

CANADA / JUDGMENT

Kaban Resources Inc. v. Goldcorp Inc.

2020 BCSC 1982

COURT

Supreme Court of British Columbia

DECIDED

15 December 2020

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2020 BCSC 1982 Kaban Resources Inc. v. Goldcorp Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kaban Resources Inc. v. Goldcorp Inc.,

2020 BCSC 1982

Date: 20201215

Docket: S165822

Registry: Vancouver

Between:

Kaban Resources Inc.

Plaintiff

And

Goldcorp Inc., Goldcorp Holdings (Barbados) Ltd., and Guatemala Holdings (Barbados) Limited.

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for Plaintiff:

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M. Lam

A. Cocks

Written Submissions Received:

Vancouver, B.C.

October 13, November 26 and

December 1, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 15, 2020

[1] The defendants apply for an order of double costs, under Rule 9-1(5)(b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. They apply for such costs after the date of delivery of an offer to settle to the plaintiff, Kaban Resources Inc. ("Kaban"), made August 21, 2020 (the "Offer to Settle"). Judgment was granted on September 4, 2020 dismissing the plaintiff's claim.

Background

[2] The parties contacted the court, through the Registry, and asked that this application be dealt with in writing. I agreed to that and a schedule for the exchange of written submissions was established. The parties did not, however, file any application materials or formal record in connection with the application. Instead, the submissions of counsel for the defendants included a written description of the relevant interactions between the parties. Counsel also indicated that she would prepare an affidavit with this information if necessary. The responding submissions of counsel for Kaban did not raise any concern in relation to this written history or the manner in which it was tendered to the Court. I have, accordingly, relied on the history I was provided in circumstances where I might normally, at least in part, expect more formal materials.

[3] The following summary is excerpted from the defendants' submissions:

2. The relevant procedural history is as follows: The plaintiff filed a notice of civil claim on June 24, 2016. On November 8, 2016, the defendants file an application for security costs. The application confirmed that the defendants anticipated incurring expert fees on the issue of damages valuation in the amount of approximately \$150,000. The plaintiff opposed the application. On November 15, 2016, the plaintiff delivered a letter from counsel to the defendants' confirming the plaintiff's intention "to prosecute this action quickly and efficiently by way of summary judgment or summary trial", and in late November 2016,

delivered a notice of application for severance of liability from damages. On December 2, 2016, Master Scarth ordered the plaintiff to pay \$60,000 into court as security for costs.

3. On April 8, 2019, the plaintiff filed a notice requiring trial by jury and a notice of trial for 30 days commencing October 26, 2020. In March 2020, the defendants advised the plaintiff they wished to schedule a summary trial on the issue of liability. Later in March 2020, as a result of COVID-19, the B.C. Supreme Court suspended its regular operations. Once the court began accepting long Chambers bookings again in June 2020, the parties secured a two day summary trial for August 4-5, 2020. On August 4, 2020, the plaintiff delivered a 101-page expert report from Spencer Cotton of BDO Canada on the issue of valuation of damages. On August 4-6, 2020, the summary trial took place before Mr. Justice Voith.
 4. On August 21, 2020, the defendants delivered a formal offer to settle under Rule 9-1: the plaintiff would dismiss the action and the plaintiff and defendants would split equally the \$60,000 paid into court as security for costs (the "Offer"). The plaintiff was aware that the defendants continued to incur fees and disbursements, including those associated with a rebuttal expert. The plaintiff did not respond to the Offer. On the same day, the defendants requested an extension of time to deliver the rebuttal expert report. The plaintiff rejected the request. On September 4, 2020, Mr. Justice Voith issued reasons for judgment dismissing the action and ordering costs of the action to the defendants (the "Judgment").
- [4] The Judgment that is referred to in the last sentence of the foregoing chronology is indexed at 2020 BCSC 1307 ("Reasons").
- [5] The Offer to Settle provided:

The defendants are confident that Mr. Justice Voith will dismiss this case and order costs against Kaban. The amount of the costs award will increase significantly as the defendants continue to incur fees and disbursements, including those associated with rebuttal experts. Accordingly, we have instructions to offer to settle this action on the following terms:

- The plaintiff and defendants agree to split equally the \$60,000 paid into court as security for costs, with \$30,000 to the plaintiff and \$30,000 to the defendants, and that no other costs will be payable by any party;
- The parties will execute a mutual release on terms acceptable to counsel; and
- A consent dismissal order will be entered without costs to any party.

