

CANADA / JUDGMENT

Gichuru v. Purewal

2021 BCCA 91

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 91 Gichuru v. Purewal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gichuru v. Purewal,

2021 BCCA 91

Date: 20210301

Dockets: CA46392; CA46407

Docket: CA46392

Between:

Mokua Gichuru

Appellant

(Plaintiff)

And

Kulbir Purewal and Sukhbir Purewal

Respondents

(Defendants)

- and -

Docket: CA46407

Between:

Mokua Gichuru

Respondent

(Plaintiff)

And

Sukhbir Purewal

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 30, 2019 (Gichuru v. Purewal, Vancouver Docket S167828).

The Appellant, appearing in person (via videoconference):

M. Gichuru

Counsel for the Respondent Sukhbir Purewal (via videoconference):

A.E. Syer

Place and Date of Hearing:

Vancouver, British Columbia

January 22, 2021

Place and Date of Judgment:

Vancouver, British Columbia

March 1, 2021

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

Summary:

The plaintiff succeeded at trial in a defamation action. He was awarded \$5000 in general damages jointly and severally against both defendants, and \$5000 in punitive damages individually against only one defendant. In the trial reasons, the judge declined to order special costs to the plaintiff and ordered costs at Scale B. Both parties applied to the court to reopen the issue of costs. In her subsequent reasons, the trial judge again declined to order special costs to the plaintiff. She reduced the plaintiff's Scale B costs to 50% from the date of an \$8000 offer to settle before trial, but she did not award the defendants any costs. The plaintiff appeals the issue of special costs and the reduction of his Scale B costs. One of the defendants appeals the refusal to order any costs in her favour.

Held: Appeals allowed, costs order set aside, and the various issues of costs remitted to the trial judge for reconsideration. The trial judge's reasons refusing special costs provide no meaningful explanation for the result and rely on irrelevant considerations. There was no apparent basis to reduce the plaintiff's Scale B costs based on the offers to settle. The trial judge initially proceeded on a misapprehension of fact regarding the apportionment of liability for the trial judgment, and although she corrected this misapprehension, it does not appear that she properly reweighed the factors relevant to the offers to settle that were made.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] Following her judgment after the conclusion of a defamation trial, the trial judge issued a separate set of unreported reasons that addressed the costs of the action (the "Costs Reasons"). Each of Mr. Gichuru, the plaintiff in the action, and Ms. Sukhbir Purewal, one of the two defendants in the action, appeals aspects of the costs order arising from those Costs Reasons. For the reasons that follow, I am satisfied that the costs order made by the trial judge should be set aside and the various issues that were raised by the parties remitted to her for reconsideration.

Background

- [2] Mr. Gichuru commenced a defamation action in August 2016. The trial judge's reasons arising from the trial are indexed at 2019 BCSC 731 (the "Trial Reasons").
- [3] In the Trial Reasons, the trial judge explained that from December 2010 to December 2014, Mr. Gichuru rented a suite from Ms. Purewal. The trial judge concluded that Mr. Kulbir Purewal, the other defendant in the action and Ms. Purewal's son, acted as an agent for his mother "when he performed landlord duties." For various reasons, the Purewals sought to evict Mr. Gichuru. Mr. Purewal then made three phone calls to 911 and reported that Mr. Gichuru had threatened to start a fire and burn the house down, that Mr. Gichuru had unhooked all of the smoke alarms in his suite, and that Mr. Gichuru was "mentally ill."
- [4] Mr. Gichuru moved out of the suite, and he subsequently filed a complaint with the Human Rights Tribunal. Before the Human Rights Tribunal, Mr. Purewal admitted, under cross-examination, that he had fabricated these various allegations.

