

CANADA / JUDGMENT

Singh v. Chand

2020 BCSC 1268

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1268 Singh v. Chand

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singh v. Chand,

2020 BCSC 1268

Date: 20200827

Docket: M130151

Registry: Vancouver

Between:

Surbhi Singh

Plaintiff

And:

Subhas Chand and Interprovincial Auto Sales Ltd.

Defendants

Docket: M130580

Registry: Vancouver

Between:

Surbhi Singh

Plaintiff

And:

Spiro Katsonis and Rahul Bhagirath

Defendants

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment - Costs

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Written Submissions:

May 7, 2020

May 11, 2020

May 14, 2020

May 19, 2020

Place and Date of Hearing:

Vancouver, B.C.

July 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 27, 2020

I. Introduction

- [1] This costs hearing follows from the joint trial of two actions arising from two separate motor vehicle accidents that contributed to the same set of injuries. The defendants in the first action, Subhas Chand and Interprovincial Auto Sales Ltd. (the "Chand defendants"), admitted liability for the first accident. I dismissed the second action against the defendant Rahul Bhagirath with costs, in Reasons indexed at 2019 BCSC 932. The court had previously declined jurisdiction over the other defendant in that action, Spiro Katsonis, and stayed the action against him.

- [2] After a subsequent hearing on the quantum of damages in the Chand action, I awarded the plaintiff a total of \$137,288.29 against the Chand defendants. Those Reasons are indexed at 2019 BCSC 2055. As it happens, this was considerably less than the amount the plaintiff had already received from the Chand defendants in the form of an advance payment of \$250,000 in February 2017.
- [3] The plaintiff seeks an order of costs against the Chand defendants. She argues that she is entitled to costs because she was the successful party in the action against them. She submits that the advance payment should have no bearing on the question of costs.
- [4] The Chand defendants submit they are entitled to costs against the plaintiff by virtue of the advance payment, at least as of the date of the advance. In the alternative, they say they should be awarded costs as of the date of a subsequent offer to settle on October 26, 2018, days before the start of the trial. They further assert that the court should decline to award any costs to the plaintiff due to her conduct in failing to make disclosure in the trial.
- [5] In addition, the plaintiff seeks a Sanderson order against the Chand defendants. The effect of such an order would be to make the Chand defendants responsible for the costs payable to Mr. Bhagirath in that action.
- [6] Both sets of defendants oppose the proposed Sanderson order.
- [7] I will deal with each issue in turn.

II. The Advance Payment

- [8] Whether the plaintiff is entitled to costs against the Chand defendants depends largely on the effect of the advance payment. It is not in dispute that the plaintiff accepted an advance payment of \$250,000 from them, which was deposited into her lawyer's account on February 21, 2017. The Chand defendants agreed that they would not seek repayment regardless of the outcome of the trial. Were it not for this payment, there would be no question that the plaintiff would have been the successful party at trial, having established both liability and damages.
- [9] The Chand defendants submit that they are entitled to costs as the successful party because the advance payment entitles them to a dismissal of the action against them. They rely on a series of cases from the late 1990s concerning the cost consequences of an advance payment. The earliest of these cases, *McElroy v. Embleton* (1996), 19 B.C.L.R. (3d) 1 (B.C.C.A.), remains the leading case on this issue. There, the court considered the effect of an advance payment on the ultimate disposition of the action before it. It concluded that where an advance exceeds the award of damages at trial, a defendant is entitled to a dismissal of the action against it, and is therefore to be considered the successful party for the purposes of costs:

