

CANADA / JUDGMENT

Maras v. Seemore Entertainment Ltd.

2014 BCSC 1842

COURT

Supreme Court of British Columbia

DECIDED

30 September 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCSC 1842 Maras v. Seemore Entertainment Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maras v. Seemore Entertainment Ltd.,

2014 BCSC 1842

Date: 20140930

Docket: S103330

Registry: Vancouver

Between:

Marinko Stipan Maras

Plaintiff

And

Seemore Entertainment Ltd., Sea to Sky Hospitality Inc.,

Joseph Mario Ghattas, Constantino Stefanopoulos, Wayne Litz,

Maxwell Yip and Christopher Childs

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment Regarding Costs

Counsel for Plaintiff:

James Vilvang, Q.C.

Counsel for Defendants:

Joseph Cahan

Place and Date of Hearing:

Vancouver, B.C.

August 22, 2014

Place and Date of Judgment:

Vancouver, B.C.

September 30, 2014

Table of Contents

I: INTRODUCTION. 3

II: THE SCALE OF COSTS FOR THE ACTION. 4

III: THE COSTS OF TWO COUNSEL. 7

IV: THE OFFERS TO SETTLE AND DOUBLE COSTS. 8

A: Introduction. 8

B: The Applicable Principles. 9

C: The Parties' Positions. 11

D: Discussion. 13

V: SANDERSON ORDER. 16

VI: THE ONEROUS NATURE OF THE COSTS SOUGHT BY THE PLAINTIFF. 19

VII: CONCLUSION. 20

I: INTRODUCTION

[1] This action arose from an assault upon the plaintiff that occurred on April 4, 2009 outside the Au Bar nightclub, located on Seymour Street in Vancouver.

[2] The plaintiff sustained serious injuries including a complicated mild traumatic brain injury combined with orthopedic and psychiatric injuries.

[3] The plaintiff was 20 years old at the time of the assault and 25 years old when the action proceeded to trial before a jury for nine weeks commencing April 7, 2014.

[4] Both liability and the quantum of damages were in issue at trial and vigorously contested by the parties.

[5] On June 9, 2014, the jury delivered its verdict. Liability was found against the corporate defendant owner of the nightclub and three of the security personnel or "bouncers". The action against one of the security staff defendants, Mr. Yip, and the nightclub's manager, Mr. Childs, was dismissed. The plaintiff was found not to be contributorily negligent.

[6] The jury assessed damages as follows:

General damages

\$ 250,000

Loss of income and loss of earning capacity to trial

\$ 175,000

Future loss of earning capacity

\$1,832,000

Cost of future care

\$ 800,000

Special damages

\$ 27,200

Total

\$3,084,200

[7] The plaintiff seeks the following orders:

- (a) that his costs for the action be assessed at Scale C;
- (b) that he be entitled to costs of two counsel for preparation and attendance at the trial;
- (c) double costs of the action from March 6, 2012 to its conclusion; and
- (d) that no costs be awarded to the defendants Yip and Childs or, alternatively, a Sanderson order with respect to the payment of those costs.

II: THE SCALE OF COSTS FOR THE ACTION

[8] The plaintiff seeks costs at Scale C. Sections 2(2) and 2(3) of Appendix B of the BC Supreme Court Civil Rules (the "Rules") provide:

2 (2) In fixing the scale of costs, the court must have regard to the following principles:

- (a) Scale A is for matters of little or less than ordinary difficulty;
- (b) Scale B is for matters of ordinary difficulty;
- (c) Scale C is for matters of more than ordinary difficulty.

