Settlement Offers:
Language & Leverage

J. SCOTT STANLEY

Murphy Battista, Vancouver

IRINA KORDIC

Murphy Battista, Vancouver

Settlement Offers: Language and Leverage

J. Scott Stanley and Irina Kordic
stanley@murphybattista.com / kordic@murphybattista.com
Murphy Battista LLP
2020-650 West Georgia Street
Vancouver, BC V6B 4N7
604-633-3816/ 604-633-3818

1. General Framework

While informal offers to settle may serve their various purposes in the course of litigation, it is really the formal offers that provide some leverage to each party in terms of the costs consequences they may attract. Making a formal offer at the right time in a case can make a large difference in the conduct and the outcome of that case.

Formal offers to settle are now made pursuant to Rule 9-1, with reference to Rules 14-1(costs generally) and 15-1(fast track actions).

Rule 9-1(5) sets out the various costs options open to the court in a proceeding in which an offer to settle has been made (ie, deprive of some or all costs, award double costs, etc). The court is limited to those options: *E. (A.) (Litigation Guardian of) v. J. (D.W.),* 2011 BCCA 279 at paras. 35-40. The Rule is permissive and therefore the court can allow or deny any of the forms of relief: *British Columbia Society for the Prevention of Cruelty to Animals v. Baker*, 2008 BCSC 947 at para 12.

Rule 9-1(6) provides the guidelines for consideration when making an order for costs following a formal offer, which include:

(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.

The Rule provides for the exercise of a broad discretion by trial judges and provides principles to guide in the exercise of that discretion: *Roach v. Dutra*, 2010 BCCA 264.

In *Tompkins v. Bruce*, 2012 BCSC 833 the court discussed the purposes of cost awards:

> [30] The purpose of cost consequences of reasonable offers is to encourage settlement. On the other hand, onerous cost penalties should not discourage the seriously injured from a proper hearing and a chance to obtain a higher award, nor should they seriously subtract from what the court has found is appropriate compensation for the injury.

Broader commentary was offered by the Court in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25 regarding the guiding principles behind the enactment of the Rule in the context of an award of double costs post-trial:

> [25] An award of 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. Litigants are to be reminded that costs rules are in place "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" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:
>
> > [74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
> >
> > • "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;"
> >
> > • "[T]o 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 para. 28 (C.A.);
> >
> > • "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
> >
> > • "[T]o 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, 88 B.C.L.R. (4th) 17 at para. 16.

Within this general framework of the Rules and the large quantity of jurisprudence on costs, the courts have much latitude for a wide variety of cost consequences post-trial despite, and maybe even because of, formal offers to settle. The following discussion offers some insight into recent trends at both the trial and appellate level as well as some strategies for employing formal offers so as to maximize their strategic value.

2. Recent Trends

i) Plaintiff – unsuccessful if didn't recover the full extent of damages sought?

There was a recent trend in decisions on costs where the court deprived the plaintiff of costs after receiving judgment for less than the amount sought at trial. (*Visona v. Stewart*, 2013 BCSC 2006, *Werner v. Ondrus*, 2013 BCSC 1565).

In *Visona*, the plaintiff claimed that she sustained various soft tissue injuries as well as an injury to her tailbone and that the pain from tailbone injury left her depressed which in turn contributed to the breakdown of her marriage, past wage loss and future loss of capacity. Mr. Justice Jenkins found that the plaintiff only sustained soft tissue injuries in the accident from which she recovered within two years. Accordingly, he awarded minimal damages for pain and suffering and found no past wage loss or loss of capacity existed due to the accident. Costs were awarded to the defence because "the defendants have been generally successful in this action" (para 49).

In *Werner*, another decision by Mr. Justice Jenkins, at issue were costs after a trial where the plaintiff claimed damages arising from two accidents in which she sustained injuries. At trial, the plaintiff recovered damages but, again, less than the amount that was sought. Since "there was divided success in the "matters in dispute", there was also divided success on the more important matters in dispute [ie. non-pecuniary damages and future care costs], a "global determination" indicated the decision was almost half-way between the parties' offers and finally, the plaintiff "substantially succeeded on one major issue and one lesser issue" (para 15), the plaintiff was awarded 50% of her costs.

Both of these decisions, and other ones with a similar result, were based on Rule 14-1(9) which states that "costs of a proceeding must be awarded to the successful party unless the court otherwise orders". The term "successful" in the context of Rule 14-1(9) was interpreted to mean "substantial success" and the issue of "substantial success" in turn leads to an inquiry into global determination of whether a party was successful at 75% or more on important matters in dispute (*Werner*, para 5).

In *Loft v. Nat,* 2014 BCCA 108, the Court of Appeal recently clarified the meaning of successful party, which rendered the decisions in *Visona* and *Werner* wrong in principle:

> [46] Pursuant to Rule 14-1(9), costs in a proceeding must be awarded to the successful party unless the court otherwise orders. At its most basic level the successful party is the plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains a dismissal of the plaintiff's case: *Service Corporation International (Canada) Ltd. (Graham Funeral Ltd.) v. Nunes-Pottinger Funeral Services & Crematorium Ltd.*, 2012 BCSC 1588, 42 C.P.C. (7th) 416.

