Costs

- What's New?

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Chambers

- * Trial Adjournment Trial Preparation Costs Thrown Away
 - * Bolin v. Lylick, 2018 BCCA 127
 - * Plaintiff succeeded on application to adjourn trial for 2nd time 6 weeks before trial. Court declined to award defendant costs thrown away for trial preparation.
 - * Appeal allowed. The usual approach to costs in circumstances of a late adjournment is an award of costs thrown away.
 - * There must be some some explanation for departing from the usual path.

* Campbell v. Bouma, 2015 BCSC 817

- * Defence application for document production & particulars with costs payable against PC or plaintiff forthwith.
- * Delay by PC in producing documents.
- * Liability admitted. Inappropriate to seek costs forthwith as, if awarded, could be set off.
- * Awarded costs payable forthwith <u>against defence</u> on Scale C because of unfounded application against PC for costs.

* Forstved v. Kokabi, 2018 BCSC 111

* "Counsel must apply considerable intellectual rigour in determining whether, having regard to the nature of the issues in dispute in the case, proper and complete discovery of documents has been made by their client under each tier of discovery and having regarding to the appropriate test. ... I merely emphasize the Court's expectation in general terms that counsel will perform their duties respecting discovery with utmost probity and rigour."

Cost Follow the Event (Except when they don't)

- * Tisalona v. Easton, 2017 BCCA 272
- * 2 actions heard at the same time. Liability admitted in both.
- * 2nd action dismissed on causation issue (ie 2nd accident did not aggravate or prolong original injuries). Plaintiff awarded costs of both actions.
- * Appeal dismissed. Rule was that costs of a proceeding be awarded to successful party unless the court otherwise orders. Although unusual, it is within the trial judge's discretion to so order. 2nd action took up only 1 hour of total trial time & it was reasonable to join the claim to the more substantial action.

Fast Track

- * Actions litigated under Rule 15-1
- * Rule 14-1(f): Fast Track costs apply if:
 - * Amount recovered is \$100,000 or less
 - * Trial completed within 3 days or less

- * Mothe v. Silva, 2015 BCSC 1053
 - * Not conducted under Rule 15-1
 - * \$65,000 award & 5-day trial.
 - * \$11,000 + \$3,000 for 2 extra trial days.
- * Saopaseuth v. Phavongkham, 2015 BCSC 45
 - * Unclear whether parties intended matter to be 15-1
 - * \$44,920 award & 7-day trial.
 - * \$11,000 + \$6,000 for 4 extra days

Fast Track Settlements

- * Fixed Costs on Settlement before trial
 - * \$6,500 (\$8,000 \$1,500)
- * Avoiding litigation on settlement of claims focus is on the useful preparatory work done and not where in the pre-trial timeline the resolution was reached. Simple cases require less work to be ready for trial: Yuan v. Fan, 2017 BCSC 147.
- * Multiple Actions
 - * Harvey v. Tooshley, 2014 BCSC 433
 - * Two Rule 15-1 actions heard at the same time
 - * Settled before trial
 - * Awarded two sets of costs at \$6,500 each



* Gill v. Fowler, 2016 BCSC 1163

- Assessment of Costs following settlement
- 3 FT actions trials to be heard at same time
- Some efficiencies
- Fixed costs of \$6,500 for each with small deduction
- \$20,000 plus taxes for 3 actions.

Costs of Two Counsel



- * No.
- * Pinch (Guardian ad litem of) v. Morwood, 2016 BCSC 1907, Dillon J.
- * Thom v. Canada Safeway Limited, 2015 BCSC 2016
- * The only authority for additional costs is Scale C and Appendix b s. 2(5) which allowed the 1.5 unit uplift.

Special Costs

- * Norris v. Burgess, 2016 BCSC 1451
 - * Following a jury trial, plaintiff was awarded full amount of her contingency fee payable to her counsel for the entirety of the case as special costs.
 - * Based upon defence disclosure of video surveillance during 4th week of jury trial and contrary to a trial management conference order which required its listing.



Failure to Comply with Rule 9-1(1)(c) & Wording of the Offer

- * Granja v. Jozef, 2017 BCSC 1087
- * Offer #1 did not contain the 9-1(1)(c)(iii) reservation language = not a valid offer.
- * Offer #2 not served on unrepresented defendant where ICBC had conduct of defence as Third Party as required by 9-1(1)(ii) = not a valid offer.

- * 469238 BC Ltd. (Lawrence Heights) v. Okanagan Aggregates Ltd., 2016 BCSC 1159
- * "...it is not for the court to go around correcting mistakes made in the crafting of formal offers to settle."