- (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
- (a) whether a difficult issue of law, fact or construction is involved;
 - (b) whether an issue is of importance to a class or body of persons, or is of general interest;
 - (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- [9] Scale C is the merger of the former Scales 4 and 5 and is applicable to "matters of more than ordinary difficulty", including matters of unusual difficulty or importance: *Meghi v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 105 at para. 138.
- [10] Although there is no definition of what constituted "unusual difficulty" under the former scales, prior decisions do provide guidance and "the trial judge should, or is at least expected to, recognize such a case when he hears and sees it". In addition, "those observations are also apposite to the formulation of what constitutes a matter of more than ordinary difficulty under the new Rules": *X. v. Y.*, 2012 BCSC 37 at paras. 20-21 citing *Ter Neuzen v. Korn*, [1992] 64 B.C.L.R. (2d) 125 (S.C.) at 130-31).
- [11] *Mort v. Saanich School District No. 63*, 2001 BCSC 1473 at para 6 sets out various factors to be considered in determining the appropriate scale of costs under the former scales. They include:
- (a) the length of trial;
 - (b) the complexity of issues involved;
 - (c) the number and the complexity of pretrial applications;
 - (d) whether the action was hard fought with little conceded;
 - (e) the number and length of examinations for discovery;
 - (f) the number and complexity of expert reports; and
 - (g) the extent of the effort required in the collection and proof of facts.

See: *Danicek v. Li*, 2011 BCSC 444 at para. 40.

- [12] The overall difficulty of the matter is the governing factor in Appendix B with the factors to be considered collectively. That some of the considerations are neutral does not allow them to be set off against or deducted from the factors that militate in favor of an order for costs on the increased scale, if Scale C is justified on the basis of one or more of the other factors: *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.*, 2010 BCSC 1494 at para. 23. See also, *Moulton Contracting Ltd. v. British Columbia*, 2014 BCSC 993 at paras. 7-12.

- [13] The plaintiff's position is that this was a complex case. The trial lasted 43 days. Forty-nine witnesses were called which included engineering, soccer, and medical experts. There were two mistrial applications and several voir dieres. There were many pretrial applications and multiple examinations for discovery. He submits this case was every bit as complex as *Wallman v. Doe*, 2014 BCSC 968 where costs at Scale C were awarded.
- [14] The defendants' position is that Scale C costs are not justified simply because the length of the trial was significant and there were a number of expert reports produced. They say that the legal issues regarding liability and damages were not complex nor were they of more than ordinary difficulty. The matter did not involve novel scientific evidence or complex legislation. They further submit that this case is more similar to *Burnett v. Moir*, 2012 BCSC 1286 and *X. v. Y.* where a request for costs at Scale C was denied.
- [15] As I noted above, a trial judge is expected to recognize a Scale C case when "he or she hears and sees it".
- [16] I was appointed the judicial management judge of this case in June 2012. I have heard most, if not all, the pretrial motions since then. When I consider the factors and principles to which I have referred, I conclude that costs at Scale B, not Scale C, are appropriate. My reasons are as follows:
- although the trial was lengthy and there were several pretrial applications and many examinations for discovery, the issues were not of more than ordinary difficulty;
 - the liability issues were primarily related to what occurred during the evening of April 3 and the early morning hours of April 4, 2009. While many non-expert witnesses were called to give evidence on this point, their evidence was not complicated. With the exception of one witness, Mr. Gerum, the collection and proof of facts in this case was not out of the ordinary;
 - unlike *Wallman v. Doe*, the issue of whether the plaintiff had, in fact, sustained a brain injury was not contested by the defence in this case. In *Wallman v. Doe*, most, if not all, of the expert evidence, was focused on whether the plaintiff sustained a mild traumatic brain injury as a result of a relatively minor rear-end impact during the accident. In this case, the defence conceded a complicated mild traumatic brain injury had been sustained and the evidence, including the expert evidence, focused on the extent of the injury on the plaintiff's ability to function in the past and in the future. This evidence was not, in my view, of more than ordinary difficulty;
 - I also do not consider the biomechanical engineering evidence to have been complex particularly in light of the fact that there was no contrary defence report; and finally
 - while the action was hard fought, the concession by the defence that the plaintiff had sustained a complicated mild traumatic brain injury was not unexpected. There was clear radiological imaging to this effect. It was also conceded that the injury had and would have an effect on the plaintiff's ability to function, although the extent of his disabilities were very much in issue. That is not unusual in this type of case.