- [5] The trial judge explained that Ms. Purewal, though she was represented, did not attend at trial. This was on account of health issues. Mr. Purewal, who was unrepresented, similarly did not attend at trial. The trial judge made an express finding that this was a "deliberate decision" on his part and that she was accordingly prepared to make adverse inferences against him "where necessary and appropriate."
- [6] The trial judge concluded that Mr. Purewal's false allegations to the police, claiming that Mr. Gichuru had threatened to start a fire, constituted slander. She further concluded that Mr. Purewal "intentionally lied to the police, and his dominant motive for making the false claim was malicious." Further, she concluded that she was satisfied that Ms. Purewal was "vicariously liable for her son's wrongful actions."
- [7] The trial judge determined that an award of general damages in the amount of \$5000 was appropriate and that each of Ms. and Mr. Purewal were jointly and severally liable for these damages. She declined to award aggravated damages. She concluded that "Mr. Purewal's misconduct was sufficiently malicious to warrant punitive damages," which she assessed at \$5000. She declined, however, to award punitive damages against Ms. Purewal or to make her vicariously liable for the punitive damages award.
- [8] It appears to be common ground that, although Mr. Gichuru sought special costs in his pleadings, the parties did not make any submissions at the conclusion of the trial about costs. Nevertheless, the trial judge concluded that special costs were not warranted in the circumstances before her. Instead, she awarded Mr. Gichuru "costs at Schedule B."
- [9] Thereafter, counsel for Ms. Purewal wrote to the trial judge seeking leave to make submissions on costs based on offers to settle that had been delivered to Mr. Gichuru in the action. Ms. Purewal submitted that Mr. Gichuru should be deprived of his costs and that she should be awarded her costs from the date of one of the offers to settle. Mr. Gichuru similarly sought leave to make submissions on the issue of special costs. The trial judge communicated that she would hear both parties' costs applications and asked for the parties to file written briefs in advance of the hearing. At the start of the hearing, the trial judge informed the parties that she had read their briefs and that she did not need to hear from them further unless there was something that they "wish[ed] to draw to [her] attention." Counsel for Ms. Purewal made some limited further submissions.
- [10] Thereafter, the trial judge issued the Costs Reasons. In the Costs Reasons, she dismissed Mr. Gichuru's application for special costs and she reduced the costs payable to him to "costs at Scale B up until August 22, 2018, and costs at half of Scale B from August 22, 2018." She did not make any costs award on behalf of either defendant. The order that reflects these determinations states:

THIS COURT ORDERS that:

1. the plaintiff's application for special costs is dismissed; and

2. the plaintiff is entitled to costs at Scale B up until August 22, 2018 and 50 percent of his costs at Scale B from August 22, 2018.
- [11] Ms. Purewal and Mr. Gichuru both sought leave to appeal the costs order. Justice Dickson granted leave to both.

Issues on Appeal

- [12] Mr. Gichuru raises two issues on appeal. The first arises from the dismissal of his application for special costs. The second arises from the reduction of the Scale B costs order made by the trial judge. Ms. Purewal also appeals that Scale B costs order, on the ground that the judge misapprehended the evidence and erred in failing to award her costs after the date of her second offer to settle.

The General Legal Framework

- [13] This Court has repeatedly commented that an order regarding costs, while highly discretionary, must be made judicially and in accordance with the jurisprudence and the Supreme Court Civil Rules relating to the specific costs order. For example, in *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329, the Court summarized:
- [33] Decisions on whether to order costs and, if so, how to calculate them, are governed by a wide measure of discretion. Accordingly, costs awards attract a high degree of appellate deference. Nevertheless, the discretion to award costs must be exercised judicially and in accordance with the Supreme Court Civil Rules and established principles. This Court will interfere with a costs award if, but only if, the judge misdirected himself or herself on the applicable law, made an error in principle, made a palpable error in assessing the facts or otherwise made an award that is so clearly wrong as to amount to an injustice: *Seminoff v. Seminoff*, 2007 BCCA 403 at paras. 2, 4; *Smithies Holdings* at para. 113.

See also *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at paras. 73, 88; *Gichuru v. British Columbia (Attorney General)*, 2020 BCCA 374 at para. 29; *Bains v. Antle*, 2019 BCCA 383 at para. 33.

- [14] This Court has recently also summarized the general standard for reviewing a discretionary order. In *Shoolestani v. Ichikawa*, 2016 BCCA 452 (Chambers) (cited in *Mayer v. Mayer Estate*, 2020 BCCA 282 at para. 22), Justice Garson said:
- [16] The appellate standard of review in respect of the appeal of discretionary orders was articulated by the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27:

- [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
- [17] An appellate court may not interfere with a discretionary decision on the grounds that it would have exercised the discretion differently: see *Law Society of British Columbia v. Canada (Attorney General)*, 2002 BCCA 49 at para. 7, per Finch C.J.B.C. Intervention is only justifiable upon identification of a demonstrated error: see *Dhillon v. Pannu*, 2008 BCCA 514, per Tysoe J.A., leave to appeal ref'd [2009] S.C.C.A. No. 58.
- [18] Mr. Justice Rothstein said in *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43 that "[t]he test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations".