This offer is open for acceptance until 5:00 PT on August 26, 2020 at which time it is revoked.

The defendants reserve the right to bring this offer to the attention of the court for consideration in relation to costs after this court has pronounced judgment on all other issues in this proceedings.

The Relevant Legal Framework

[6] Rule 9-1(5) provides:

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
 - (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
 - (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[7] Rule 9-1(6) provides the court with various considerations that are relevant to making an order under subrule (5) and provides:

Considerations of court

- (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.
- [8] Various types of costs orders are intended to either address or promote various types of litigation behaviour. For example, an order of special costs is an exceptional order that is usually made to address forms of conduct, arising in the course of litigation, that are worthy of rebuke and sanction: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57.
- [9] The case law pertaining to Rule 9-1 is well-established. An order for 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", and Rule 9-1 seeks 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": *Hartshorne v.*

Hartshorne, 2011 BCCA 29 at para. 25. See also *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30 at paras. 94-95; *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 27.

Analysis

- [10] Kaban initially made two primary submissions in opposing the order that the defendants seek. First, it argued that the Offer to Settle is in the nature of a "negative" offer in that it required Kaban to pay money to the defendants. Second, it argued that the Offer to Settle was delivered several weeks after I heard the summary judgment application that the defendants had brought. As such, it was inconsistent with the object of Rule 9-1 and its underlying purpose of promoting reasonable settlements.
- [11] In reviewing the submissions of the parties it became apparent that the entire amount in respect of which the defendants seek "double costs" is, in fact, a disbursement in the amount of \$8,482.19 for expert fees. I therefore contacted counsel through the Registry, and asked for further submissions on whether Rule 9-1(5)(b) allows for an award of double disbursements. These reasons address this third issue as well.
- i) The "negative" nature of the Offer to Settle
- [12] This aspect of Kaban's submission is based on the fact that the Offer to Settle contemplated that the parties would "split equally the \$60,000 paid into court as security for costs". This, it is argued, is in the nature of a requirement that the "plaintiff must pay money to the defendants". Kaban argues that such an offer is not one which, under Rule 9-1(6)(a), "ought reasonably to have been accepted", in that it provided no real incentive to settle.
- [13] The relevant authorities are generally consistent on the considerations that inform whether an offer to settle ought reasonably have been accepted. In *McLachlin & Taylor*, *British Columbia Practice*, 3d ed, loose-leaf (consulted on December 11, 2020), (Markham: LexisNexis, 2006) at 9-16.27, the authors state: "In assessing whether an offer ought reasonably to have been accepted, the court often looks to whether the offer provided a genuine incentive to settle, or whether it was a 'nuisance' offer that could not have provided [a] real incentive given the issues for determination and the amounts at stake. Such assessment depends on how the recipient of the offer would have viewed it in light of the knowledge they had at the time the offer was made."
- [14] The Court of Appeal in *Giles v. Westminster Savings Credit Union*, 2010 BCCA 282 said:
- [88] I appreciate there are no mandatory factors under Rule 37B(6) and that trial judges have discretion to take into account whatever factors they consider appropriate in a given case. However, the ultimate discretion as to double costs must be exercised in a just, principled, and consistent way. One of the goals of Rule 37B is to promote settlement by imposing consequences on parties who have refused to accept an offer that ought reasonably to have

been accepted. While it may not invariably be the case, I consider that it would be generally antithetical to that goal to penalize an unsuccessful plaintiff with double costs for proceeding to trial in the face of an unreasonable offer. Virtually all litigation comes with a degree of risk. When faced with settlement offers, plaintiffs must carefully consider their positions. However, they should not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to "beat" that offer. Put somewhat differently, plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances. In this case, the Credit Union and Mr. Thomas have not pointed to anything that would support a finding that the plaintiffs' decision to refuse their offer was, at the time of the refusal, an unreasonable one.