III: THE COSTS OF TWO COUNSEL

- [17] The plaintiff seeks an award of double units for the preparation and attendance at trial on the basis that it was appropriate for him to be represented by two counsel.
- [18] He submits that the trial was well-managed by counsel with few interruptions. It was largely on schedule and proper use was made of Skype and video conferencing. He relies on *Wallman v. Doe* where the plaintiff was entitled to recover the costs of two counsel for the preparation for trial and 70% of the attendance of the second counsel at trial. The reduction was made in that case due to the fact that the Court concluded two counsel were not required 100% of the time at trial and in particular during the lengthy video evidence.
- [19] Relying on *Burnett v. Moir*, the defence concedes that the plaintiff should recover 1.5 of the units for counsel's attendance at trial. The defendants submit, however, that the plaintiff and the defendants each had a single primary counsel conducting the action until a few months prior to trial and, on that basis, that the plaintiff should not recover additional units for preparation.
- [20] As was the case in *Burnett v. Moir*, this case certainly profited at trial from the use of two counsel for the plaintiff as well as for the defendants. But that is not to say that the defendants should be responsible for the costs of two counsel for both preparation and attendance at trial.
- [21] When I consider what occurred in *Wallman v. Doe*, *Burnett v. Moir*, and my own involvement in this case as a result of judicial case management, I conclude that the plaintiff should receive his costs for preparation and attendance at trial based on one and one-half counsel, but not two.

IV: THE OFFERS TO SETTLE AND DOUBLE COSTS

A: Introduction

- [22] The plaintiff made three formal offers to settle the action.
- [23] The first ("Offer #1") was dated March 6, 2012. It was in the amount of \$1,800,000 plus assessed costs and disbursements in exchange for a consent dismissal order on a without costs basis.
- [24] The second offer to settle ("Offer #2") was dated April 3, 2012. It was forwarded approximately two weeks before a 20 day trial was set to commence with a jury on April 16, 2012. The trial did not proceed on that date. This offer was also in the amount of \$1,800,000 plus assessed costs and disbursements payable by the defendant Seemore in exchange for a consent dismissal order on a without costs basis. Upon payment, the plaintiff offered to waive his claim for punitive damages and all claims against the other parties.
- [25] Offer #2 was left open for acceptance for more than one year. It was formally withdrawn on June 27, 2013.

- [26] The plaintiff's third offer to settle ("Offer #3") was dated September 9, 2013. It was in the amount of \$1,425,000 plus assessed costs and disbursements. This was to include general and special damages, the "in trust" claim being advanced by the plaintiff, the claim under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, and interest. The plaintiff also offered to waive his claim for punitive and exemplary damages if the offer was accepted. Offer #3 was left open for acceptance for 10 days from September 9, 2013.
- [27] Accordingly, there were no offers to settle from the plaintiff that were open for acceptance by the defendants immediately prior to the trial commencing on April 7, 2014.
- [28] The defendants made one offer to settle. It was dated June 3, 2011 and was on behalf of the defendants Parkwell, Au Bar, and Seemore. It was for the sum of \$20,000 inclusive of costs but not disbursements.
- [29] The defendants did not respond to any of the plaintiff's settlement offers.

B: The Applicable Principles

- [30] Rule 9-1(4), (5) and (6) of the Rules provide, in part:

Offer may be considered in relation to costs

(4)The court may consider an offer to settle when exercising the court's discretion in relation to costs.

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[.]

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.

[31] I recently reviewed the applicable principles in *Bideci v. Neuhold*, 2014 BCSC 1212 at paras. 38-40, 51-52:

- (a) the party "seek[ing] to displace the usual rule [as to costs] has the burden of persuading the judge that the rule should be displaced: *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 75, citing *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24;
- (b) the overarching purpose of Rule 9-1 is to promote reasonable settlements and to attach some consequences to the failure of a party to accept a reasonable settlement: *Brewster v. Li*, 2014 BCSC 463 at paras. 15-16;
- (c) the present Rules provide the court with considerable discretion to define and fix an appropriate cost award: *Brewster v. Li* at para. 14, citing *Bailey v. Jang*, 2008 BCSC 1372 at paras. 10, 18. The presumption under Rule 14-1(9) that a successful party is entitled to his costs is subject to the broad purpose of Rule 9-1 and the opportunity for judicial discretion under Rule 9-1(4) in that "the court may consider an offer to settle when exercising its discretion in relation to costs. Rule 9-1(5) enumerates the orders the court may make. In making an order under subrule (5), the court may consider the factors listed in subrule (6)": *Wafler v. Trinh*, 2014 BCCA 95 at para. 79 [emphasis in the original];
- (d) unlike under the former Rule 37, it is not mandated under Rule 9-1 that a plaintiff who rejects a reasonable offer should face some sort of sanction. Rather, "[t]he permissive wording in Rules 9-1(5) and (6) indicates the legislature intended to preserve the historically discretionary nature of costs awards, including an award of costs where an offer to settle has been made": *Wafler v. Trinh* at para. 82 [emphasis added in *Bideci v. Neuhold*];
- (e) in addition to indemnifying a successful litigant, the purposes for which cost rules exist were articulated by Frankel J.A. for the court in *Giles v. Westminster* at para. 74 and include:
 - "deterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave to appeal to the S.C.C. refused, [1988] 1 S.C.R. ix;
 - "to encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore*, [1995] 2 B.C.L.R. (3d) 201 at 208 (C.A.);
 - "encouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases": *Bedwell v. McGill*, 2008 BCCA 526 at para. 33; and

· "to 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 at para.16.

[32] The proposition that a plaintiff who rejects a reasonable offer should face some form of sanction applies equally to defendants.

C: The Parties' Positions

[33] The plaintiff argues that this is a "classic case" for double costs because Offers #1, #2 and #3 ought all to have been accepted. Although Offer #3 in the amount of \$1.425 million was only open for acceptance for 10 days in September 2013, Offer #2 for \$1.8 million was left open for acceptance for in excess of one year, being the period of April 3, 2012 to June 27, 2013. The Rules do not provide that any offer must be left open until the eve of the trial.

[34] The plaintiff submits that during his examination for discovery on August 23, 2011, he referred to the independent eyewitness witness Jamel Caines-Walker and what he understood his evidence would be as to how the assault had occurred. Mr. Caines-Walker had also spoken to an investigator retained by the defence in November 2011 and provided answers to questions at that time.

[35] The plaintiff argues that it should have been clear to the defendants during the timeframe that each of the offers was open for acceptance that they faced a significant risk in not accepting the offers and proceeding to trial. The defendants, however, made no counter offers and apparently took the position that they had little or no risk. Defendants are "presumed to know that the potential consequences for not accepting an offer to settle will be an award of double costs against [them]": *Hutson v. Michaels of Canada, ULC*, 2009 BCSC 1587 at para. 14.

[36] The defendants present a number of arguments against increased cost consequences. They argue that if costs are to have double costs consequences, the "normal practice" is for the offer to be left open until immediately prior to trial.

[37] The defendants say that liability was vigorously opposed based on the contents of the police file as well as the personal defendants' adamant denial of any involvement in the incident. They submit that the plaintiff, through one of his counsel, effectively blocked the defendants' access to liability witnesses, in particular Mr. Caines-Walker and Ms. Frigon, until shortly before the trial.

- [38] The defendants argue that there were approximately 8 to 10 hours of examination for discovery after Offer #3 expired. The defendant Ghattas was examined on two occasions with the defendants Stefanopoulos, Yip, and Childs being each examined on one occasion after this offer expired. What these defendants were going to testify to under oath was not known in its entirety at the time that Offer #3 was open for acceptance. Accordingly, it was not an offer that ought reasonably to have been accepted.
- [39] Although the defendants agree that they had significant exposure on damages, the most complex issue was the plaintiff's ability to function. Certain of the reports that dealt with this issue were not received or obtained until after Offer #3 had expired.
- [40] The defendants also rely on the fact that the plaintiff's biomechanical engineering report was not served until January 2014 and that the court-ordered discount rate pertaining to loss of earning capacity and cost of future care was changed during the course of the trial. This added approximately \$1 million to the defendants' maximum exposure.