See also *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at para. 72.

Analysis

A. The Issues Raised by Mr. Gichuru

i) Special Costs

- [15] The trial judge dismissed Mr. Gichuru's application for special costs, saying:
- [7] I will deal with the issue of special costs first.
- [8] As properly noted by the plaintiff in his written submissions, special costs orders are to be made sparingly and are a matter of judicial discretion. Although a lay litigant may be entitled to special costs (*Somani v. Jilani*, 2018 BCSC 1331), I am not persuaded that I should make that order.
- [9] The basis for the special costs claim here relates to conduct which the plaintiff says is wide-ranging and includes evasion of service by Kulbir Purewal, failure to obey court orders by Kulbir Purewal, baseless allegations of reprehensible conduct, making false and misleading statements, putting an undisclosed document to a witness on cross-examination, making improper and irrelevant allegations of unethical conduct, and improper communication with the court. I do not intend to address each of these grounds individually. I note that many of the allegations were raised by Mr. Gichuru in the trial proper.
- [10] I have determined on the totality of all of the circumstances and the written submissions that this is not one of those exceptional cases that should draw an order for special costs. In this regard I noted in my judgment that, throughout the events that give rise to this

litigation, Mr. Gichuru was well aware of his rights and fully engaged in exercising those rights. I described him as a professional litigant. Justice Groves referenced this in an interlocutory decision awarding special costs to the defendants. I now understand that that decision was overturned on appeal. However, his comments in terms of conduct were still and are, in my view, relevant.

[11] In all of the circumstances, I continue to be of the view that special costs are not warranted here and my original decision remains unchanged.

[16] Mr. Gichuru raises three issues that arise from the dismissal of his application for special costs.

a) Sufficiency of the Costs Reasons

[17] The first ground is that the first sentence of para. 10 of the Costs Reasons is conclusory and does not provide any real explanation for that conclusion. For example, it is not clear whether the trial judge accepted some or all of the various allegations of wrongdoing that are described in para. 9 of the Costs Reasons or whether she rejected these allegations. If she accepted the allegations, there is no explanation for why, based on "all of the circumstances and the written submissions", such wrongdoing did not warrant an award of special costs.

[18] Furthermore, in the "written submissions" of Ms. Purewal, her counsel had referred to 14 different forms of conduct on the part of Mr. Gichuru that she argued disentitled him "to any costs in the litigation" (emphasis added). Again, it is not apparent whether the judge accepted some or all of these considerations and the extent to which, if at all, they informed her decision to deny Mr. Gichuru an award of special costs. Later in the Costs Reasons, and in relation to a different issue, the trial judge referred to one of these 14 alleged forms of wrongdoing. Does this suggest, looking at the Costs Reasons as a whole, that she accepted that single form of wrongdoing but not any of the other assertions?

[19] Recently, in *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29, Justice Fenlon, in relation to the issue of sufficiency of reasons generally, said:

[7] The sole issue on appeal is whether the trial judge's reasons addressing the estoppel defence are sufficient to permit appellate review. The test for sufficiency of reasons is set out in *K.L.K. v. E.J.G.K.*, 2011 BCCA 276:

[25] The function of reasons in the civil context is to justify and explain the result, to tell the losing party why he or she lost, to provide for informed consideration of the grounds of appeal, and to satisfy the public that justice has been done: *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41.

A failure to give adequate reasons is not a free-standing basis for appeal. Nor can an appellate court intervene merely because it believes the trial judge did a poor job of expressing himself: *F.H. v. McDougall*, 2008 SCC 53 at para. 99.

