# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davies v. Canada Shineray Suppliers Group Inc.,* 2017 BCSC 1729

Date: 20170927
Docket: S163406
Registry: Vancouver

Between:

**Sian Lydia Davies and Daisy Chain Montessori Child Care Inc.**

Plaintiffs

And

**Canada Shineray Suppliers Group Inc. dba Shineray Suppliers Group Inc. and the said Shineray Suppliers Group Inc.**

Defendants

Before: The Honourable Madam Justice Fisher

## Reasons for Judgment on Costs

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|---|---|
| Counsel for the Plaintiffs: | M. Sheard<br>S. Barker |
| Counsel for the Defendants: | J.R. Shewfelt |
| Counsel for Jack Wang and Jack Wang Law Corporation | T.G. Keast, Q.C. |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>September 7-8, 2017 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 27, 2017 |

[1] On February 27, 2017, I awarded contractual damages of $15,000 and aggravated damages of $30,000 to the plaintiff Sian Lydia Davies as a consequence of a breach by the defendant Canada Shineray Suppliers Group Inc. of a fixed term employment contract. I also dismissed a counterclaim filed by the defendant. The circumstances are set out in some detail in my reasons, *Davies v. Canada Shineray Suppliers Group Inc.,* 2017 BCSC 304.

[2] There are two applications before me.

[3] The first is the plaintiff's application for costs against the defendant, payable either by the defendant or its then counsel, Jack Wang. She seeks special costs, or alternatively party and party costs at Scale C, as well as double costs incurred after the delivery of an offer to settle.

[4] The second application is brought by the defendant, which seeks orders that Jack Wang be personally liable to the plaintiff for 70% of any costs it is ordered to pay, or alternatively an amount that exceeds costs payable under the fast track rule, and that the fees and disbursements billed by Jack Wang Law Corporation to it be disallowed by 50%, or alternatively in respect of the first six days of trial.

[5] The defendant opposes the plaintiff's application on the basis that she should not be entitled to any costs because she failed to achieve substantial success at trial, having failed in her claim for damages of $255,000 for the entire contractual term. If costs are to be awarded, the defendant says that they should be party and party costs at the usual scale, and the plaintiff should not be entitled to double costs, as her offer to settle was not one that it ought reasonably to have accepted.

[6] Jack Wang opposes any order for costs to be payable by him other than on a party and party basis, and any reduction of his fees and disbursements to the defendant, for no more than one day of trial.

[7] Many issues were raised by the parties, which require assessment *seriatim*:

1. Did the plaintiff achieve substantial success at trial, thus entitling her to costs?

2. If so, is the plaintiff entitled to special costs?

3. If not, should costs be assessed at the higher Scale C under Appendix B of the *Supreme Court Civil Rules*?

4. Should the plaintiff be entitled to double costs for all steps taken after she made an offer to settle?

5. Should Jack Wang be personally liable for all or part of the costs that the defendant is ordered to pay, either as special costs or party and party costs?

6. Should any fees and disbursements between Jack Wang and/or Jack Wang Law Corporation and the defendant be disallowed?

## 1. Did the plaintiff achieve substantial success at trial, thus entitling her to costs?

[8] Rule 14-1(9) of the *Supreme Court Civil Rules* entitles the successful party to costs, unless the court otherwise orders.

[9] At trial, the plaintiff was awarded a total of $45,000 for contractual and aggravated damages for the defendant's breach of a fixed term employment contract. This was far lower than the amount sought, $255,000, being damages for the remainder of the contract term. This is because she was unsuccessful in establishing that the termination provision in the contract, which required three months' notice with or without cause, was unenforceable. However, the defendant was unsuccessful in establishing just cause for dismissal, an issue that was relevant only in the event that the termination clause was deemed unenforceable, but which occupied a considerable amount of time at trial.

[10] In my view, the plaintiff achieved substantial success in the context of a claim for wrongful dismissal. In *Loft v. Nat*, 2014 BCCA 108, leave to appeal ref'd [2014] S.C.C.A. No. 211, Goepel J.A., for a unanimous court, made it clear that the successful party includes a plaintiff who establishes liability under a cause of action and obtains a remedy. Moreover, a plaintiff will be considered the successful party even where a defendant admits liability, and even where he or she obtains a judgment for less than the amount sought:

> [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.
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> [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.

