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Formal Offers to Settle:
Shields or Swords?

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As the title of this paper suggests, in British Columbia for over two decades the formal offer has served not only as a means of managing one's own risk by encouraging the settlement of claims but also a tool to put opposing litigants at risk for proceeding with overvalued claims.

As one of the authors to this paper noted in his 2011 BC Continuing Legal Education publication *Formal Offers under Rule 9-1 of the BC Supreme Court Civil Rules*, the process for determining the effect of a given offer has become vastly more complex in its current manifestation. As per Rule 9-1(5) the following remedies are potentially available to an offering party after trial:

(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.

The aforementioned paper reviewed some fundamental considerations that courts take into account when making a determination under Rule 9-1(6) regarding costs that a rejecting party may have to pay to the offering party (we will hereafter refer to this scenario as an "Effective Offer"). The following are "takeaway points" from that previous publication:

1. The formal offer should include detailed argument justifying the quantum offered.
2. The formal offer should address relevant evidence available.
3. The formal offer should set out a consideration of expert opinions that have been served by all the parties.
4. The formal offer should give the opposing party adequate time to consider it prior to having to respond. This period within which acceptance can be made

> will differ from litigant to litigant depending on their circumstances on the date of the offer. Issues that may be ambiguous in the short-term may require an extension of the period for acceptance. For that reason, generally speaking 'short fuse' offers are to be eschewed.

The BC Court of Appeal stated the test for an Effective Offer in the following manner:

> the reasonableness [of an offer] is to be assessed by considering such factors as the timing of the offer, whether it had some relationship to the claim (as opposed to simply being a "nuisance offer"), whether it could be easily evaluated, and whether some rationale for the offer was provided. We do not intend this to be a comprehensive list, nor do we suggest that each of these factors will necessarily be relevant in a given case.[1]

In this paper the authors will consider cases[2] that have been decided since the previous publication that may inform litigants who are making a formal offer on factors to weigh when considering an offer in a given case.

No double costs to be awarded against plaintiffs who succeed at trial

Under a plain reading of Rule 9-1(6)(b), the court has the discretion to award double costs to a party that put forward a reasonable offer which was unreasonably refused. The typical example would be where a party made a significant offer to settle before trial and the trial award bested that offer, thereby entitling the offering party to double costs for each step taken after said offer to penalize the opposing party for unreasonably refusing to accept.

The BC Court of Appeal in *C.P.* v. *RBC Life Insurance Co.* 2015 BCCA 30 clearly enunciate the view that a trial judge does not have the discretion to award a defendant double costs where the plaintiff obtains any type of success in judgment.[3] Goepel J.A. for a unanimous 3-judge panel of the BCCA stated that it was a punishment for a successful plaintiff to be denied its costs from the date of the offer was made and a further punishment if it was required to pay any of the defendant's costs. The court

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[1] *Hartshorne* v. *Hartshorne* 2011 BCCA 29 at para 27

[2] As was noted in the previous publication unfortunately this subject remains plagued by a frustrating plethora of contradictory trial-level rulings. One can only hope that counsel in the future will endeavor to more exhaustively canvass the relevant case law when making submissions relating to formal offers than have their predecessors.

[3] In doing so, they expressly overruled the trial ruling in *Minhas* v. *Sartor* 2014 BCSC 47 a case in which the trial judge had relied on the BC Court of Appeal ruling in *Giles* v. *Westminster Savings Credit Union* 2010 BCCA 282 which had implied that an award of double costs may be made in a case in which the plaintiff's claim is not dismissed in its entirety.

ruled that to "also allow a defendant double costs would skew the procedure in favour of defendants and unfairly penalize and pressure plaintiffs."[4]

The nominal or nuisance offer

While one avenue for double costs has seemingly been taken away, the court has also clarified that another still exists. While there had been some case law to suggest otherwise, a nuisance or nominal offer (e.g., $1.00) can still trigger an award of double costs in favor of the defendant.

Some early jurisprudence relating to the new Rules suggested nominal offers provide no incentive to settle and therefore cannot trigger a consequential cost award.[5] More recent case law suggests that there may certainly be occasions in which the Plaintiff should accept a nominal offer, if not at the time that the offer is made, then after the key evidence is known or should reasonably be appreciated.[6]

That being said, in practical application, the effectiveness of a nominal offer will still require the case to be at a stage where the offering party is able to clearly set out the basis for success at trial. Furthermore, the offering party should be aware that the date from which the double cost award may be made against the rejecting party may be later than the date of offer. For example consider *McCaffrey* v. *Kang* 2014 BCSC 2294, in which the Court dismissed the claim and the Defendant sought costs pursuant to a waiver of costs offer made almost a year and a half before trial. While the Court found that the critical evidence was known to the Plaintiff at the time of the offer, the Defendant was only awarded double costs for the six-day trial.