- [8] In *R. v. Walker*, 2008 SCC 34, Binnie J. described the approach to be taken by an appellate court assessing the sufficiency of reasons this way:
- [20] Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue. The duty to give reasons "should be given a functional and purposeful interpretation" and the failure to live up to the duty does not provide "a free-standing right of appeal" or "in itself confere[r] entitlement to appellate intervention" (*R. v. Sheppard*, 2002 SCC 26] para. 53).
- [9] Finally, as this Court observed in *Shannon v. Shannon*, 2011 BCCA 397, a decision should not be set aside if the record permits meaningful appellate review:
- [9] It is now settled law that there is no free-standing right of appeal on the adequacy or sufficiency of a judge's reasons. Moreover, even where the logical connection between the evidence and the decision cannot be discerned (i.e., the reasons are objectively inadequate), appellate intervention will not be justified if the record itself permits meaningful appellate review. This is evident from the comments of Mr. Justice Bastarache and Madam Justice Abella, for the majority of a five-judge panel in *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621:
- [13] ... Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court [in *Sheppard*] concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required. [Emphasis added.]
- [20] Furthermore, the legal standard to interfere with a discretionary order, in circumstances where there is an assertion that the reasons are inadequate, is very high. In *E.T. v. K.H.T.* (1996), 27 B.C.L.R. (3d) 347 (C.A.), Justice Lambert, dissenting in the result, said:
- [29] The law is not in dispute. When an order is made without a statement of specific reasons, the order will not be set aside simply because of the absence of reasons. Before such an order will be set aside there must be a rational basis for concluding that the order was made under an error by the judge in appreciation of a relevant issue or in appreciation of the evidence. See *Macdonald v. R.*, [1977] 2 S.C.R. 665 at 673, and *Bond v. Dupras* (9 October 1996), Vancouver CA020079 (B.C. C.A.) at para. 22. Where the order under review is made in the exercise of a judicial discretion and in the absence of reasons the test for setting aside the order must be that no judge acting judicially could, in the circumstances, have made the order that was made.

[Emphasis added.]

See also *White v. Nuraney*, 2000 BCCA 675 at paras. 9-11.

- [21] In *Price v. Robson*, 2017 BCCA 419 (Chambers), Justice Fitch, in the context of an application for leave to appeal a special costs order, said:
- [53] Obviously, the discretion [to award costs] must be exercised judicially, which is to say not arbitrarily or capriciously. While the trial judge is not required to itemize in detail the many factors that may have been taken into account in making a costs award, appellate intervention may be required where the reasons do not reveal the foundation upon which the trial judge exercised his or her discretion: *White v. Nuraney*, 2000 BCCA 675 at para. 10.
- [22] *Ecobase* confirms that a trial judge's reasons for judgment will not be insufficient if the "record itself permits meaningful appellate review". *E.T.* confirms that the question is whether a judge "acting judicially could, in the circumstances, have made the order that was made." In this case, the record that underlies each party's assertions of wrongdoing is not before the court. Furthermore, it is not clear what the "circumstances before the court," in relation to a special costs order, were. The reasons of the trial judge provide no meaningful explanation for the result she arrived at.
- [23] I do not say that it was necessary for the trial judge to address each of the considerations that Mr. Gichuru relied on in his submissions, or each of the considerations that were raised on behalf of Ms. Purewal. That would be unrealistic. It was, however, necessary for the trial judge to explain or develop her reasoning to a sufficient degree that the parties and this Court, having regard to the record before it, are able to understand that reasoning. Absent that level of content and reasoning, it is not possible to discern if the trial judge acted on a principled basis.
- b) Pre-litigation Conduct
- [24] The second issue raised by Mr. Gichuru pertains to the second sentence of para. 10 of the Costs Reasons. In that sentence, the trial judge said that "throughout the events that gave rise to this litigation, Mr. Gichuru was well aware of his rights and fully engaged in exercising those rights." Mr. Gichuru argues this indicates that the trial judge improperly relied on and addressed events that pre-dated the litigation itself. Counsel for Ms. Purewal did not disagree with that assertion.
- [25] In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, this Court said:
- [134] In the result, I am of the view that a bright line can and should be drawn so that judges will be able to exercise their discretion in like cases in a like manner. Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate. There are other suitable mechanisms to censure pre-litigation conduct.

[26] This bright line rule is equally applicable when considering whether an applicant's pre-litigation conduct should disentitle them to a special costs award. To the extent the trial judge appears to have been influenced or informed by Mr. Gichuru's pre-litigation conduct, this reflects an error in principle.

c) Reliance on an Irrelevant Consideration

[27] The third reason that Mr. Gichuru argues the trial judge erred arises from the second and third sentences at para. 10 of the Costs Reasons. It is here that the trial judge said that Mr. Gichuru "was well aware of his rights and fully engaged in exercising those rights" and where she described him "as a professional litigant." Later in her reasons she explained that in describing Mr. Gichuru as a "professional litigant" she meant that "he is legally trained and has experience with all aspects of court procedure".

