bouck J. in *Fotheringham* is suitable for cases where discreet non-monetary issues exist such as matrimonial cases, it should not be applied to cases where the only relief sought is monetary.
32. Mr. Ritchey for the defendant referred to the decision of Ballance J. in *Cardwell et al v. Perthen et al.*, 2007 BCSC 366 (CanLII), 155 A.C.W.S. (3d) 1040 as just one example of a case where the principles articulated by Bouck J. in *Fotheringham* were applied in circumstances where the claim was purely for a monetary award and the plaintiff had some financial recovery.
33. A similar result occurred in *Citta Construction Ltd. v. E. Lane Holdings Ltd. et al.*, 2004 BCSC 280 (CanLII), 129 A.C.W.S. (3d) 46, again despite a financial recovery on the part of the plaintiff.
34. I am satisfied that the four step test identified by Bouck J. applies not only to matrimonial cases, but also to all types of cases where Rule 57(9) has application.
- [40] The onus is on the party seeking to avoid the usual rule that costs follow the event: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.

- [41] I am satisfied that in this case the defendant was substantially successful in defending the plaintiff's claim for general, punitive, aggravated and special damages. Similarly, the defendant was successful in his counterclaim from which he recovered general and punitive damages against Canuck and Express.
- [42] Mr. Gill's employment status with both Canuck and Express was an issue important to all parties. The steps in the litigation up to May 31, 2012 were directed at the defendant's allegations that Canuck and Express had failed to pay his wages. The records indicated that Canuck and Express operated a complex business through two incorporated companies that were designed to adversely impact their employees and shield the companies from ESA obligations and contractual obligations to pay for work exceeding the prescribed and agreed-upon number of hours to be worked. Mr. Gill was an unsophisticated recent immigrant to Canada. Canuck and Express took advantage of his vulnerability and consistently failed to meet their obligations.
- [43] I am satisfied that the defendant "substantially succeeded" on the matters most important to the parties. Thus, this is not a case where costs should be apportioned between the parties in reference to discrete issues upon which each of them succeeded. In this case, the issue on which the plaintiff succeeded was not sufficiently discrete from the issues upon which it failed, namely the plaintiff's wrongful failure to pay wages, that a just result will occur if the costs were apportioned: see *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27.
- [44] Considering all the evidence, I see no reason to order the defendant be deprived of his costs.
- [45] Thus, I am satisfied that the plaintiff will not recover any costs of this litigation and the remaining issue is whether the defendant recovers double costs, costs at scale C or costs at scale B.
- [46] According to Rule 9-1(4), the Court may consider an offer to settle when exercising its discretion in relation to costs. Rule 9-1(5) sets out the various costs orders available to the Court in such a context, including an award for double costs of all or some of the steps taken in the proceeding after an offer to settle has been made. Rule 9-1(6) lists four factors that the Court may consider in making an order for double costs:
- (6) In making an order under subrule (5), the court may consider the following:
 - (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.

[47] On the issue of double costs, the Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29 discussed the guiding principles regarding double costs at para. 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), 1995 1537 (BC CA), 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), 1988 CanLII 186 (BC CA), 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), 1995 CanLII 1537 (BC CA), 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 (CanLII), 88 B.C.L.R. (4th) 17 at para. 16.

[48] The reasonableness of the decision to accept or reject a settlement offer must be measured against the circumstances existing when the offer was open for acceptance. It must be considered from the perspective of the party receiving the offer: *Ward v. Klaus*, 2012 BCSC 99 at para 36; *Hartshorne* at para. 27

[49] Mr. Gill made his complaint to the ESB in October 2010 in the hopes of achieving full payment for his outstanding wages including overtime payments and a termination allowance without resorting to the courts. By March 2011, Mr. Gill was frustrated at the progress in resolving his claim for unpaid wages and wrote his letter to various parties including the ill-advised allegation that he had been fired without cause. That allegation was untrue and resulted in an award of nominal damages of \$1000 to the plaintiff.