- * Park v. Donnelly, 2018 BCSC 219
 - * Deals with the ICBC standard form of Offer to Settle
 - * Offered \$430,000 "old money"
 - * after taking into account Part 7 benefits paid or payable
 - * after taking into account any advances paid to date
 - * ICBC argued that benefits and advances had to be deducted from the old money Settlement Payment

- * That position is at odds with the position taken by ICBC and the Court of Appeal decision in Anderson v. Routbard, 2007 BCCA 193:
 - * no reference to "old money" in the offer
 - * sum defined as the Settlement Payment was the net figure, "no more, no less". No various or additional sums were to be deducted.
- * Critical of the use of the term "old money" which had no foundation in any legislation, case law or opinion evidence. There is no place to turn to determine what these words mean on an objective basis.

- * No Mistake as to Terms in Viewcrest Estates Ltd. v. Alfonso, 2016 BCSC 2368
 - * Defence offer to settle "all claims" for \$17,500.
 - * Plaintiff accepted offer but sought costs in addition.
 - * "Claims" included means all things one party want from another and includes costs.

- * Rule 9-1 Offer Need not be served on formal address for delivery: Hanson v. Sharma, 2017 BCSC 2310
- * No Requirement in Rule 9-1 that acceptance of a formal offer be in writing: **Hanson, supra**

Double Costs to Defendant

- * Only available if the action is dismissed
- * C.P. V. RBC Life Insurance Company, 2015 BCCA 30
- * No jurisdiction to award a defendant double costs for beating an offer to settle in circumstances where the plaintiff recovers a judgment.

Double Disbursements?

- * No.
- * Lafond v. Mandair, 2017 BCSC 1081
- * double disbursements are not available as the absence of any reference to disbursements in subsection 9-1(5)(b) precluded an award for double disbursements.
- * Double costs may be awarded for some or all steps taken after delivery of the offer. A step in the proceeding is a formal step that moves the action forward. Incurring a disbursement is not a formal step as contemplated by the Civil Rules.

Factors Considered

- * Rule 9-1(b) enumerates the factors the court may consider in making a costs order:
 - * (a) whether the offer was one that ought reasonably to have been accepted;
 - * (b) the relationship between the terms of settlement offered and the final judgment;
 - * (c) the relative financial circumstances of the parties;
 - * (d) any other factor the court considers appropriate

- * British Columbia v. Salt Spring Ventures, 2015 BCCA 343
 - * These are independent factors.
 - * Factors may be considered in silo.
 - * Weight to be given to any one factor is within the discretion of the trial judge.
- * There is no hierarchy to the factors: Wafler v. Trinh, 2012 BCSC 1798

- * Timing of Offer
 - * 3 days before trial (but not seen until the Saturday before the Monday start): White v. Wang, 2015 BCSC 1080
 - * 2 days: Manoharan v. Kaur, 2016 BCSC 1016
 - * Morning of first day of trial: **Johal v. Radek, 2016 BCSC 1170**

Offer where amount is under \$100,000

- * Smith v. Neil, 2015 BCSC 572
 - * Not litigated under 15-1
 - * Plaintiff's FOS \$85,000 + Appendix B costs
 - * Trial award \$85,529
 - * No effect to FOS
 - * it asked for costs in accordance with Appendix B
 - * that difference rendered the offer in excess of trial award
 - * also only 2% difference

Fast Track

- * Calculating double costs
 - * Double fixed fees: Codling v. Sosnowsky, 2013 BCSC 1220

Assessment of Costs

- * Is A Pre-Hearing Conference Required?
 - * Not new but often overlooked.
 - * Administrative Notice 8:
 - * all appointments to assess BOCs where the amount involved is \$45,000 or more
 - * all Vancouver, New West & Victoria matters one day or longer
 - * all matters elsewhere ½ day or longer.

Evidence

 It is common for counsel to speak to their own affidavits in assessment hearings: Heuser v.
Carnovale, 2017 BCSC 855

* Garayt v. Deneumoustier, 2018 BCSC 295

- * OT invoice challenged on basis that preparation and time spent by expert in assessing plaintiff and preparing report was not sufficiently disclosed or justified.
- * Report not served. Litigation privilege maintained over report so it was not before the Registrar.
- * Reasons do not elaborate on what was in the Affidavit of justification from counsel but court accepted it as sufficient proof.