[28] Respectfully, the fact that Mr. Gichuru commences proceedings before various tribunals and the courts with remarkable frequency is not, on a principled basis, a reason to deny him special costs if such an award is, in a particular case, otherwise warranted. Special costs are a means by which courts express their condemnation or censure of a litigant's reprehensible behaviour during the course of the proceeding. If the nature of Mr. Purewal's litigation conduct warranted special costs, and if Mr. Gichuru's litigation conduct did not disentitle him from such special costs, then the fact that Mr. Gichuru is legally trained or has experience with all aspects of court procedure was not relevant to the specific enquiry before the court, and it reflects a form of impermissible reasoning.

[29] I would, accordingly, allow this first ground of appeal and set aside para. 1 of the costs order. Unfortunately, for the reasons that I have described, this Court lacks the findings and foundation that might allow it to address Mr. Gichuru's special costs application rather than remit it to the trial judge.

ii) The Trial Judge Improperly Reduced Mr. Gichuru's Costs Award

[30] In the Trial Reasons, the judge had awarded "Mr. Gichuru costs at Schedule B." Ms. Purewal had delivered two formal offers to settle to Mr. Gichuru. Those offers to settle are particularly relevant to the ground of appeal that is raised by Ms. Purewal, and I will return to them. For present purposes, however, it is relevant that the second offer to settle was in the amount of \$8000.

[31] In the Costs Reasons, the trial judge said:

[17] I note that the second offer of \$8,000 was only slightly less than the total \$10,000 awarded at trial.

- [18] I have considered the submissions of the defendant and the conduct of Mr. Gichuru, and the defendant for that matter, throughout this litigation. I note that although Mr. Gichuru was a professional litigant in the sense that he is legally trained and has experience with all aspects of court procedure, I accept the submission of the defendant that he appeared at trial at times unprepared and it was necessary to adjourn the proceedings in order to give him additional time to prepare. The result was that the trial took longer than it needed.
- [19] While I cannot say that Mr. Gichuru should have accepted the second offer, having considered that offer and given how close that offer was to the final award at trial and the totality of the circumstances here, including Mr. Gichuru's lack of preparation at trial, I have determined that I should exercise my discretion and reduce the costs at Scale B award by 50 percent only after the date of the second offer of the formal offer to settle. That is August 22, 2018.
- [20] Accordingly, Mr. Gichuru is entitled to costs at Scale B up until that date and 50 percent of his costs at Scale B from August 22, 2018. I confirm that this order relates to items that are not otherwise subject to an order in this proceeding.
- [32] The trial judge may have misspoken when she noted "that the second offer of \$8,000 was only slightly less than the total \$10,000 awarded at trial." That potential misapprehension, however, has no immediate relevance to this ground of appeal.
- [33] Instead, Mr. Gichuru argues, and I accept, that the trial judge appears to have conflated the considerations that are relevant to weighing whether an offer to settle should have been accepted under Rule 9-1 of the Supreme Court Civil Rules and the jurisdiction of a trial judge to reduce an award of costs that might otherwise be made.
- [34] In the context of this particular issue, the trial judge concluded that the second offer to settle made by Ms. Purewal was less, though "only slightly less", than the amount awarded at trial. She concluded that she could not say that "Mr. Gichuru should have accepted the second offer".
- [35] She then appears to have concluded that the fact the second offer to settle was "close to the final award at trial" was one basis on which she could reduce the costs award that Mr. Gichuru would otherwise have been entitled to. This is incorrect. There is no principled basis to punish a successful plaintiff in costs--whether by reducing the costs award the plaintiff otherwise would have received or by ordering costs in favour of the defendant--where the formal offer the plaintiff rejected was less than the amount they were awarded at trial: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 36; *Kovac v. Moscone*, 2014 BCSC 259 at paras. 21-24. This is true even where the offer to settle was "only slightly less" than the trial judgment: see *Pepin v. Telecommunications Workers Union*, 2016 BCSC 2077 at para. 16.