[11] These principles were applied in *Nicholls v. Columbia Taping Tools Ltd*., 2014 BCSC 1428, also a wrongful dismissal action where the plaintiff obtained judgment for an amount less than that sought. Even in *Nixon v. Pickton*, 2015 BCSC 1700, a case cited by the defendant, the trial judge awarded costs to the plaintiff in circumstances where he considered that she did not achieve substantial success but rather an adequate amount of success to satisfy Rule 14-1(9) given his interpretation of *Loft*.

[12] There is no basis here for me to deprive the plaintiff of her costs. She succeeded in establishing the defendant's liability for breach of her employment contract and obtaining an award of both contractual and aggravated damages. On the other hand, the defendant did not succeed in proving just cause and its counterclaim was dismissed.

[13] The plaintiff pointed out that the issue on which she did not succeed did not take up much time at trial. That is true, as the enforceability of the termination clause was a question of law addressed primarily in submissions. However, little turns on this because the defendant did not seek any apportionment of costs under Rule 14-1(15), nor would I have considered such an order to be appropriate here. Apportionment of costs is to be confined to relatively rare cases: see *Loft v. Nat*, 2015 BCCA 418 at para. 25.

## 2. Is the plaintiff entitled to special costs?

[14] Special costs are awarded only in exceptional circumstances, as they are intended to serve a deterrent function and are punitive in effect. In the leading case of *Garcia v. Crestbrook Forest Industries Ltd.* [1994] B.C.J. No. 2486, 9 B.C.L.R. (3d) 242 (C.A.), the court established a single standard of “reprehensible” conduct to justify an award of special costs. This is a broad standard which encompasses not only scandalous or outrageous conduct but also “milder forms of misconduct deserving of reproof or rebuke” (see para. 17).

[15] Recognizing this broad standard, the court provided some guidance about what would be considered “reprehensible” at paras. 23 and 25:

> …the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs…Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
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> …
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> If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive, is in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.

[16] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, Gropper J. extensively reviewed the case law on special costs, noting some inconsistencies, but gleaning the following principles at para. 73:

> a) the court must exercise restraint in awarding special costs;
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> b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
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> c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
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> d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
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> e) special costs can be ordered against parties and non-parties alike; and
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> f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[17] Where special costs are awarded, they are generally awarded for an entire proceeding, but a partial award may be made if it would be disproportionate to do so: *Gichuru v. Smith*, 2014 BCCA 414 at para. 91; see also *Commonwealth Trust Company (In Liquidation) (Re)*, 2012 BCCA 138 at para. 44.

[18] The plaintiff's submissions about special costs concerned conduct before and during the trial and did not differentiate between the conduct of the defendant and of its counsel, Mr. Wang. Her counsel submitted that the question of who bears responsibility "remains at large and must be resolved on the basis of the application record", but she placed responsibility on Mr. Wang for conducting this litigation ineffectively. Her complaints regarding his conduct focused on positions taken in settlement discussions, which she says were unreasonable, inappropriate behaviour towards other counsel, the litigants and the court, recklessly maintaining claims that were bound to fail, and carelessly conducting the trial - all of which resulted in a trial that took much longer than it should have given the issues at stake.

[19] I found this approach problematic for two main reasons. First, some of the pre-trial conduct complained of was not supported by evidence, and some was supported only by inadmissible hearsay. Second, there are principles that apply specifically to the consideration of a costs order against a lawyer. Special costs may be awarded but such orders are rare and the threshold is high. Party and party costs may be ordered in a variety of ways under Rule 14-1(33) where a party's lawyer has unreasonably caused costs to be incurred.

[20] I have not considered any pre-trial conduct that was not supported by admissible evidence. I address below the question of costs against Mr. Wang.