Tariff Units

- * Gibson v. Mihalcheon, 2018 BCSC 35
- * Good overview case of the general principles applied to assessment of units and disbursements.
- * Tariff:
 - * where there is discretion on range of units, the test is objective.
 - * Registrar is to compare the case at bar with all other cases that come before the court and decide where it fits within the spectrum.
 - * was the case straightforward, number of parties, nature of legal issues, experts, worth of the case, any other factor impacting on case's difficulty.

Disbursements Frolic



\$15 Trust Administration Fee

- * A proper disbursement.
- * Garayt v. Deneumoustier, 2018 BCSC 295
- * Registrar Cameron was very clear:

* ...on numerous occasions on assessment that I have presided over I have advised counsel for the Insurance Corporation of British Columbia...that unless there is an issue as to whether or not the Plaintiff's counsel has received a deposit into trust in respect of resolution of the litigation, there is absolutely no justification to put the trust administration fee into issue.

* "I have said to counsel, who come with instructions to oppose the TAF disbursements that those instructions are simply misguided and the matter ought not to be raised unless there is an issue about the deposit being made."

2 months later...

- * Steinhauser v. Stinson, 2018 BCSC 596
- * "For reasons which escape me, and which counsel for the defendants could not address without improperly disclosing instructions, the defendants have submitted that I should disallow the trust administration fee."

- * Fee allowed.
- * "If the defendants and their insurers were unable to rely on the sanctity of trust monies provided to members of the legal profession in this province, it would cost those defendants and their insurers substantially more than the relatively minor amount the plaintiffs' lawyer are required by the Law Society to pay for each file where trust funds are dealt with."



Experts - Reasonableness of Fees

- * If challenging the reasonableness of the expert fees, challenging party may be required to provide details of the costs they incurred for the same or similar experts.
- * **Sturdy v. Dhadda, 2016 BCSC 505:** while not determinative it is relevant as Registrars often compare charges.

- * Harvey v. Tooshley, 2014 BCSC 433
 - * Scrutinize the retainer letter.
 - * Charges of an OT reduced on assessment as some of the work went beyond the opinion sought in the retainer letter.

Experts – Service Providers

- * Administration Fee Mark-Up of Service Provider
 - * Disallowed in Haller v. Galey, 2016 BCSC 998
 - * \$2,000 for coordination of testimony when timing was known substantially in advance.
 - * The fact that defendant also retained experts through the same organization and presumably paid the same administration fee is not determinative.

Expert's File

- * Charges that exceed the BCMA Guidlines can be scrutinized. (\$1.60 for first 10 pages and \$.30 thereafter). Administrative Notice No. 5 provides a guideline of \$.25/page.
- * "The sky is not the limit"
- * Carreiro v. Smith, 2015 BCSC 2379

Mediation Costs

- * Noori v. Pochman, 2016 BCSC 1329
 - * On his way to mediation, the plaintiff spoke with his lawyer who advised that the handling adjuster had advised that he would not entertain settlement beyond his \$15,000 authority. Counsel advised the plaintiff not to bother attending as it would be a waste of time.
 - * File later settled for \$30,000.
 - * Plaintiff awarded mediation costs.

MRIs

- * Not Allowed
 - * Ali v. Fineblit, 2016 BCSC 566
 - * Carby v. Benoit, 2016 BCSC 1675
 - * Gibson v. Mihalcheon, 2018 BCSC 35

Trial Preparation Consultants



- * Trial preparation is compensated by Tariff Item 34.
- * Jury consultant disallowed as a luxury: Haller v. Galey, 2016 BCSC 998
- * Service provider who conducted a mock direct and cross-examination of the plaintiff before a mock jury disallowed: Pacholski v. Doe, 2016 BCSC 1157

After-the-Event Insurance

- * Disallowed in Wynia v. Soviskov, 2017 BCSC 195
- * Coverage insures against plaintiff's own disbursements and opponents' cost and disbursements in a lost or abandoned case.
- * Relates to the direction, management or control of the litigation and does not arise from the exigencies of the proceeding itself.

Part 7 Action

- * Cost of filing a Part 7 action when a tort claim is pursued has been both allowed and disallowed.
- * Reed v. Amell, 2014 BCSC 1613 allowed the cost of filing the Part 7 NOCC.
- * **Ball v. ICBC** unreported March 22, 2018 did not allow the cost of the Part 7 NOCC as a proper disbursement.

Interest on Disbursements

- * No!
- * MacKenzie v. Rogalasky/Chandi v. Atwell, 2014 BCCA 446

Overhead

- * No!
- * File Administration fee- Dakin v. Roth, 2013 BCSC 1018
- * Binders, Tabs, Binding Park v. Koepke, 2013 BCSC 1086