- [36] Rule 9-1 serves the salutary purpose of promoting reasonable settlements by rewarding a party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25; Cottrill at para. 27. At the same time, this Court, in the context of double costs orders under Rule 9-1, has expressed a concern that litigants not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs: see *Giles* at para. 88. That same concern would be engaged if litigants faced the risk of having the costs awards that they might otherwise be entitled to reduced because they had failed to accept an offer that was "only slightly less" than the amount they were awarded at trial.
- [37] A further concern arises with this aspect of the Costs Reasons. The trial judge commented that it had been "necessary to adjourn the proceedings in order to give [Mr. Gichuru] additional time to prepare." On appeal Mr. Gichuru advised the Court that the only instance on which this occurred was on the last day of trial when he requested a 15-minute adjournment so that he could have his book of authorities bound. Counsel for Ms. Purewal did not disagree with this, though I note that the issue of a lack of preparedness or delay was one of the 14 grounds that I referred to earlier and was one basis on which it was argued that Mr. Gichuru should be denied his costs of the action. If this was, in fact, the only time that Mr. Gichuru delayed the orderly progress of the trial--and there is no means to determine this on the record before us--this would be a curious basis on which to reduce the costs award that was made in his favour.
- [38] Still further, the trial judge reduced Mr. Gichuru's costs award by 50% but "only after the date of the second offer of the formal offer to settle." Once again, this suggests that the trial judge conflated the orders that might be made under Rule 9-1 with a reduction of Mr. Gichuru's costs award that was based on his having delayed the trial. There is no apparent relationship between the various cost options that are available under Rule 9-1(5) after an offer to settle is made by a defendant and reducing the costs a plaintiff would otherwise be entitled to on account of that plaintiff's conduct during the litigation. Such conduct would normally, if at all, be a consideration for special costs, apportioning costs under Rule 14-1(15)(b)-(c) for particular parts of a proceeding, or depriving a party of costs or ordering costs against a party related to a particular act or omission under Rule 14-1(14). Certainly the trial judge did not explain the relationship between the second offer to settle and Mr. Gichuru's conduct at trial in the award that she made.
- [39] I consider that this segment of the Costs Reasons reflects different errors in principle. I would set aside para. 2 of the costs order and remit the determination of Mr. Gichuru's entitlement to party and party costs, subject to the reconsideration of his entitlement to special costs, to the trial judge.

B. The Issue Raised by Ms. Purewal - The Trial Judge Misapprehended the Evidence

[40] This third issue is raised by Ms. Purewal and is directly related to the formal offers to settle that she made under Rule 9-1. The first offer to settle (the "First Offer"), dated June 15, 2018, provided:

Dear Mr. Gichuru,

Re: Gichuru v Purewal and Purewal, Supreme Court File #S-167828

I am instructed to make the following offer as full and final settlement of the above-noted matter:

1. The defendant, Sukhbir Purewal, will pay you \$5,000.00,
2. The costs orders that have been made in any event of the cause in favour of both you and Ms. Purewal (including at the Supreme Court and Court of Appeal levels), to the date of acceptance of this offer, shall remain due and owing as assessed or agreed, and
3. No other costs shall be owed by either party to the other.

This offer shall remain open for acceptance until 4pm on Friday, July 6, 2018.

Pursuant to Rule 9-1 of the Supreme Court Civil Rules, the defendant, Sukhbir Purewal, 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.

[41] The second offer to settle (the "Second Offer"), dated August 22, 2018, provided:

Dear Mr. Gichuru,

Re: Gichuru v Purewal and Purewal, Supreme Court File #S-167828

I am instructed to make the following offer as full and final settlement of the above-noted matter:

1. The defendant, Sukhbir Purewal, will pay you \$8,000.00,
2. The costs orders that have been made in any event of the cause in favour of both you and Ms. Purewal, to the date of acceptance of this offer, shall remain due and owing as assessed or agreed, and
3. No other costs shall be owed by either party to the other.

This offer shall remain open for acceptance until 4pm on Wednesday, September 5, 2018.

Pursuant to Rule 9-1 of the Supreme Court Civil Rules, the defendant, Sukhbir Purewal, 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.

[42] In the Costs Reasons, the trial judge said:

[13] In my trial judgment, I awarded the plaintiff Mr. Gichuru costs at Scale B. The defendant, Sukhbir Purewal, says that the plaintiff should be deprived of his costs beginning June 6, 2019, as a result of formal offers to settle that were made in this matter and which the court was unaware of. This aspect of the analysis engages Rule 9-1 of the Rules of Court.

[15] In this case, Sukhbir Purewal delivered three formal offers to settle in accordance with Rule 9-1 and alleges that the plaintiff did not respond to any of the offers to settle. The defendant argues that two of those formal offers to settle are relevant on the costs submission. The first relevant offer was dated June 15, 2018, [and] was delivered by email. The terms were as follows:

- that Ms. Purewal would pay the sum of \$5,000 to Mr. Gichuru;
- costs orders that had been made in any event of the cause in favour of either party would remain due as assess[ed] or agreed; and
- no further costs orders would be owed by either party to the other.