[21] At this point it is important to note that Tong Du, the principal of the defendant, waived solicitor-client privilege over his communications with Mr. Wang. His evidence conflicted in a number of ways with the evidence tendered by Mr. Wang. The tenor of Mr. Du's evidence was that Mr. Wang was in the "driver's seat" regarding the conduct of the litigation; the tenor of Mr. Wang's evidence was that he was at all times acting on instructions from his client. Mr. Du deposed that he had no experience with the Canadian civil court system and relied on Mr. Wang's advice on how to proceed, which I accept. However, Mr. Wang's affidavit included copies of correspondence he received from Mr. Du, which shows that Mr. Du gave fairly detailed written instructions about the facts of the case and how he wished to proceed, including the scope of settlement offers. On this basis, the defendant must bear responsibility for the positions taken in this case.

[22] The evidence before me shows that this was a hard-fought case. The plaintiff pushed for early resolution by negotiation and summary trial. The defendant was not prepared to settle anywhere near the amount being sought and raised many issues at the summary trial about the plaintiff's competence and credibility, resulting in a decision by Fleming J. that the matter was not suitable for summary trial: *Davies v. Canada Shineray Suppliers Group Inc.,* 2016 BCSC 1853.

[23] The plaintiff says that the defendant took a stonewalling approach to settlement, but the fact that she was claiming damages for the entire contract term was an issue that made this case difficult to settle. It set the parties widely apart on quantum and brought into play the issue of just cause. As the contract entitled the plaintiff to three months' pay for termination with or without cause, the matter would have been fairly simple had she not challenged the enforceability of the termination clause.

[24] The plaintiff also says that the result of the summary trial application would have been different had the defendant advanced its case in a consistent manner, but the only evidence I can properly consider about this is the reasons for judgment, which outline concerns about the credibility of the plaintiff's evidence in relation to defences that were considered to be viable. Moreover, the judge did not find the defendants to be dilatory, accepting that the issues pertaining to their yet to be pleaded defence were not known to them until shortly before the summary trial application was served. Other pre-trial conduct complained of – generally of Mr. Wang – was either unsupported by evidence or involved somewhat bizarre behaviour that, as I discuss below, cannot fairly be assessed in the context of an application for costs.

[25] The plaintiff's remaining complaints concern the trial itself and the conduct of Mr. Wang. Her main concerns are that the defendant persisted with positions that were bound to fail and engaged in careless conduct that resulted in a substantial waste of court time, such as Mr. Wang's repetitive cross-examination, disorganization, lack of familiarity with basic principles of trial procedure, and continual tardiness.

[26] Special costs may be ordered where a party displays "reckless indifference" by not recognizing early on that a claim is "manifestly deficient", or pursues a meritless claim and is reckless with regard to the truth: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11; *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at para. 29.

[27] I appreciate the plaintiff's frustration with the manner in which this case proceeded through to trial, but I am not satisfied that, overall, the conduct complained of is the kind of reprehensible conduct that justifies an order for special costs against the defendant. From my perspective, there were several dynamics at play between these parties which resulted in the defendant taking firm positions and not moving from them, and there is no cogent evidence that the defendant was in a financially stronger position than the plaintiff such that it was more able to impose the financial burden of the trial on her.

[28] At trial, a number of positions taken by the defendant did lack merit - such as whether the plaintiff was an independent contractor, whether the expiration of the plaintiff's Early Childhood Education certificate constituted a fundamental breach of the contract (a position not pleaded), and whether there was just cause for dismissal on the grounds of incompetence or lack of good character. The defendant was quite careless about the manner in which these issues were pursued at trial, but many of them may have been unnecessary had the plaintiff not claimed damages to the end of the contract's five-year term. This brings me back to the dynamics between the parties and the overall hard-fought nature of this litigation. At most, the manner in which the defendant advanced its positions at trial made it more complicated than it deserved.

[29] Therefore, I do not consider that the plaintiff is entitled to special costs against the defendant.

## 3. Should costs be assessed at the higher Scale C under Appendix B of the *Supreme Court Civil Rules*?

[30] In the alternative to special costs, the plaintiff seeks party and party costs assessed at Scale C on the basis that the conduct of the defendant or Mr. Wang made this matter one of more than ordinary difficulty.

[31] Appendix B of the *Supreme Court Civil Rules* provides, in s. 2(2), that the court must have regard to the following principles when fixing the scale of costs:

(a) Scale A is for matters of little or less than ordinary difficulty;

(b) Scale B is for matters of ordinary difficulty;

(c) Scale C is for matters of more than ordinary difficulty.