- [15] There is no suggestion that there is anything in the express language of Rule 9-1, and Rule 9-1(6) in particular, that prevents a party from agreeing to settle an action on the basis that the other party agrees to pay some portion of the costs it has incurred. I was referred to no authority in support of this proposition. Finally, there is no reason, as a matter of principle, that such an offer should fall outside of the purview of Rule 9-1.
- [16] The underlying question is whether an offer to settle is reasonable and whether, in the circumstances, it provides a genuine incentive to settle. Those questions, in turn, are related to the merits of the case being advanced and the amounts in issue. This necessarily includes the litigation costs that attend the ongoing conduct or defence of an action.
- [17] In complex litigation, the costs and disbursements that the parties incur can be significant. If such litigation is without merit, or of little merit, and if one of the parties has incurred significant costs and disbursements, there is no reason in principle why the only offer it is able or permitted to make, under Rule 9-1, is one where it agrees to abandon, or to walk away from, such costs and to offer some payment--however modest that may be.
- [18] To the extent that the object of Rule 9-1 is the promotion of reasonable settlements, an offer based on one party's willingness to forsake a part of its considerable costs may well, in all of the circumstances, be reasonable. These considerations, based on the earlier background to the offer to settle that I referred to, appear to have been engaged. The defendants had incurred significant costs and were facing the prospect of incurring further costs. Their submissions indicate that they delivered a bill of costs, inclusive of disbursements, to Kaban for \$232,333.33. The Offer to Settle proposed a settlement for less than 15% of this amount. Had the matter proceeded to a full trial, their costs would have been markedly higher. The earlier chronology I referred to indicated the trial of this action had been set for six weeks, though I was told during the summary trial application that likely less than this time estimate would be necessary: Reasons at para. 37.

- [19] I have said that one aspect of whether an offer to settle is reasonable is the underlying merit of the action in issue. Kaban did not address this issue in its submissions but it is nevertheless necessary, under Rule 9-1(6)(a), that I do so. Having said that, Kaban has appealed the Reasons and an extensive assessment of the merits of its claim would not be appropriate.
- [20] The merit of a claim is not to be determined with hindsight taking into account the ultimate judgment of the Court: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24; *Bains v. Antle*, 2019 BCCA 383 at para. 34. In this case, the parties had exchanged documents, conducted discoveries, conducted a summary trial on the basis of extensive written argument, and were within perhaps six weeks of a lengthy trial when the Offer to Settle was delivered. They were represented by able and experienced counsel. The fact that the parties agreed that Kaban's claim could be addressed by means of a summary trial indicates that each party's assessment of the central issues had crystallized.
- [21] Kaban's claim faced numerous difficulties. These difficulties were identified, at length, by the defendants during the course of the summary trial. The Offer to Settle was delivered approximately two weeks before the Reasons were issued.
- [22] Further relevant factors in determining the reasonableness of the Offer to Settle include the timing of the offer, whether it had some relationship to the claim, whether it could be easily evaluated, and whether some rationale for the offer was provided: *Hartshorne* at para. 27. Each of these considerations is addressed and satisfied by the terms of the Offer to Settle.
- ii) The Offer to Settle was made after the summary trial
- [23] In relation to the second issue, Kaban argues the Offer to Settle was made after the summary trial application and, as such, it could not serve to promote a reasonable settlement. Instead, it is argued, the Offer to Settle was really directed to the prospect of an appeal and a desire to stifle such an appeal. Still further, it is argued that parties should not be cowed into foregoing an appeal by unreasonable offers.
- [24] The timing of the Offer to Settle is important. It followed on the heels of the summary trial application, but it preceded the scheduled trial of the matter. Indeed, at the summary trial application, I was asked to provide my reasons for judgment as promptly as reasonably possible so that the parties would not, in the event I dismissed the application, incur unnecessary costs in preparing for trial.
- [25] It cannot be said that the Offer to Settle was directed towards an appeal, or to stifling an appeal, in circumstances where that offer was made prior to the Reasons being issued and where both parties were preparing for a formal trial.
- [26] Furthermore, I do not consider that the fact that the Offer to Settle was made after the summary trial application is relevant to that offer. By virtue of Rule 9-1(5), the cost consequences of the Offer to Settle only became effective after the offer was delivered. It was not directed towards a settlement of the summary trial application. Rather, it was directed

towards a settlement of the imminent formal or conventional trial of the action. This is patent from the language of the Offer to Settle itself. Furthermore, the effect of the double costs award that the defendants seek is limited to the disbursements they incurred between August 21, 2020, when the Offer to Settle was made, and September 4, 2020, when I issued the Reasons.