D: Discussion

- [41] The first consideration under Rule 9-1(6) is whether any of the formal offers were ones that ought reasonably to have been accepted by the defendants.
- [42] This question is not to be addressed with the benefit of hindsight, that is, with the knowledge of the award that was ultimately made: *Bailey v. Jang*, 2008 BCSC 1372 at para. 24; *A.E. v. D.W.J.*, 2009 BCSC 505 at para. 55, *aff'd* 2011 BCCA 279 (sub nom. *Evans v. Jensen*); *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.
- [43] A factor that may be taken into account is whether the offer was well within the range of outcomes that could reasonably have been expected: *Hartshorne v. Hartshorne* at para. 27, citing *A.E. v. D.W.J.* at para. 55; *Brewster v. Li* at para. 22.
- [44] It is clear that liability was a principal focus of this proceeding. In addition, although the defendants accepted that the plaintiff had sustained a mild complicated traumatic brain injury, the extent to which this had and would affect his ability to function was in issue. At trial, the plaintiff sought several million dollars in damages, not including general damages for pain and suffering.
- [45] When I apply the principles to which I have referred to the circumstances that existed as at the time Offers #1 and #2 were made, I conclude they were not offers that ought reasonably to have been accepted by the defendants to whom they were addressed. I reach the same conclusion with respect to Offer #3.
- [46] My reasons include that:
- the examinations for discovery of all the defendants were not completed until the fall of 2013;

- the garnering of medical and other evidence by both the plaintiff and the defendants, but particularly the defendants, pertaining to the plaintiff's injuries and the effect on his functioning was ongoing after Offer #3 expired;
- the plaintiff's biomechanical engineering expert report pertaining to the forces required to cause the plaintiff's injuries was not served on the defendants until January 2014; and
- the change to the court-ordered discount rate came into effect as of April 30, 2014, after the commencement of the trial and after the plaintiff's economist had testified. Mr. Carson prepared revised reports that increased the defendants' maximum exposure for damages for loss of earning capacity and cost of future care by almost \$1 million. He was also recalled to give evidence with respect to his revised reports dealing with this issue.

[47] And yet, when I consider the other applicable factors in Rule 9-1(6), particularly (b), I am of the view that there should be significant cost consequences to the unsuccessful defendants in deciding to take this proceeding to a lengthy jury trial. I reach this conclusion because:

- (a) by mid-January 2014 at the latest, the defendants were well aware of the risks they were assuming in taking this action to trial;
- (b) while offers to settle are often left open for acceptance up to the eve of trial, it is not a prerequisite to the court's exercise of discretion on costs that this occur;
- (c) insofar as liability was concerned, by mid-January 2014, all examinations for discovery had been completed and the individual defendants' denial of any involvement had been tested under oath. In addition, the plaintiff's biomechanical engineering report had been received. The defendants chose not to serve any engineering report in response;
- (d) I do not accept the defendants' submission that the conduct of the plaintiff's counsel impeded their ability to access Mr. Caines-Walker and Ms. Frigon, the two independent witnesses to the incident. In August 2012, the defendants brought an application to examine these two witnesses under oath. This application was dismissed by Master Scarth with liberty to re-apply. The basis of this order was that a list of written questions had been provided by defence counsel to be answered by Mr. Caines-Walker and Ms. Frigon and if counsel were not satisfied with the responses received then there was liberty to reapply to examine these potential witnesses under oath. Defence counsel was satisfied with the answers received and an examination under oath was not pursued;
- (e) as for the defendants' exposure on damages, they knew or should have been well aware by mid-January 2014 as to the potential magnitude of the claim. The defence experts were in agreement that the plaintiff had sustained a complicated mild traumatic brain injury. There was an issue as to whether cognitive behavioral therapy had been undertaken by the plaintiff and, if not, the extent to which that therapy could assist him in the future. However, there was no real dispute that the plaintiff's functioning had been seriously compromised by the injuries that he had sustained. He was a young man in his 20s. There was a serious claim advanced as to the loss of a potential professional soccer career. The evidence led on the

plaintiff's behalf that his future employability would likely be restricted to a sheltered environment was not seriously tested by the defendants' experts;

- (f) the plaintiff made three attempts to settle his claims;
- (g) the only offer made by the defendants prior to the trial commencing in April 2014 was the June 2011 offer for \$20,000 plus disbursements; and
- (h) notwithstanding this set of circumstances, the defendants, as counsel candidly admitted during submissions, made the decision, which was their right, "to take the case to trial and let the jury decide".