- [9] It is obvious that the sum of \$24,000 paid in 1991 far exceeded the verdict of the jury. The question is what ought then to have followed. In my view, in light of paragraph two of that agreement the net result was that that judgment ought not to have been entered for the appellant at all because it is not conceivable that one can enter a judgment in any sort of action for zero. When there is nothing to be recovered, an action ought to be dismissed. Had the learned judge appreciated that, his view on the question of costs might have been different.
- [10] I do not think it necessary to quote from the learned trial judge's reasons on costs. He referred to some cases. There have been some trial judgments touching on the problem of what the judgment on costs is to be when the effect of an agreement for advance payments, in light of the assessment of damages, is that a plaintiff is entitled to nothing. I hope this judgment will solve at least the problem of what the judgment as to damages should be. It should be that the action be dismissed. When that happens the Court has to address the question of when, if at all, a plaintiff whose action is dismissed is to be awarded costs. It would be proper, in my view, if, for instance, where such an agreement is made well on in the course of litigation, to award the plaintiff costs until the date of agreement.
- [10] McElroy was subsequently followed in *Baxter v. Brown* (1997), 28 B.C.L.R. (3d) 351 and *Specht v. Yeo*, 1999 BCCA 499.
- [11] In this case, the plaintiff received an advance payment of \$250,000. She was awarded a little over half that amount at trial. According to the reasoning in *McElroy*, the Chand defendants would be entitled to costs, at least as of the date of the advance.
- [12] The plaintiff submits, however, that the advance payment cannot be taken into account in this case. The agreement under which the funds were advanced failed to indicate it could have future costs consequences. This failure, the plaintiff argues, precludes the Chand defendants from relying on it to establish their entitlement to costs. In other words, they say that although *McElroy* remains good law, it does not apply in this case because evidence of the advance payment is not properly before the court.
- [13] The plaintiff's argument rests on the proposition that an advance payment is equivalent to an offer to settle, and should be treated in the same way. In particular, the plaintiff relies on Rule 9-1 of the Supreme Court Civil Rules. Under this rule, an offer to settle must contain specific language reserving the right to bring it to the attention of the court. In effect, the offer must put the offeree on notice of the potential of costs consequences. Absent such language, an offer to settle may not be brought to the attention of the court. In the same way, the plaintiff argues, an advance payment agreement cannot be brought to the attention of the court unless it contains language advertent to the possibility of costs consequences.
- [14] The plaintiff relies on *Carey v. McLean*, 1999 BCCA 222, where although the court followed *McElroy*, it also discussed the similarity between an advance payment and an offer to settle:

- [13] In my judgment the advance ought to have been treated in the same way as an offer to settle, resembling as it does in all important respects the characteristics of the former procedure of a payment into court. The receipt of monies on account of damages before trial places an obligation on the plaintiff to realistically assess the value of his claim knowing that proceeding to trial carries a risk in costs. I can see no reason why the rationale for offers to settle -- encouragement of settlement and avoidance of unnecessary trials -- should not apply to the present circumstances. The plaintiff put the defendant to the expense of defending a trial for no advantage. His decision to proceed should carry appropriate consequences in costs.
- [15] I am not persuaded by the plaintiff's argument. In my view, neither McElroy nor Carey require an advance payment agreement to contain language expressly signalling the possibility of costs consequences. I say this for several reasons.
- [16] First, with respect, the plaintiff's argument misapprehends the reasoning in McElroy. McElroy suggests that it is the acceptance of an advance payment, as opposed to the communication of an offer, that carries costs consequences in this context. Rule 9-1, which governs the disclosure of offers, is therefore irrelevant even if it were applicable. McElroy's central proposition remains unchanged; when there is nothing to be recovered, the action must be dismissed. Whether or not this is so does not depend upon whether the underlying agreement explicitly mentions the possibility of costs consequences. Indeed, it is not the agreement itself the Chand defendants seek to rely upon, but the fact the plaintiff accepted the advance.
- [17] In this regard, I also note that "offer to settle" is a defined term (Rule 9-1(1)), and if an offer to settle does not meet the terms of the definition, the cost options in Rule 9-1 are not triggered: *Roach v. Dutra*, 2010 BCCA 264.
- [18] Second, even with the similarity in purpose between an advance payment and an offer to settle, it does not follow that the same formal requirements apply. The reasoning in Carey rests on the convergence of the underlying rationale -- "encouragement of settlement and avoidance of unnecessary trials" -- between the court's treatment of advance payments and its treatment of offers to settle. In my view, this convergence does not extend to the precise form an advance payment must take.
- [19] The potential costs consequences of an advance payment are inherent in the acceptance of such a payment. In light of McElroy, a plaintiff who accepts an advance payment must be held to have accepted the possibility that its action may be dismissed if it recovers less than the advance. It follows that a plaintiff therefore also accepts the possibility of cost consequences when it accepts such a payment. In other words, the nature of an advance payment is itself sufficient notice of the potential for costs consequences.
- [20] I do not read McElroy, or any of the other governing cases, as requiring anything more to establish a defendant's status as the successful party at trial. The plaintiff attempted to distinguish the present case in that, unlike those authorities, the advance payment

agreement in this case was silent on the question of costs. However, nothing in those authorities suggests this is a relevant consideration. In fact, in *Carey*, the "advance payment" in question was not the result of an agreement, but was a court-ordered payment made as a condition for receiving an adjournment. In that case, it was the fact the payment had been made that was determinative, and not the presence or absence of language concerning costs.