- [27] One other point is relevant. There are numerous means by which a party can, under the Rules, seek to address the difficulties in another party's claim or defence. A party can, for example, seek to strike pleadings or determine a matter on a point of law or bring a summary judgment or summary trial application. These various applications may or may not be successful. There is nothing in Rule 9-1 that prevents a party from making a formal offer to settle under that Rule after any such application.
- [28] In saying this, I am mindful that summary trial is different from other applications in that it is itself in the nature a trial: *Creyke v. Creyke*, 2016 BCCA 499 at para. 43. Such an offer to settle would not be directed to the summary trial application, but it might still, in appropriate circumstances, serve the salutary purpose of fostering a reasonable settlement of the action.

iii) Does Rule 9-1(5)(b) allow for an award of double disbursements?

- [29] The resolution of this issue is complicated by both the language of Rule 9-1(5) and some inconsistency in the relevant case law. The specific difficulty is that Rule 9-1(5)(b), which provides for the specific cost option of double costs within Rule 9-1, includes the word "costs," but it does not include the word "disbursements." Conversely, Rule 9-1(5)(a), which deals with a different cost option, does expressly referred to both "costs" and "disbursements." Normally, as a matter of legislative interpretation, that distinction would be expected to have some significance.
- [30] In *Moore v. Kyba*, 2012 BCSC 577, the plaintiff sought an award of double costs after an offer to settle had been delivered to the defendant. Justice Brown awarded double tariff costs, but she concluded that no award of double disbursements could be made because Rule 9-1(5)(b) did not expressly refer to "disbursements": at paras. 6-8.
- [31] In *Gonzales v. Voskakis*, 2013 BCSC 675, the defendant had delivered an offer to settle that was higher than the amount awarded at trial. The defendant did not, however, seek double costs. Instead he argued that an appropriate award of costs would have the plaintiff receive her costs up to the date of the offer and that he be awarded his costs after that date in accordance with Rule 9-1(5)(a) and (d): at para. 11. The plaintiff argued that Rule 9-1(5)(d) did not permit the Court to include disbursements in an order for costs: at para. 57. The plaintiff relied primarily on the reasoning in *Moore* in advancing this submission.
- [32] Justice Fitzpatrick, at paras. 59-64, relied on a number of authorities which concluded that the word "costs" encompasses both fees and disbursements. She referred to *Moore* but did not consider that she was bound by that decision because some of the authorities she relied

on, in support of her decision, did not appear to have been placed before Brown J.: at para. 66. She acknowledged that "the wording of Rule 9-1(5), in its reference to 'disbursements' in subcategory (a) without an accompanying reference to 'disbursements' in subcategory (d), is awkward and confounding": at para. 67.

- [33] In *Lafond v. Mandair*, 2017 BCSC 1081, the plaintiff had made an offer to settle. At trial the plaintiff was awarded an amount in excess of the offer that he had made. The defendant agreed that the plaintiff was entitled to double costs for tariff items but did not accept that double disbursements were warranted or available. Justice Dley referred to both *Moore* and *Gonzalez*. He chose to rely on *Moore* because it was "directly on point" in that it dealt expressly with the issue of double disbursements under Rule 9-1(5)(b). Furthermore, Justice Dley addressed the meaning of the words "steps taken in the proceeding" that are found in Rule 9-1(5)(b). Relying on *Canadian National Railway Company v. Chiu*, 2014 BCSC 75 at para. 7, he concluded that a "step in the proceeding" was a formal step that moves the action forward and that "[i]ncurring a disbursement is not a formal step as contemplated by the Civil Rules": at paras. 14-15.
- [34] The defendants argue *Gonzalez* is binding and that it is not open to me to follow either *Moore* or *Lafond*. I do not consider that is so. The authorities that are relied on in *Gonzales* do establish that the word "costs" does, in the normal case, include the word "disbursements." The various decisions that have since referred to *Gonzalez* and that are relied on by the defendants in their submissions, such as *The Owners, Strata Plan KAS 2428 v. Baettig*, 2017 BCCA 377 at para. 74, simply endorse the general proposition that the ordinary meaning of the word "costs" includes both fees and disbursements.
- [35] The issue in this case is not, however, what the word "costs" means at large. Instead, the question is what that word means in the specific context of Rule 9-1(5) and Rule 9-1(5)(b). That issue necessarily engages both the language and the intended purpose of these provisions. There are several difficulties with the position being advanced by the defendants.
- [36] First, it suggests, as *Gonzalez* concluded, that the presence of both the words "costs" and "disbursements" in Rule 9-1(5)(a) while Rule 9-1(5)(b) only refers to "costs" is merely "awkward and confounding." But the reality is that this difference would be expected, as a matter of interpretation, to have significance. *Moore* recognizes that legislatures are an "idealized speaker" and that they "always say what they mean and mean what they say. They do not make mistakes." The legislature is also presumed to use language carefully and consistently and to avoid stylistic variation. It is expected that if the legislature intended "to include a particular thing in its legislation, it would have referred to that thing expressly", particularly where it has done so elsewhere in the legislation. See *Ruth Sullivan, Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 207, 217, 248, 251.