[48] After a lengthy trial, the jury indeed decided. The plaintiff was successful on liability without any contributory negligence being found on his part. He was awarded damages of approximately \$3.1 million. Even taking into account the potential effect of the change to the court-ordered discount rate, this was well above the amounts in Offers #1, #2 and #3 and bore no resemblance to the defendants' only offer to settle made three years earlier.

[49] The defendants chose not to respond to Offers #1, #2 or #3 or to otherwise engage the plaintiff in settlement negotiations at any time and, in particular, after mid-January 2014. Rather, they proceeded to what they knew would be a prolonged trial. I consider the appropriate costs consequence for the unsuccessful defendants is that the plaintiff should recover costs at 1.5 of the unit amounts for the preparation and attendance at the trial as of January 15, 2014.

V: SANDERSON ORDER

[50] The case was dismissed against the defendants Childs and Yip.

[51] The plaintiff seeks an order that these defendants not recover any costs. In the alternative, he seeks an order that the costs of the defendants Childs and Yip be paid directly to them by the unsuccessful defendants, by way of a Sanderson order.

[52] Rule 14-1(9) provides that the court has the discretion to deny a party his costs. Under Rule 14-1(18) the court has the discretion to order that the costs of one defendant be paid by another defendant.

[53] The principles that apply to a Sanderson order include:

- the plaintiff bears the onus of justifying a departure from the usual rule that costs follow the event: 0915406 B.C. Ltd. v. 0834618 B.C. Ltd., 2013 BCSC 1529 at para. 15;
- the test is whether it was reasonable for the plaintiff to sue the successful defendant together with the unsuccessful defendant. There must be something that the unsuccessful defendant did to warrant being made to reimburse the plaintiff for the successful defendant's costs: Grassi v. WIC Radio Ltd. Once the threshold question is answered affirmatively then the granting of a Sanderson order becomes an exercise of judicial discretion in determining what is just and fair in the circumstances: Robertson v. North Island College Technical and Vocational Institute and

Wing, [1981] 26 BCLR 225 at 228 (C.A.); *Brown v. Lowe*, 2002 BCCA 7 at paras. 129-130;

- a Sanderson order can be granted when there is a close legal relationship between a successful and unsuccessful defendant but it is not required that there be some unusual circumstances;

Brown v. Lowe at paras. 131-132;

- when exercising its discretion, the court may consider whether it was appropriate for a plaintiff to maintain his or her action against the successful defendant when it becomes apparent during the course of litigation that the claims against that party have no reasonable prospect of success: *Lee (Guardian of) v. Richmond Hospital Society*, 2002 BCSC 862 at para. 58, rev'd on other grounds 2005 BCCA 107;

- a successful defendant will not be entitled to costs if the unsuccessful and successful defendants are represented by the same counsel and no separate steps were taken on behalf of the successful defendant that resulted in additional legal costs: *St. George Transportation Ltd. v. Sawicky*, 2004 BCSC 1488 at para. 4; and

- in cases where counsel take separate steps on behalf of the successful defendant, it may be appropriate to limit costs awarded to the portion of the trial solely related to claims against the successful defendant: *Lam v. Chiu*, 2013 BCSC 1281 at para. 100; *Antrobus v. Antrobus*, 2012 BCSC 613 at paras. 21-25.

[54] The plaintiff submits that there was a close legal relationship between Mr. Childs and Mr. Yip with the corporate defendant Seemore. Seemore was found liable. All of the personal defendants took the position that they either knew nothing about what had occurred or that the plaintiff was the author of his own misfortune in that he had tripped over the umbrella stand of the hot dog cart. By their evidence, they attempted not only to exonerate themselves but also their co-defendants.

[55] The defendants submit that it was unnecessary and unreasonable for the plaintiff to name Mr. Childs as a defendant since his employer was already named. In addition, he could have been examined without being named as a defendant in the action in his capacity as an employee of the defendant Seemore.

[56] In so far as Mr. Yip is concerned, the defendants say that he was not present at the time of the incident. He was working as a member of the security staff inside the nightclub. The plaintiff should have sought the dismissal of the proceedings against Mr. Yip when it became clear that there was no credible evidence to continue to name him as a defendant. Relevant information possessed by him could be attained by calling him as a witness rather than by naming him as the defendant.

