Formal Settlement Offers And Costs: A Matter Of Discretion

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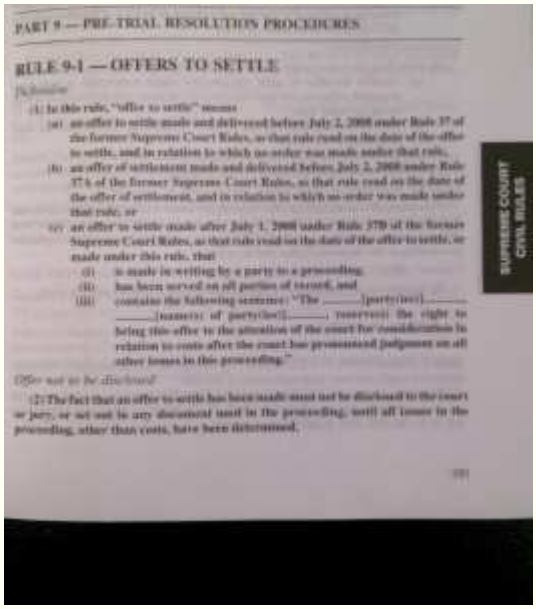
PART 9 — PRE-TRIAL RESOLUTION PROCEDURES

RULE 9-1 — OFFERS TO SETTLE

SUPREME COURT CIVIL RULES

As recently discussed, costs consequences following trial where a formal settlement offer is not beat is a matter of judicial discretion. While the principles behind the exercise of that discretion are reasonably well formulated the costs results can be a little trickier to predict. Two sets of reasons for judgement were released this week by the BC Supreme Court demonstrating this discretion in action.

In the first case (Khunkhun v. Titus) the Plaintiff advanced a personal injury claim in excess of one million dollars. She claimed she suffered from "*a significant and disabling vestibular injury*" as a result of a collision. The jury largely rejected the Plaintiff's sought damages and awarded $45,000.

ICBC made a more generous settlement offer prior to trial which the Plaintiff did not accept (*about 30% higher than the jury award*). As a result, Mr. Justice Willcock stripped the Plaintiff of her costs from the time of the offer onward. The Court did not go so far as to order that the Plaintiff pay the Defendant costs finding that it would be unjust. Mr. Justice Willcock repeated the following reasoning from Madam Justice Humphries in Lumanlan v. Sadler:

Given the significant injury to the plaintiff, which was caused by the defendant's foolish and reckless behaviour, and the effect on the award of a further reduction for costs, even if not doubled, and taking into account all of the above considerations, in my view it would not be fair or just to require the plaintiff to pay ICBC's costs after the date of the offer.

In the second case released this week (Mazur v. Lucas) the Plaintiff was awarded $538,400 following a jury trial to compensate her for injuries sustained in a collision. ICBC appealed and succeeded in having a new trial ordered.

Prior to the second trial ICBC made a formal settlement offer of $300,000. The Plaintiff rejected this and proceeded to trial again. This time the jury came in lower awarding $84,000 in damages.

ICBC brought an application seeking costs for both trial. The result of this would have been financially significant. Madam Justice Humphries declined to allow this and instead awarded the Plaintiff costs for both trials despite not besting ICBC's offer. In exercising its discretion the Court provided the following reasons:

[62] This court has stated many times that parties should be encouraged to settle, and if unreasonable in not doing so, may be punished in costs. As well, the fact that an award of costs against a party may wipe out their award of damages is not determinative. However, given all the circumstances that existed at the time the offer was made which did not change throughout the trial, I am not persuaded that the plaintiff ought to be denied her costs on the basis that she ought reasonably to have accepted the offer that was made twelve days before the trial began. Having in mind the amount of the first award, the narrow issue upon which a new trial was ordered, the amount of the second offer, and the expected similarity of the evidence at the second trial, the plaintiff was reasonable in deciding not to accept the offer and to have the action adjudicated by a second jury.

In addition to this final result, this case is worth reviewing for the Court's discussion of advance payment orders. Prior to the second trial ICBC paid the Plaintiff $250,000 in exchange for a stay of execution so the Plaintiff would not collect the damages from the Defendants personally. Madam Justice Humphries found that an advance payment after judgement should not be factored into a costs assessment. The Corut provided the following reasons:

[14] The defendants argue that the plaintiff should be deprived of her costs of the second trial as of December 24, 2009, the date on which the negotiated agreement was signed. They cite cases dealing with situations in which awards at trial are less than an advance, and in which plaintiffs have been deprived of costs as of the date of the advance (McElroy v. Embelton (1996), 19 B.C.L.R. (3d) 1 (B.C.C.A.); Baxter v. Brown (1997), 28 B.C.L.R. (3d) 351 (B.C.C.A.).

[15] However, those cases are all advances before trial. The basis on which the Court of Appeal in those cases concluded that the date of the advance was relevant to costs was because the plaintiff "had in hand more at the start of the action than the amount of the jury's verdict." (see McElroy). The plaintiff, upon receipt of an advance, must realistically assess his or her claim knowing that proceeding to trial carries a risk in costs (Carey v. McLean, 1999 BCCA 222).

[16] This advance was one paid to avoid execution on an existing judgment, pending an appeal that would proceed regardless of whether the plaintiff wished to accept the money in final settlement of the action or not. That option was not open to her. The agreement signed by the plaintiff required repayment if a new trial were ordered and the results were not favourable to her, but did not give her the option of accepting the money and ending the proceedings. This advance payment, unlike those in the cases cited by the defendant, is not the equivalent of an offer to settle.

[17] The date of the advance is not appropriately considered in these circumstances.