- [50] Canuck was dilatory in resolving the ESB complaint and in complying with its obligations for documentary disclosure in the litigation. In the end, settlement of the April 2010 to October 2010 component of the defendant's wage loss claim did not occur until shortly before this trial commenced which kept that issue alive until the agreement was signed. Until that point, his claim in this litigation remained a claim for wages and overtime payments commencing December 2009. In the reasons I concluded that Canuck and Express were under a contractual duty to pay overtime wages to Mr. Gill in addition to the other benefits flowing from his employment contract. These are the facts germane to considering whether Canuck ought to have accepted the defendant's settlement offer.
- [51] When the trial began the plaintiff was pursuing defamation claims from the January 2011 and March 2011 letters. The plaintiff failed to provide any evidence connecting Mr. Gill to the January 2011 letter and achieved a very modest success in regard to one statement made in his March 2011 letter.
- [52] Before and after the trial commenced, the plaintiff was in breach of the order of Voith J. regarding document production. The plaintiff had produced contradictory documents and was dilatory in attending to its disclosure obligations.
- [53] After the trial commenced Mr. Lidder for the plaintiff, invited the Court to grant the judgment to Mr. Gill for his unpaid wages as calculated by the ESB from December 2009 to April 2010, though he declined to acknowledge this as a legal responsibility.
- [54] The allegations in the defendant's March 2011 letter engaged the very issue that Mr. Lidder seemed unwilling to acknowledge at trial, namely that the defendant had been deliberately denied his wages from December 2009 onward. The defendant was required to prove the truth of the allegations contained in his letter of March 2011. In light of Mr. Lidder's statement that Canuck would pay the defendant was unhelpful because he would not admit that Canuck had a legal obligation to pay Mr. Gill; his failure to make the admissions prevented the defendant from relying on his remarks to prove the truth of his March 2011 letter and effectively bring the litigation to an end.
- [55] I note that the Plaintiff's Offer and Second Offer were all-inclusive proposals that did not provide any contribution to defendant's assessable costs, disbursements or court order interest. Further, neither offer would have settled the defamation claim. Throughout of the trial plaintiff's counsel reminded the defendant that it was seeking special costs based on Mr. Gill's failure to accept the plaintiff's offer. The plaintiff's position was wholly unreasonable on this point.
- [56] The remaining issue regarding the settlement offers is what impact, if any, should be ascribed to the Defendant's Offer made on May 24, 2012 to accept \$9,000 in settlement of the entire action including his claim for wages, overtime and termination pay together with solicitor-client costs of \$37,915.

- [57] I have concluded that when considering the matters in issue in the Defendant's Offer, and taking into consideration that the plaintiff's repeated assertion that special costs were appropriate, the Defendant's Offer was a reasonable proposal and the plaintiff ought to have accepted it on the circumstances known to the plaintiff at the time. The Defendant's Offer was all-inclusive of punitive damages, court order interest, costs and the defamation claim.
- [58] The net result of the defendant's judgment in the proceeding will be an order for payment of \$15,548 plus court order interest and costs. This amount is somewhat less than the defendant's settlement offer that included solicitor-client costs but, in the circumstances known at the time it would have been reasonable to accept the proposal.
- [59] Another consideration in the costs analysis is the relationship between the terms of the settlement offer and the final judgment. Except for the issue of costs and interest, the Defendant's Offer, if accepted, would have resulted in recovery of \$47,000. In the result the defendant recovered approximately \$28,678 plus interest and costs. His actual recovery after trial (and after the ESB settlement) would have been \$41,800. If the plaintiff had accepted the defendant's proposal to settle the December 2009 to April 2010 claim alone, it would have paid \$47,000 including costs.
- [60] Rule 9-1(6)(c) engages a consideration of the parties relative financial circumstances. In this case, the plaintiff and Express were known to have revenues in the range of \$3 - 4 million per year and at times employed as many as 200 people. The defendant was earning \$12.50 an hour and working many long and consecutive shifts. The behaviour of Canuck and Express in failing to pay the defendant his wages for a prolonged period of time was a profitable strategy for the companies and with an equally punishing impact on Mr. Gill.
- [61] It was clear to me on the evidence that Mr. Gill was an unsophisticated and vulnerable person who was not financially secure. Weighing the limited evidence regarding the financial circumstances of the parties, I am satisfied that the differences between these parties favour an award of double costs for the defendant.
- [62] Finally, sub rule 9-1(6)(d) require the Court to consider a broad range of other factors. As an example, in *Witzel Capital Corp. v. LED Medical Diagnostics Inc.*, 2010 BCSC 959, allegations suggesting misconduct during the litigation, though not sufficient to support an award for special costs, may be considered in awarding double costs.
- [63] Late disclosure of documents may also be a factor in refusing an order for double costs. In *Demarzo v. Michaud*, 2010 BCSC 1123 Brown J. said:
- [18] The main purpose of Rule 9-1 is to encourage parties to settle, early if possible. But the purposes of the Rule, and modern practice, assumes timely disclosure of documents and reports that would significantly affect a party's ability to make a rational assessment of the litigation risks they face. While it is true the Rules of Court provide parties means to discover facts and the parties can conduct their own investigations to assess litigation risks, in my view it is also incumbent on a party expecting an order for double costs to show