[32] Under s. 2(3), in fixing the appropriate scale under which costs will be assessed, the court may take into account the following:

(a) whether a difficult issue of law, fact or construction is involved;

(b) whether an issue is of importance to a class or body of persons, or is of general interest;

(c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[33] Under the former Rules of Court there were five scales of costs. The two higher scales, 4 and 5, have been merged into Scale C. Despite this, factors in addition to those under s. 2(3), developed under the former Rules, remain relevant to assessing the degree of difficulty under Appendix B: see *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.,* 2010 BCSC 1494; *International Energy and Mineral Resources Investment (Hong Kong) Company Limited v. Mosquito Consolidated Gold Mines Limited*, 2012 BCSC 1475; *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company,* 2014 BCSC 1907 (aff'd 2015 BCCA 347). These factors include:

(a) the length of the trial;

(b) the complexity of the issues involved;

(c) the number and complexity of pre-trial applications;

(d) whether or not the action was hard fought with little or nothing being conceded along the way;

(e) the number and length of examinations for discovery;

(f) the number and complexity of expert's reports;

(g) the extent of the effort required in the collection and proof of the facts.

[34] The plaintiff did not address these factors in submissions, but as I understand her position, those that may bear on the circumstances here relate to the complexity of the issues and the lack of any concessions as a result of the approach taken by

the defendant. The defendant submitted that there is no basis on which to treat this case as a matter of more than ordinary difficulty, as it involved a simple employment contract and issues related to what happened before, during and after it was entered into.

[35] My view is that the manner in which the defendant conducted this litigation turned a matter of ordinary difficulty into one of more than ordinary difficulty. Factual issues became unnecessarily complex. Despite the plaintiff's primary position regarding the validity of the termination clause, the defendant raised issues and defences that were not supported by evidence or not pleaded, abandoned positions that were pleaded, and conceded little to nothing throughout the entire process. The plaintiff was required to respond to differing positions which evolved over time, even as late as during final submissions at trial.

[36] The trial was initially set down under Rule 15-1 (Fast Track Litigation) but soon after, plaintiff's counsel agreed to set it down for six days. The trial actually took almost nine days. Although this was not inordinately long, it should have concluded well within the six-day estimate given the real issues between the parties.

[37] Therefore, it is my view that the plaintiff is entitled to costs against the defendant at Scale C.

## 4. Should the plaintiff be entitled to double costs for all steps taken after she made an offer to settle?

[38] The plaintiff seeks double costs under Rule 9-1(5)(b) of the *Supreme Court Civil Rules*, stemming from an offer to settle she made on October 13, 2016 (the Offer). The Offer, made within the scope of Rule 9-1, was on the following terms:

> Your clients shall pay the total sum of $90,000 in new money, plus
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> a. any cost award the Court of Appeal should make;
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> b. an additional sum of $900 for each further half day of examination for discovery attended in Vancouver or surrounding cities;
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> c. an additional sum of $750 for every application initiated by you which we successfully defend, or initiated by us and which you unsuccessfully defend;

> d. an additional sum of $500 if we attend a Trial Management Conference;
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> e. an additional sum of $3,000 if we come within 14 days of a live witness Trial, but settle before the said Trial …

[39] Additional terms related to how the settlement monies were to be allocated, when they were to be paid, consequences for not meeting deadlines and the requirement of mutual releases and a consent dismissal order. A rationale was provided, which referred to an assessment of the "settlement value" set out in a similar offer made September 15, 2016.

[40] Rule 9-1(5) sets out the costs options available to the court in a proceeding in which an offer to settle has been made. Paragraph (b) allows the court to award double costs of all or some of the steps taken after the date of delivery of the offer. Such orders are discretionary. Rule 9-1(6) directs the court to consider the following factors in the exercise of this discretion:

> (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.

[41] The plaintiff submitted that the Offer of $90,000 was one that the defendant ought reasonably to have accepted in October 2016, as it was facing a potential liability of $255,000, not including any award for aggravated or punitive damages, and costs to go to trial estimated at $90,000. She says that the defendant behaved unreasonably because it was not prepared to accept any risk, exemplified by the fact that its offers to settle never exceeded $15,000, an amount it never denied was owed. The plaintiff also submitted that the Offer was comparable to the judgment since it included costs, and her financial position was inferior to that of the defendant.