[16] The second relevant offer was dated August 22, 2018. It was delivered again by email to Mr. Gichuru's email address for service. The terms of the second offer were as follows:

- Mr. Purewal would pay the sum of \$8,000 to Mr. Gichuru;
- costs orders that had been made in any event of the cause in favour of either party would remain due as assess[ed] or agreed; and
- no further costs would be owed by either party to the other.

[43] These paragraphs were then followed by paras. 17-20, which I have referred to earlier at para. 31 of these reasons. At that point, counsel for Ms. Purewal sought some clarification on an aspect of the Costs Reasons and had a brief exchange with the trial judge.

[44] Following that exchange the trial judge said:

[21] THE COURT: Well, I am of the view that the \$8,000 is so close to the \$5,000, in any event. I cannot say that it should have been accepted. In the entirety of the circumstances, given my findings on vicarious liability with respect to the first head of damages, my decision, as outlined today, remains unchanged.

[22] So that is costs at Scale B up until August 22, 2018, and costs at half of Scale B from August 22, 2018.

[45] In order to understand the foundation of Ms. Purewal's appeal, it is necessary to return to aspects of the trial judge's conclusions in the Trial Reasons. Specifically, it is important to recall that the trial judge awarded Mr. Gichuru \$5000 in general damages and that she made Ms. Purewal and Mr. Purewal jointly and severally liable for such damages. She also awarded Mr. Gichuru \$5000 in punitive damages. This award, however, was made against Mr. Purewal. The trial judge expressly declined to award punitive damages against Ms. Purewal.

She expressly declined to make Ms. Purewal vicariously liable for the punitive damages.

- [46] Accordingly, the issue that counsel for Ms. Purewal raised before the trial judge by way of clarification, and the issue that is raised on appeal, is that the second offer of \$8000 actually exceeded the \$5000 award that was made against Ms. Purewal at trial. The trial judge had, however, earlier said that "the second offer of \$8,000 was only slightly less than the total \$10,000 awarded at trial."
- [47] Ms. Purewal raises several interrelated arguments. She argues that the trial judge's costs order was based on her misapprehension that Ms. Purewal offered less, in the Second Offer, than Mr. Gichuru was awarded at trial and that her discretion under Rule 9-1(5) was exercised in light of that misapprehension. She further argues the trial judge necessarily relied on that same misapprehension when weighing the factors in Rule 9-1(6). Finally, she argues that when the trial judge's error was brought to her attention, she maintained the correctness of her decision without any apparent reconsideration or reweighing of the factors described in Rule 9-1(6). She argues that she should have received her costs of the action following the First Offer (for \$5000) and certainly following the Second Offer (for \$8000).
- [48] Mr. Gichuru, in turn, argues that it is not clear from the terms of the First and Second Offers that they contemplated a release of Ms. Purewal alone, as opposed to a release of both Ms. Purewal and her son. Specifically, both the First and the Second Offer purport to be an offer made in "full and final settlement of the above-noted matter". Second, Mr. Gichuru argues that the Second Offer did not include costs of the action. He argues that the \$5000 award made against Ms. Purewal, together with costs of the action, would, in any event, exceed the \$8000 offer in the Second Offer.
- [49] It is clear from the transcript of the exchange between the trial judge and counsel for Ms. Purewal, which followed the trial judge providing the Costs Reasons through to para. 20, that the trial judge had proceeded on a misapprehension of fact. In particular, she had mistakenly believed that Ms. Purewal and Mr. Purewal were jointly and severally liable for the whole of the \$10,000 award she had made rather than for just \$5000 of that amount.
- [50] Following this exchange, Mr. Gichuru then interjected and identified, as he had in his written submissions, that the Second Offer required him to "settle the entire matter".
- [51] It was necessary for the trial judge to address these issues to some extent. If she concluded that the First and Second Offers required Mr. Gichuru to "settle the entire matter", and that they were not offers made solely on behalf of Ms. Purewal, the issues raised by Ms. Purewal, by way of "clarification", were immaterial. It was for this reason that I earlier said the trial judge "may have misspoken" when she said that "the second offer of \$8,000 was only slightly less than the \$10,000 awarded at trial." If the First and Second Offers, properly construed, required Mr. Gichuru to settle the "entire matter", and not just the action against Ms. Purewal, that statement, though based on a misapprehension, would remain accurate.