- [37] Second, Gonzalez does not address the meaning of the words "steps taken in the proceeding" that are found in Rule 9-1(5). Those words were addressed in *Canadian National Railway Co.* and in *Easton v. Cooper*, 2010 BCSC 1079. In *Easton*, the Court undertook a review of a number of authorities and ultimately concluded, at para. 13, that "within the 'Rules context', a 'step' means a formal step expressly permitted or required by the Rules." Lafond correctly concludes that a party that incurs a disbursement is not undertaking a "step in the proceeding".
- [38] Third, I have said that the object of Rule 9-1(5) is to promote reasonable settlements and to penalize parties that act unreasonably in rejecting a settlement. This object can be advanced by requiring an unreasonable party to pay double costs in the sense of double the usual tariff amounts. The usual tariff amounts yield a relatively modest level of recovery for litigants. Even double the tariff amounts associated with a trial are not normally expected to provide full indemnity for a successful litigant. Accordingly, Rule 9-1(5)(b) provides a significant incentive for litigants to act reasonably when they weigh the offers for settlement they are presented.
- [39] Awarding a party double the amount of the actual disbursements they have incurred achieves a different result. It gives that party a windfall. There is no form of costs award that seeks to or is expected to provide one party with a windfall. In *Gichuru v. Smith*, 2014 BCCA 414, the Court addressed various issues that can arise in an award of special costs. Special costs are typically, but not necessarily, awarded when there has been some form of reprehensible conduct on the part of one of the parties. Such orders can also arise under the terms of a statute, or a contract, or, for example, in estate litigation. Special costs are usually intended to indemnify a successful litigant, fully or at least substantially: at para. 91. Special costs are, however, meant to be an indemnity for the legal fees a party has incurred rather than to provide a windfall: at paras. 103, 155.
- [40] While an award of double costs is intended as a penalty, rather than as a form of enhanced indemnity, it would still be inappropriate to make a costs award where it is patent that that award would create a windfall for the successful party. Though an award of double costs is intended to incentivize litigants to act reasonably and to penalize unreasonable litigants, its object is not to bludgeon one of the parties.
- [41] One of the concerns that has been raised in the context of double costs awards is that such awards have the potential of intimidating litigants into accepting unreasonable offers to settle. In *Giles* at para. 88, the Court of Appeal noted that litigants "should not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to 'beat' that offer." The risk of a costs award that could potentially require a litigant to pay double the amount of the actual disbursements incurred by the other party would exacerbate this concern.

- [42] Two other practical matters arise. First, litigants will often have a good sense of what the other parties' tariff costs should be. They are able to assess their potential liability for a costs award if they are unsuccessful. It is much more difficult, however, to assess the disbursements, and in particular the expert fees, that an opposing party may have incurred. All such issues are components of the measured decisions that parties make when they undertake litigation and when they seek to settle that litigation.
- [43] Second, as a matter of practice, the Registrar does not award double disbursements when a double costs award is made.
- [44] For the foregoing reasons, I do not consider that Rule 9-1(5)(b) contemplates or allows a court to make an award of "double disbursements." If I am mistaken in this conclusion I would not, as a matter of discretion, award the defendants double the amount of the disbursement that they have incurred. Accordingly, the defendants' application is dismissed.

"Voith, J."

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