Fast Track cost award ceiling

Another development to consider when making an offer to settle is the application of Rule 15-1 as a cap on a party's costs when quantum is $100,000 or less, even if Notice of Fast Track was not filed in the action.

The BC *Civil Rules* provide that if an action falls into the enumerated criteria outlined in Rule 15-1(1), that any party may seek to apply the Fast Track Rules to said action by filing a Notice of Fast Track action. When a matter is conducted under the Fast Track Rules, costs are awarded according to the set schedule whether the matter proceeds through trial or settles in advance of trial. While not explicitly outlined in the rules, under the current schedule, costs for a Fast Track matter, which settles before trial, are capped at $6,500.[7] Note, the court can also deduct a percentage from the cap in

[4] 2015 BCCA 30 at para 91
[5] *Giles* v. *Westminster Savings & Credit Union*, 2010 BCCA 282
[6] *Bay* v. *Pasieka* 2014 BCSC 809 at para 20; and *Henry* v. *Bennett* 2014 BCSC 1963 at para 29
[7] *Benz* v. *Coxe*, 2012 BCSC 1043

accordance to the maturity of the matter and the necessary steps yet to be taken before trial[8]. Generally if the matter is at the stage where relevant documents have been disclosed and Examinations for Discovery have occurred the cap will be awarded.[9]

Even when a Notice of Fast Track has not been filed, an action with a quantum of less than $100,000, may be deemed to be captured under the Fast Track cost schedule by virtue of Rule 14-1(1)(f). Effectively, actions that were not explicitly fast-tracked may still be treated as such by virtue of the amount for which they settled, provided they are not excluded by the other provisions of the Fast Track Rule.[10] Generally therefore, when considering an offer to settle, an offering party should be mindful that any action which settles for $100,000 may be subject to the cost cap of $6,500 instead of the Tariff rate, provided the parties have not contracted to some other arrangement as part of the settlement agreement.[11]

One caution regarding the above would be to recognize that, if a formal offer to settle was outstanding for a long period of time and a number of steps had been taken before dismissal at trial, an award of double costs for steps taken between the offer and acceptance is arguably also available under the Fast Track schedule.[12]

Double disbursements?

Can an award of double costs include an award of double disbursements? Brown J. in *Moore* v. *Kyba* 2012 BCSC 577, concluded that, while the *Rules* are silent on disbursements, such an award was not permitted (at para 8). Shortly thereafter, Fitzpatrick J. in *Gonzales* v. *Voskakis* 2013 BCSC 675, while not awarding double costs or disbursements, explicitly contradicted *Moore*, holding that the *Rules* do not limit the courts discretion in this regard as to do so would defeat the clear intention of the *Rules* (at para 65). The court then simply ended by saying "One can only hope for some clarity on this issue by possible amendments to Rule 9-1(5)" (at para 67). This will therefore be a topic that we will have to continue to monitor for further clarification by way of future case law and/or potential amendment of the BC *Civil Rules*.

Conclusion

As can be seen from the above, nominal success and nominal offers can influence cost awards. While the courts have curtailed the ability of defendants to seek double costs

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[8] *Bowen* v. *Martinec* 2008 BCSC 104

[9] *Benz* v. *Coxe*, 2012 BCSC 1043; *Gill* v. *Widjaja* 2011 BCSC 1822, affirming 2011 BCSC 951

[10] *Varga* v. *Shin*, 2012 BCSC 1643 at para. 27

[11] *Wan* v. *Smith Estate* 2013 BCSC 205

[12] See *Gichuru* v. *Pallai* 2013 BCCA 60, at paras. 39-40, note also that double costs have been awarded to matters which have proceeded through trial under the Fast Track Rules *Coutakis* v. *Lean* 2012 BCSC 1447.

where a Plaintiff achieves even nominal success at trial, they have also confirmed that double costs remain a reasonably viable option where a defendant only makes a nominal offer and the Plaintiff's claim is dismissed.

There is a tension relating to the question of cost certainty at this time. On the one hand, the determination of whether costs are to be awarded is now a complex and highly discretionary exercise, but on the other, it can be argued that the broader application of the Fast Track Rules, and the associated predictability it may ensure, may counterbalance that. While the long-term effects of the above have yet to really be tested, this is a positive development for those who hope to more effectively manage risk using offers to settle.

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