> [47] In this proceeding Mr. Loft was awarded damages for injuries he had suffered in the motor vehicle accident. The respondents had denied liability until shortly before trial. Although the damage award was far less than sought, Mr. Loft was the successful party. The fact that he obtained a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving him of costs: *3464920 Canada Inc. v. Strother*, 2010 BCCA 328, 320 D.L.R. (4th) 637.
>
> [48] The trial judge's stated reason for awarding costs to the respondents was that the respondents had been largely successful in all areas of the claim. With respect, that decision is wrong in principle and cannot stand. I note that on the hearing of the appeal the respondents did not suggest otherwise.
>
> [49] The fact that a party has been successful at trial does not however necessarily mean that the trial judge must award costs in its favour. The rule empowers the court to otherwise order. The court may make a contrary order for many reasons. One example is misconduct in the course of the litigation: *Brown v. Lowe*, 2002 BCCA 7, 97 B.C.L.R. (3d) 246. Another is a failure to accept an offer to settle under Rule 9-1. A third arises when the court rules against the successful party on one or more issues that took a discrete amount of time at trial. In such a case the judge may award costs in respect to those issues to the other party under Rule 14-1(15): *Lee v. Jarvie*, 2013 BCCA 515. Such an order is not a regular part of litigation and should be confined to relatively rare cases: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, 77 B.C.L.R. (4th) 142; *Lewis v. Lehigh Northwest Cement Limited*, 2009 BCCA 424, 97 B.C.L.R. (4th) 256. Whether a judge will order otherwise in any particular case will be dependent upon the circumstances of that individual action.

While it seems that the decision in *Loft* will provide some measure of certainty regarding cost awards post-trial, the trial judges still retain the discretion to not award full costs to a plaintiff who receives a judgement in his favour below the amount asked for. Strategically, in order to insulate the plaintiff from any costs reductions, it is crucial that counsel makes a good formal offer before trial.

ii) Defendant – deprived of costs after beating a formal offer?

There has also been a recent trend where the defence is not recovering any costs, let alone double costs, after beating a formal offer to settle. This trend was also addressed by the Court of Appeal recently.

Wafler v. Trinh, 2014 BCCA 95 was the plaintiff's appeal from a jury award that was much lower than the three defence formal offers. The defendant cross-appealed the cost award post-trial which determined that, despite the defendant's success and formal offers, the plaintiff would

have his costs to the date of the last formal offer and each party was to bear their own costs thereafter. The Court of Appeal was dealing with the defendant's candid submissions that:

> [59] ... the purpose of the appeal on costs was to reverse what he described as a trend in the trial court wherein plaintiffs who succeed in "beating" an offer to settle are routinely awarded double costs but defendants who have made an offer to settle that was rejected but well within the claim value are deprived an order of costs. The defendant says this is unjust. In other words, the defendant submits there should be significant consequences to plaintiffs who fail to accept a reasonable offer.

In dismissing the appeal relating to the cost award, and addressing the general defence argument of unfairness, Mdm. Justice Kirkpatrick said:

> [81] I do not quarrel with the general proposition that a plaintiff who rejects a reasonable offer to settle should usually face some sanction in costs, even in circumstances in which it cannot be said that the plaintiff should have accepted the offer. To do otherwise would undermine the importance of certainty and consequences in applying the Rule. The importance of those principles was emphasized by this court in *Evans v. Jensen*, 2011 BCCA 279:
>
> > [41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.
>
> > [82] That said, under the present Rule, unlike its predecessor which mandated the result, it is for the trial judge to determine in any particular case the nature and scope of whatever sanctions are to be applied. The 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.

Though the decision in *Wafler* and the general trend in cost awards seem to be favouring the plaintiff at the moment, it is still prudent to make a well-reasoned formal offer to ensure that no adverse cost consequences are awarded post-trial.

3. Divided Interests

While in most cases the interests of the insurer and the insured will be aligned, there are cases in which they are divided. These are mainly policy limits cases. Such cases, if not appropriately settled for the policy limits by the insurer, can attract bad faith claims by defendants and expose the insurer to further payouts. This situation provides the perfect opportunity to use a formal offer to settle in order to gain some leverage in the case.

As soon as a case is identified as one which realistically could exceed the available policy limits, a formal offer to settle for the policy limits should be made. When making such an offer, the following information should be included:

a. all clinical records, possibly reports, and other details generally that prove the claim to be above policy limits;

b. discussion on why an early settlement would be advisable (ie, savings in disbursements and interest; later settlement would require contribution from the defendant, etc.);

c. background information on the defendant's employment and assets so that the offer is taken seriously by both the insurer and the defendant;

d. a time limit that gives the insurer and insured enough time to consider the offer and its merits, but has an expiry date; and

e. a clause that states that a limits offer will not necessarily be available after the expiry date.

This type of a formal offer serves different purposes at different times in the litigation. If the offer is accepted early on, then that concludes matters and much is achieved in the savings of time and expense in pursuing the case. If the offer is not accepted and that is due to an unrealistic view of the case by the insurer, then the chances of recovering a judgement amount in excess of the policy limits increase significantly because of the well-reasoned offer and the grounds it provides for a finding of breach of duty to settle.

Another way to approach a policy limits case and the issue of divided interests is to present a well-reasoned formal offer for above the policy limits, then send a letter to defence counsel indicating that if they were to make an offer of the policy limits, the plaintiff would take it. This again puts defence counsel and the insurer in a difficult position that they have to approach cautiously due to the duty to settle.