[42] The defendant submitted that the Offer was not one that ought reasonably to have been accepted because it was not a simple $90,000 offer, the $255,000 claim was speculative, an award of $15,000 was the most likely result, and aggravated damages were not the subject of any discussions or analysis by counsel in relation to the Offer. Moreover, the judgment obtained was much lower than the Offer.

[43] The evidence before me in this application includes correspondence between counsel about settlement, with offers going back and forth, some made under Rule 9-1. While initially in issue, the defendant withdrew its objections to any of this evidence on the basis of settlement privilege. In addition, as Mr. Du waived solicitor client privilege in respect of the defendant's communications with Mr. Wang, there is evidence of their discussions about the various settlement offers. I found little in this evidence that was pertinent to the analysis required here other than to show how the defendant considered the Offer.

[44] The plaintiff made a similar offer on September 15, 2016, just before the summary trial application. At that time, Mr. Wang advised Mr. Du about the range of possible outcomes but Mr. Du remained adamant that he did not wish to settle for any more than $15,000. When the Offer was made on October 13, 2016, after the summary trial application had been dismissed as unsuitable, Mr. Wang urged Mr. Du to seriously consider making a counter-offer but Mr. Du refused, this time taking the position that the defendant would pay nothing to the plaintiff. According to Mr. Wang, Mr. Du said that he would rather pay $90,000 to legal fees than to the plaintiff.

[45] This evidence, which was not denied by Mr. Du, shows that the defendant was taking an unreasonably hard line. However, this in itself does not mean that the Offer ought to have been accepted.

[46] The Offer was not a straightforward offer of $90,000. It was "all in" with respect to costs to date but it added costs that would be incurred if the defendant accepted it at a later time, and it stipulated how and when the money was to be paid.

The actual amount offered as damages for breach of contract was not apparent. It was not an easy offer to evaluate.

[47] Moreover, the Offer was made after the summary trial application had been dismissed, when the defendant was taking steps to amend its pleading. It is quite apparent that the defendant did not consider the plaintiff's $255,000 claim to be a likely outcome; even the plaintiff's counsel assessed its chance of success as only 40% in its September 15, 2016 offer, only a month earlier. There was a large gap between this maximum claim and the $15,000 payable under the contract for termination, thus making compromise difficult. The defendant may have been unreasonable, but I cannot say that a $90,000 offer in these circumstances is one that ought reasonably to have been accepted.

[48] Due to the nature of the Offer, the relationship between its terms and the judgment obtained is also not easy to evaluate. The plaintiff sought to minimize the difference between the $90,000 offered and the $45,000 judgment based on the costs that would have been included in the Offer and the costs payable by the defendant after the judgment. However, the Offer did not stipulate how much was for damages and how much for costs, and there is no evidence as to what the plaintiff's costs were to the time of the Offer, nor is there evidence of the plaintiff's bill of costs to the end of trial.

[49] Under the former Rule 37, an offer to settle was not permitted to be a single sum inclusive of costs. The rationale was explained in *Helm v. Pattie*, [1998] B.C.J. No. 1290 at para. 53, 52 B.C.L.R. (3d) 81 (C.A.):

> A trial judge...has no way of knowing to what costs the party to whom the offer is made is entitled against the offeror. The costs, for some reason, such as contested applications upon which the offeree was successful, or lengthy and necessary examinations for discovery, may be substantial. So may be the disbursements. With an "all in" offer, the judge cannot determine what amount of the offer is in discharge of the offeree's cause of action and, therefore, cannot ascertain whether the offeree recovered more or less at trial than the amount offered.