timely disclosure of documents and reports that would have significantly affected the other party's assessment of whether the offer ought reasonably to be accepted.

- [64] In my view, the converse is also applicable. A party who has failed to respond to an order requiring production of documents before and during the trial, hampers the ability of the other party to make or accept a reasonable offer of settlement. In this case, the plaintiff's shortcomings in document production are a factor to be considered in the plaintiff's claim for double costs.
- [65] After weighing these considerations in rule 9-1(6), I conclude that when the defendant made his settlement offer, it would have been reasonable for Canuck and Express to have accepted the proposal, notwithstanding the request for solicitor-client costs. I also conclude that the plaintiff was dilatory in its document production and failed to produce important records that hampered the defendant's trial preparation. I conclude that Canuck and Express used their economic superiority to undermine the defendant's financial security; they maintained a defiant veneer and obfuscated their actual roles in managing a company served by many vulnerable employees.
- [66] The plaintiff's financial circumstances were substantial superior to the defendant's position. The plaintiff used that discrepancy to its advantage in all of its dealings with the defendant and this conclusion further supports an increased costs order to the defendant. In the end, I am satisfied that the defendant is entitled to recover double costs of all steps in the litigation after June 1, 2012.

Scale of Costs

- [67] The defendant asked for an order for costs at scale C. The defendant relies on *Kinloch v. Edmonds*, 2008 BCSC 1684, at para. 43:

There have come to be accepted a series of criteria that can properly be considered in assessing the level of difficulty of a proceeding. These were helpfully set out by Wilson J. in *Mort v. Saanich School Board No. 63*, 2001 BCSC 1473 (CanLII) at para 6:

- (a) the length of the hearing on the substantive point;
- (b) the "complexity of the issues involved";
- (c) the number and complexity of pre-trial or hearing applications;
- (d) whether the proceeding was "hard-fought", with little or nothing having been conceded along the way;
- (e) the "number and length of examinations for discovery";
- (f) the "number and complexity of experts' reports"; and
- (g) the extent of the effort required in fact gathering and proof.

- [68] This was a complex case involving a wide range of legal and factual issues. The plaintiff claimed general punitive and aggravated damages. It claimed an injunction to prohibit the defendant publishing statements or allegations of wrongdoing by the plaintiff. The counterclaim also included claims for general damages, punitive damages, aggravated damages, and special damages.
- [69] It was a hard fought proceeding requiring applications to the Court to compel production of documents.
- [70] The defendant also relies on *Friedl v. Friedl*, 2010 BCSC 138 where Blair J. addressed the defendant's misconduct during a trial. He said:
- [29] Ms. Friedl will have her costs at Scale C payable forthwith in light of what I conclude was Dr. Friedl's deliberate attempt to mislead this court by failing to provide full and proper disclosure of his financial circumstances: *Rozen v. Rozen*, 2002 BCCA 537 (CanLII). I set costs at Scale C to reflect the more than ordinary difficulty encountered by counsel for Ms. Friedl in responding to Dr. Friedl's application and determining the questions raised by his failure to make full disclosure.
- [71] In view of the defendant's difficulties in obtaining disclosure of documents, including the production of documents containing conflicting material, I consider this to be a case where it is appropriate to order costs at scale C. In my view Canuck was not forthcoming in a timely way with document disclosure that was necessary to support the defendant's claim for unpaid wages and to defend the defamation case. The plaintiff's failure to abide by the Voith J. production order and its failure to meet his documentary disclosure obligations to provide accurate and reliable documents compromised the defendant's ability to address the issues raised in the defamation action and in his own claim for unpaid wages. These factors have persuaded me that the defendant should have ordered costs at Scale C.
- [72] Therefore the defendant will recover costs at Scale C and double costs payable after June 1, 2012.

"The Honourable Mr. Justice Armstrong"

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