- [52] Furthermore, and in a similar vein, the trial judge should have addressed whether the award made to Mr. Gichuru, even if limited to the \$5000 amount against Ms. Purewal, together with his costs of the action, exceeded the Second Offer: see Cottrill at paras. 33, 36; see also e.g., *Wong-Lai v. Ong*, 2012 BCSC 1569 at para. 51; *Alvaro v. InsureBC (Lee & Porter) Insurance Services Inc.*, 2020 BCSC 153 at paras. 44, 50. If so, the issues raised by Ms. Purewal were, again, potentially immaterial.
- [53] Conversely, if the Second Offer was made on behalf of Ms. Purewal alone and if the Second Offer exceeded the amount awarded to Mr. Gichuru when including a consideration of costs, it was necessary for the trial judge to revisit and address Rule 9-1(6).
- [54] Rule 9-1(6) provides:
- (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.
- [55] Ms. Purewal argues, as I have said, that the trial judge failed to reconsider or reweigh the various factors identified in Rule 9-1(6). These various factors are not mandatory. In *Bains*, the Court said:
- [33] While the judicial discretion provided by Rule 9-1 is broad, it must, of course, be exercised judicially and in a principled manner: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at paras. 73, 88. In assessing the costs options under Rule 9-1(5), the court may consider the factors in Rule 9-1(6), although these factors are not mandatory: *Giles* at para. 88.
- [42] The second enumerated factor for consideration in Rule 9-1(6) concerns the reasonableness of the offer itself, assessed against the objective measurement of the trial award: *C.P.* at para. 99. This Court has held that "a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer": *Wafler* at para. 81. However, it is open to the trial judge to determine how much weight, if any, to place on this factor: *British Columbia v. Salt Spring Ventures Incorporated*, 2015 BCCA 343 at para. 20; *Wafler* at para. 82; and *Smagh* at para. 13. As I have noted, none of the factors in Rule 9-1(6) are mandatory: *Giles* at para. 88.
- [56] Nevertheless, it was necessary for the trial judge to address those factors within Rule 9-1(6) that she considered pertinent and to explain, however concisely, her conclusions.

- [57] In her concluding statement, the trial judge said: "I am of the view that the \$8,000 is so close to the \$5,000, in any event. I cannot say that it should have been accepted." This conclusion is problematic. It appears to be directed towards Rule 9-1(6)(a), that being a consideration of "whether the offer to settle was one that ought reasonably to have been accepted". The usual considerations relating to this factor are matters such as the relationship of the offer to the amount claimed, the amount of time given to consider the offer, the complexity of the action, and other similar considerations. None of these matters were addressed by the trial judge.
- [58] At the same time, Rule 9-1(6)(a) does not permit any hindsight analysis: Bains at para. 34; Cottrill at para. 29; Hartshorne at para. 27. The trial judge's conclusion, on its face, appears to engage in such hindsight analysis. The relationship between the \$8000 offer and the \$5000 award would appropriately be a consideration under Rule 9-1(6)(b), but it is unclear if the trial judge appreciated the different considerations under these factors.
- [59] Furthermore, the trial judge concluded, "[i]n the entirety of the circumstances, given my findings on vicarious liability with respect to the first head of damages, my decision, as outlined today, remains unchanged." Rule 9-1(6)(d) permits a court to consider "any other factor the court considers appropriate." It is not clear, however, what the trial judge meant when she said "in the entirety of the circumstances". It is also unclear how the trial judge's "finding on vicarious liability with respect to the first head of damages" informs and supports her costs award. On its face, the finding that Ms. Purewal was not vicariously liable for the punitive damages award made against her son ought, under Rule 9-1(6), to have worked in her favour, rather than against her.
- [60] On account of the foregoing considerations, and in recognition of the interrelationship between the Scale B costs order made in favour of Mr. Gichuru and the issues raised by Ms. Purewal, I would remit these further issues to the trial judge for her reconsideration.
- [61] For the foregoing reasons, I would allow both appeals, set aside the costs order, and remit each issue to the trial judge for reconsideration. To be clear, I consider that the question of Mr. Gichuru's entitlement, if any, to either special costs or party and party costs, and the question of Ms. Purewal's entitlement, if any, to costs under Rule 9-1, should all be remitted to the trial judge.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

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Prepared on 26 October 2026 · Esheria