[50] This was important under Rule 37, as it was a complete code that dictated the cost consequences of an offer to settle. However, amendments to that Rule (first in Rule 37B, now Rule 9-1) now give broad discretion to the trial judge to determine the cost consequences of a failure to settle. In *Dodge v. Shaw Cablesystems Ltd.*, 2009 BCSC 1765, Masuhara J. considered that "all in" offers under the amended Rule (then 37B) were no longer prohibited but nevertheless, the rationale for doing so as set out in *Helm* remained relevant. At para. 24:

> …While I accept that the consequences of an uncertainty in the calculation of costs up to the date of the offer to settle are no longer as stringent, as under the old Rules, the court is still faced with difficulty in summarily determining the relationship between the offer and the costs in an "all-in" offer. Consequently, the potential for injustice still exists. Thus, under Rule 37B, it does not appear to me that the rationale for the rule in *Helm* is no longer of assistance. In my view the language of Rule 37B is broad and assumes that the trial judge in every case is in the best position to determine whether an "all-in" offer can be considered. Provided that the proper form of an offer to settle is adhered to, the court has under Rule 37B the discretion to take into account that offer to settle. Nonetheless, defendants who make an "all-in" offer do so at their own peril.

[51] I agree with those comments. In this case, the plaintiff has not provided a sufficient evidentiary record on which the court is able to properly evaluate the relationship between the Offer and the judgment obtained.

[52] Nor has the plaintiff provided evidence that would enable the court to evaluate the relative financial circumstances of the parties. She relied on her evidence at trial about the financial hardship she suffered, which focused on her circumstances at the time of her termination. She also relied on Mr. Wang's evidence that Mr. Du chose to spend money fighting this case rather than paying her, suggesting that an inference could be drawn from this that the defendant had the resources to do so. This evidence is not sufficient, in my view, to support the plaintiff's contention that the defendant is in a superior financial position.

[53] In all of these circumstances, I do not consider it appropriate to award the plaintiff double costs.

## 5. Should Jack Wang be personally liable for all or part of the costs that the defendant is ordered to pay, either as special costs or party and party costs?

[54] Orders for costs against lawyers are rare, and orders for special costs even more so. While the plaintiff seeks special costs to be payable by Mr. Wang, the defendant seeks only party and party costs. Both seek an order that Mr. Wang be personally liable for a portion of the costs payable by the defendant.

### Special costs

[55] I have already determined that the plaintiff is not entitled to special costs as against the defendant. In light of this, it would be most unusual, if at all appropriate, for special costs to be ordered payable by Mr. Wang. As I have found, Mr. Wang took positions in this litigation based on instructions from the defendant. There is some evidence that Mr. Wang was prone to angry or unreasonable outbursts during the plaintiff's examination for discovery and when dealing with witnesses and opposing counsel, but none of this was in the presence of this Court. As I indicated above, it is difficult to assess such conduct in the context of these applications. Such matters may be more suitably addressed, if necessary, by the Law Society of British Columbia (a power parallel, and not mutually exclusive, to the Court's power to award costs against lawyers: *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at para. 20).

[56] The plaintiff's concerns about the conduct of the trial related to both substantive and procedural matters. With respect to substantive matters, Mr. Wang did pursue unmeritorious positions, but the main one - just cause - was relevant only because of the position taken by the plaintiff, as I explained above, and was pursued on instructions. As for procedural matters, Mr. Wang must take responsibility for the way in which he conducted the trial. Mr. Du's evidence shows that he followed Mr. Wang's advice about such matters and this was not disputed by Mr. Wang.

[57] This Court's power to order special costs against lawyers is one that is often exercised under its inherent jurisdiction as part of the power to maintain respect for

the Court and for the administration of justice, and to control the proceedings. This was recently affirmed by the Supreme Court of Canada in *Jodoin*:

> [16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).
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> …
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> [18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. CA), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[58] Special costs may also be ordered under Rule 14-1(33). In *Nazmdeh v. Spraggs*, 2010 BCCA 131, it was held that the secondary function of this rule is punitive, based on the court's power to control its processes, including the conduct of lawyers, and a lawyer may be ordered to pay special costs where there is reprehensible or serious misconduct in the litigation process.

[59] *Jodoin* also affirmed that conduct justifying an award of special costs against a lawyer must represent "a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system"; mere mistakes, errors of judgment or even negligence will not be sufficient; "there must at the very least be gross neglect or inaccuracy": *Jodoin* at para. 27; see also *Knox v. Silver Pacific Investments Inc.*, 2016 BCSC 1280 at para. 56.