[57] I accept the plaintiff's submission that it was appropriate for him to name Mr. Childs and Mr. Yip as defendants and, after examinations for discovery, not to seek to have the proceedings against them dismissed or discontinued.

- [58] Although he was positioned inside the nightclub, Mr. Yip's station was visible from the entrance where the jury found the assault to have occurred. In so far as Mr. Childs was concerned, he had been the manager of the nightclub for some time prior to the incident. He had authored the policy procedures manual. Mr. Ghattas who was head of security reported directly to him. The claims advanced by the plaintiff included the failure to have adequate procedures in place and that Mr. Childs had not exercised his responsibilities appropriately.
- [59] I do not see the continuation of the proceedings against Mr. Yip and Mr. Childs after examinations for discovery as being the case of the plaintiff stubbornly pursuing a claim of doubtful merit. Although made within the context of a claim for double costs, what was stated by Cullen A.C.J. in *Burnett v. Moir* at para. 53 applies in my consideration of this issue:

The line between the dogged pursuit of a very dubious claim and the determined exploration of a legitimate but ultimately unsuccessful theory of liability is not always clear-cut. The Court, however, must be careful not to too readily assume the former making costs awards which would deter the latter. In this case, while clearly the plaintiff faced the prospect of failure, I am not prepared to conclude that the merit of his claim was such that it should factor into a consideration of double costs.

- [60] The defendants' position appears to be that the successful defendants should be entitled, at a minimum, to their costs after examinations for discovery were concluded in the fall of 2013. But they have not pointed to any additional steps taken on their behalf which have amounted to additional costs since that time.
- [61] In addition, the plaintiff did discontinue the action against the defendant Paul Blackwell in April 2012. This indicates that he was not prepared to pursue claims that he viewed as having no reasonable likelihood of success.
- [62] Accordingly, based on the Sanderson order principles and the circumstances of this case, I conclude that such an order is appropriate with respect to the costs of the defendants, Childs and Yip.

VI: THE ONEROUS NATURE OF THE COSTS SOUGHT BY THE PLAINTIFF

- [63] The plaintiff's draft bill of costs as presented is \$460,800.
- [64] The unsuccessful defendants submit that awarding all of the costs relief sought in the plaintiff's notice of application will result in unduly onerous costs consequences to them.
- [65] They rely on *Burnett v. Moir* as authority for this proposition. In that case, however, the defendants conceded that a costs award based on the submissions made would result in an excessive amount being paid by the seriously impaired plaintiff. Had such an award been made, it would have significantly impacted the funds he would have available to him for his future needs: para. 36.

[66] There is nothing in the record before me on this application that could lead to a similar conclusion. In addition, the defendants have been successful on certain of the costs issues.

VII: CONCLUSION

[67] The unsuccessful defendants are ordered to pay costs at Scale B on the basis of one and one half counsel for preparation and attendance at trial.

[68] The plaintiff is also entitled to one and one-half costs from January 15, 2014 to the conclusion of the trial.

[69] The costs of the successful defendants, Childs and Yip, shall be paid directly by the unsuccessful defendants Seymour, Ghattas, Stefanopoulos, and Litz by way of a Sanderson order.

[70] There has been divided success on this application although the plaintiff, in my view, has achieved greater success than the defendants. He shall receive two thirds of his costs of this application at Scale B.

[71] The plaintiff also seeks judgment against the defendants for tax gross-up and management fees.

[72] This application was heard on August 22, 2014. Counsel for the plaintiff had obtained a report from the economist Mr. Robert Carson pertaining to the tax gross-up issue. Counsel for the defendants obtained a report from Mr. Mark Szekely in response but it could only be provided to the plaintiff that day. Submissions on this issue were not completed and so it was adjourned generally.

[73] The difference between Mr. Carson's opinion and Mr. Szekely's is approximately \$50,000. It may well be that counsel will be able to resolve this issue once Mr. Carson has reviewed Mr. Szekely's report. Should that not occur, the parties have leave to reset that issue for hearing before me.

"Abrioux J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/14/18/2014BCSC1842.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/maras-v-seemore-entertainment-ltd-2014>

Prepared on 27 October 2026 · Esheria