- [21] In my view, the real question is what cost consequences should flow from the advance payment. The concurring judgment of McEachern CJBC in *McElroy* states that a defendant should automatically be entitled to costs in such circumstances, as of the date of the advance: para. 15.
- [22] If this is still the case, the court's approach to advance payments diverges not merely in form, but in substance, from its approach to offers to settle. Since *McElroy*, amendments to the Rules of Court have given the court much wider discretion in determining the costs consequences of offers to settle: *LeFler v. Anderson*, 2008 BCSC 1563 at paras. 10 and 11. Under current Rules 9-1(5) and (6), the court can fashion an appropriate award of costs according to the circumstances, which include whether the offer was one that the plaintiff ought reasonably to have accepted.
- [23] In other words, where a defendant has made an offer to settle exceeding the award of damages at trial, the court is not required to award costs to the defendant as a matter of automatic entitlement. Instead, the court may decide to deprive the plaintiff of the costs to which it would otherwise be entitled, or even award the plaintiff the costs to which it would have been entitled despite the offer.
- [24] That the costs consequences of an advance payment and of an offer to settle differ is perhaps not surprising given that the plaintiff is entitled to keep the entire advance despite achieving a lesser result in the trial.
- [25] Nevertheless, there has been some suggestion that the court now exercises a wider discretion in determining the cost consequences of an advance payment. In *Russell v. Parks*, 2012 BCSC 1962, Abrioux J. (as he then was) appeared to suggest that the analysis of costs in this context could be guided by the discretionary considerations applicable to offers to settle, and in particular by whether the plaintiff ought reasonably to have proceeded to trial. The payments in question in that case were ultimately found not to constitute an advance payment; however, in the alternative, it was found it was not unreasonable for the plaintiff to have proceeded to trial, despite having received more than the ultimate award of damages:
- [42] if I were to consider the payments made to the plaintiff until January 2012 to be akin to a form of settlement offer, which I do not, it is difficult to conceive how it could be unreasonable for the plaintiff to decline this putative offer at the time.

- [43] This is not an appropriate case, in my view, to conclude as is submitted by the defendant that the plaintiff should not have proceeded to trial. It was not readily foreseeable to either party what the result was going to be with respect to liability or the quantum of damages. In so far as liability is concerned, I noted at para. 31 of my reasons for judgment that cases dealing with competing duties of pedestrians and operators of motor vehicles are highly fact specific.
- [26] Although this issue may invite further consideration in the future, in my opinion, McElroy remains good law, which I must follow. Under the approach set out in that case, the defendants are entitled to a dismissal of the action against them, and to costs as of the date of the advance.
- [27] I would award the plaintiff her costs up to the date of the advance payment. While misconduct in litigation can deprive a party of costs to which they may be otherwise entitled (See: *Loft v. Nat* 2014 BCCA 108 at para. 49), the plaintiff's non-disclosure was ultimately discovered to the plaintiff's detriment. In all of the circumstances of this case I would not further punish the plaintiff by depriving her of the costs to which she is otherwise entitled.
- [28] Before leaving this issue, I will briefly address a point raised by the plaintiff. In addition to the arguments summarized above, the plaintiff cited *Mazur v. Lucas*, 2011 BCSC 1685 for the proposition that once an advance has been made, but there is no option to avoid trial, it is inappropriate to deprive the plaintiff of costs. As the defendants submit, that case is readily distinguishable: unlike this case, it concerned an advance made after trial, pending an appeal. Further, the plaintiff in this case did have a choice. She did not have to accept the advance payment, nor, having accepted it, was she obligated to continue the action.

III. Sanderson Order

- [29] In addition to costs, the plaintiff seeks a Sanderson order against the Chand defendants. A Sanderson order is an order compelling an unsuccessful defendant to pay the costs of a successful co-defendant. In effect, the plaintiff seeks to have the Chand defendants pay the costs owed to Mr. Bhagirath.
- [30] The court's authority to make such an order is codified in Rule 14-1(18), which states:

Costs of one defendant payable by another

- (18) If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

- [31] A Sanderson order recognizes that in certain circumstances, it is reasonable for a plaintiff to involve potentially innocent parties in its attempt to seek full redress against the party actually responsible. If a costs order is made against the guilty party, the costs payable to the innocent third party may be included as part of the reasonable expense of bringing the claim against the true tortfeasor.
- [32] In considering whether to make a Sanderson order, the court must apply a two-part test as set out in *Danicek v. Alexander Holburn Beaudin & Lang*, 2011 BCSC 1375 as follows:
- [30] The rule was described in *Robertson v. Wing* (1980), 26 B.C.L.R. 225 (C.A.). Mr. Justice Lambert held in that case that in order for either a Sanderson or a Bullock order to be considered, there must be this threshold test to be met: it must have been reasonable for the plaintiff to have joined the successful defendant in the action. If that is the case, it is left to the judge to exercise her or his discretion in deciding what would be just: see *Times Square Holdings Ltd. v. Shimizu*, 2001 BCCA 667, at para. 9.
- [33] Both the Chand defendants and Mr. Bhagirath object to the order sought. They first argue that an order under Rule 14-1(18) may only be made against an unsuccessful defendant. They submit a Sanderson order cannot be made against the Chand defendants because they were successful against the plaintiff by virtue of the advance payment.
- [34] Secondly, the defendants argue that Rule 14-1(18) does not contemplate a defendant in one action paying the costs of another defendant in a different action, but applies only to co-defendants in the same action. They cite *Danicek* (at para. 51) for this proposition.
- [35] In my view, although neither of these arguments is necessarily a complete bar to the order sought by the plaintiff, the determinative issue is the exercise of my discretion.
- [36] With respect to the defendants' first argument, there is, admittedly, authority for the proposition that Rule 14-1(18) has no application when there is no unsuccessful defendant in an action: *Moore v. Castlegar & District Hospital* (1998), 184 W.A.C. 285 at para. 9. It is unclear, however, whether this principle extends to a defendant who is successful merely by virtue of having made a sufficiently large advance payment. The parties cited no cases that have considered the effect of an advance payment on the availability of such an order.
- [37] I have found that the Chand defendants are entitled to costs the date of the advance. I accept that they were the successful party as of that date. However, I have also found that the plaintiff is entitled to costs up to that date. It is arguable whether a Sanderson order can be made with respect to costs incurred prior to the date of the advance.
- [38] With respect to the defendants' second argument, it is an open question in British Columbia whether the court can make a Sanderson order between two defendants in separate actions. This is so notwithstanding the obiter remarks in *Danicek*. As explained in *Ilyas v. Luu*, 2007 BCSC 1926:

- [13] Rule 57(18) [current Rule 14-1(18)], on its face, appears to contemplate an order made with respect to co-defendants in a single action. The rule was applied in respect of defendants in separate actions that were tried together in the case of *Halbauer v. Morrison* (1994), 31 C.P.C. (3d) 110 (B.C.S.C.), but in *Gill v. Lindstrom*, 33 B.C.L.R. (4th) 325, 2004 BCCA 632 (B.C.C.A.), our Court of Appeal treated the applicability of the rule to multiple actions tried together as an open question.
- [39] In Ontario, Sanderson orders are available between defendants in separate actions that are heard together in a single trial. In *Moore (Litigation guardian of) v. Wienecke*, 2008 ONCA 162, the Ontario Court of Appeal accepted that a Sanderson order could be made between defendants in two separate motor vehicle actions, in circumstances where (1) the independent decision to sue each defendant was reasonable; and (2) it was reasonable for the actions to be heard together in a single trial: para. 43. In my view, both of these conditions are met in the present case. Whether courts in British Columbia should adopt a similar approach, however, remains to be seen.
- [40] However, in the circumstances of this case it is not necessary for me to resolve either of the issues raised by the defendants. Even if the plaintiff could establish a threshold entitlement to a Sanderson order, I would not exercise my discretion to grant that order.
- [41] Once a plaintiff's threshold entitlement to a Sanderson order is established, it remains for the court to exercise its discretion to decide whether to make such an order. As explained in *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 (at para. 33), it is not enough for a plaintiff to establish its threshold entitlement to a Sanderson order; rather, "[t]here must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs."
- [42] Although other factors are potentially relevant, the predominant consideration remains whether the unsuccessful party tried to shift responsibility onto the successful party, or necessitated its inclusion in the action: *Moore* at paras. 45-50.
- [43] In my view, these factors militate against a Sanderson order in this case. The Chand defendants did nothing to necessitate the inclusion of the action against the Bhagirath defendants. Their strategy at trial focused on meeting the case against them rather than attempting to blame Mr. Bhagirath. Although part of their case was that the plaintiff's injuries were attributable to the second accident, the bulk of their argument was devoted to showing that the plaintiff failed to meet her burden of showing that the first accident was the cause of her injuries, whatever their actual cause. In no respect could their strategy at trial be characterized as a "cutthroat" defence.

[44] The plaintiff emphasizes the fact that the parties were represented by the same counsel until February 2016. In my view, however, this only underscores the fact that the Chand defendants did not attempt to shift blame upon their fellow defendant; it suggests the parties viewed their interests as being aligned until at least that time. The same is true of the fact that the only settlement offers made were "global" in nature.

[45] In these circumstances, it cannot be said that there was anything the Chand defendants did to warrant their being made to pay the successful defendant's costs. As such, I would decline to make such a Sanderson order against them even if it were available in the circumstances.

IV. CONCLUSION

[46] In the result, the following costs orders are made:

1. The plaintiff is entitled to her costs against the Chand defendants up to the date of receipt of the advance payment, February 21, 2017;
2. The Chand defendants are entitled to their costs against the plaintiff from February 21, 2017 onwards; and
3. The application for a Sanderson order is dismissed.

[47] Given the position of the Chand defendants, it is therefore not necessary to consider costs consequences of the offer to settle.

"The Honourable Madam Justice Watchuk"

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