[60] Mr. Wang's conduct of the trial did fall short of the standard the court expects of counsel. He did not adduce evidence to support some of the defendant's positions, some which were not pleaded. His cross-examination of the plaintiff was repetitive, he was consistently late for court, constantly disorganized, and was unfamiliar with some of the basic principles of trial procedure. All of this wasted time and costs but I would not go so far as to say that it was designed to frustrate or interfere with the administration of justice. It was not reprehensible conduct that requires punishment, but rather neglectful conduct that requires compensation. Thus, I decline to award special costs against Mr. Wang.

**Party and party costs**

[61] Rule 14-1(33) permits the court to order a party's lawyer to be responsible for all or some of the costs of a proceeding in a variety of ways. Both the plaintiff and the defendant seek orders under Rule 14-1(33)(c) that Mr. Wang be personally liable for part of the costs the defendant is to pay to the plaintiff.

[62] This Rule provides:

> (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:
>
> > (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
> >
> > (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
> >
> > (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
> >
> > (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

[63] This rule does not distinguish between party and party costs and special costs. In *Nazmdeh*, the Court of Appeal held that the rule has expanded the scope of

conduct that may attract an order for costs against lawyers. Its function is primarily compensatory, giving the court discretion to order a lawyer to pay party and party costs where he or she has "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". This is a lower standard than that required for special costs.

[64] Both the plaintiff and the defendant have established that Mr. Wang caused costs to be incurred without reasonable cause or through delay and neglect. To his credit, Mr. Wang did not dispute that some of his inefficiencies wasted time at trial. Overall, Mr. Wang's disorganization and lack of understanding about appropriate ways to examine and cross-examine witnesses resulted in a very inefficient use of court time. Examples of his conduct include the following:

- while cross-examining the plaintiff, continually failing to properly put questions to her from her examination for discovery;
- failing to appreciate the different uses of discovery in cross-examination and as evidence to be read-in as part of the defendant's case;
- making unnecessary accusations or arguments during cross-examination and asking long, convoluted, irrelevant and repetitive questions;
- being continually disorganized with exhibits and not having copies available for the witness, opposing counsel and the court;
- putting documents to witnesses who could not testify about their creation or content;
- leading evidence for the defendant about matters that were not put to the plaintiff in cross-examination;
- conducting improper re-examination; and

- being continually late for court.

[65] I am satisfied that this conduct justifies an order that Mr. Wang be personally liable for part of the costs that the defendant is required to pay to the plaintiff.

**What part of the costs should be payable?**

[66] The defendant seeks an order that Mr. Wang be personally liable for 70% of the costs it is required to pay, or alternatively for an amount that exceeds the costs that would be assessable under Rule 15-1(15)(c), the fast track rule. Counsel for the defendant submitted that such an order should not require a mathematical analysis and that Mr. Wang's conduct should be considered holistically. The plaintiff suggested that Mr. Wang should be responsible to pay the difference between Scale B and Scale C costs.

[67] Counsel for Mr. Wang submitted that these approaches are unfair, as the costs consequences should be attributed and based on time, effort spent and the result achieved at trial, and the fast track rule is inapplicable given the amount involved and the length of the trial. He suggested that Mr. Wang should be liable for no more than one day of trial time, when the practical effect of his conduct is analyzed upon a review of the transcripts.

[68] I agree with counsel for Mr. Wang that the "holistic" approach proposed by the defendant would be unfair. Despite the fact that the plaintiff initially filed the Notice of Civil Claim under the fast track rule, her counsel later agreed (albeit reluctantly) to an estimate of a six-day trial and removal from Rule 15-1. This matter went to trial relatively quickly despite its hard-fought nature. Given the limitations of the evidence before me in the plaintiff's application, the only conduct which I can properly attribute to wasted costs is that which was before me at trial. For that reason, it would also be unfair to take the approach suggested by the plaintiff.

[69] As I indicated above, my view is that this trial ought to have completed well within the original six day estimate. Accordingly, I consider it fair to require Mr. Wang to be personally liable for the costs that the defendant has been ordered to pay for three days of trial, including preparation time for those days.

## 6. Should any fees and disbursements between Jack Wang and/or Jack Wang Law Corporation and the defendant be disallowed?

[70] The defendant also seeks an order under Rule 14-1(33)(a) to disallow 50% of the fees and disbursements billed by Jack Wang Law Corporation to the defendant, or alternatively to disallow the fees and disbursements related to the first six days of trial, including preparation for those days.

[71] Under Rule 14-1(33), it is open to me to make an order under paragraph (a) in addition to an order under paragraph (c), as the rule allows the court to make any one or more of the orders set out in (a) through (d). No case law was cited where orders under paragraph (a) were considered, either on their own or in addition to other orders under this rule.

[72] Counsel for Mr. Wang submitted that the order sought would be unfair having regard to the conduct that wasted time at trial, and that Mr. Wang is entitled to have his fees reviewed by the Registrar under the *Legal Profession Act*, S.B.C. 1998, c. 9.

[73] The defendant attempted to justify the order sought on the basis that it was not responsible for any of Mr. Wang's conduct that unnecessarily incurred or wasted costs. However, as I have found, the defendant must be responsible for the instructions given to Mr. Wang about the positions it took in this litigation, while Mr. Wang must be responsible for the way in which he conducted it. Both factors caused costs to be incurred.

[74] I agree with counsel for Mr. Wang that an order disallowing 50% of fees and disbursements would be unfair, especially given the basis for my order above under Rule 14-1(33)(c). The evidence shows that over 60% of the fees and disbursements

was billed to the defendant before trial. Moreover, an order disallowing fees for the first six days of trial is inconsistent with my assessment of the time wasted by Mr. Wang's conduct.

[75] I consider an order disallowing fees and disbursements related to three days of trial, including preparation for those days, to be appropriate here. Costs incurred due to a lawyer's conduct should not be borne by either party to the litigation. Mr. Wang remains entitled to have his accounts reviewed by the Registrar, and the amount of the fees and disbursements that are to be disallowed pursuant to this order should also be determined by the Registrar.

[76] The defendant seeks this order as against Jack Wang Law Corporation rather than Mr. Wang personally because all of the fees and disbursements billed to the defendant were from Jack Wang Law Corporation. It is not clear, however, if Rule 14-1(33) gives the court authority to make orders against law corporations.

[77] Rule 14-1(33)(a) gives the court discretion to disallow fees and disbursements "between the lawyer and the lawyer's client"; paragraphs (b) and (c) also refer to "the lawyer" and paragraph (c) refers to the lawyer being "personally liable". Here, it was Mr. Wang, not his law corporation, who caused the costs to be incurred, but it was Jack Wang Law Corporation that billed the defendant. In these circumstances, I consider it prudent to make an order under paragraph (a) as against both Mr. Wang and Jack Wang Law Corporation.

## Conclusion

[78] The plaintiff is entitled to costs as against the defendant at Scale C. Mr. Wang is to be personally liable for part of the costs that the defendant has been ordered to pay, representing three days of trial, including preparation time for those three days.

[79] The defendant is entitled to an order as against Mr. Wang and Jack Wang Law Corporation disallowing fees and disbursements billed for three days of trial, including preparation for those three days.

[80] All costs and disallowed fees and disbursements are to be assessed by the Registrar.

**Costs of this application**

[81] In her application, the plaintiff also sought an order declaring Mr. Du to be personally liable for all damages, interest and costs awarded against the defendant. This was abandoned at the hearing of the application. Mr. Du, who was required to file a response, sought costs against her to be set at $750. The plaintiff did not oppose an order for costs in favour of Mr. Du but submitted that such costs should be offset against the costs to be paid by the defendant, and all should be assessed by the Registrar.

[82] I consider the plaintiff's submission to be a practical one here, as Mr. Du is the sole principal of the defendant. Mr. Du is entitled to his costs for responding to the plaintiff's application. The plaintiff is entitled to the costs of this application as against the defendant on Scale B, subject to an offset of the costs in favour of Mr. Du.

[83] The defendant also sought the costs of its application against Mr. Wang and Jack Wang Law Corporation, including the disbursement cost incurred to obtain a transcript of the proceedings at trial. As the successful party, the defendant is entitled to costs. No submissions were made as to whether the court should order otherwise. Therefore, the defendant will have its costs for this application, also on Scale B.

"Fisher J."