IN THE MATTER OF AN ARBITRATION PURSUANT TO S. 148.2(1) OF THE REVISED REGULATION 1984 UNDER THE INSURANCE (VEHICLE) ACT, B.C. REG 447/83

BETWEEN:

JLS

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

SUPPLEMENTAL AWARD ON COSTS

Counsel for the Claimant, JLS	Meghan Neathway
Counsel for the Respondent, Insurance Corporation of British Columbia	Daniel Jaccard
Dates of Hearing:	August 24 and September 10, 2021
Place of Hearing:	Vancouver, BC
Arbitrator:	Dennis C. Quinlan, QC
Date of Award:	October 8, 2021

I. INTRODUCTION

1. On May 14, 2021, I delivered my arbitration award (the "Award") in respect to the Underinsured Motorist Protection ("UMP") claim advanced by JLS (the "Claimant").

2. The Claimant was awarded damages totalling $384,948.37, broken down as follows:

Non Pecuniary Damages	$165,000
Past Loss of Income and Earning Capacity	$ 45,000
Loss of Future Earning Capacity	$130,000
Cost of Future Care	$ 25,550
Loss of Future Housekeeping Capacity	$ 10,000
Special Damages	$ 9,398.37
TOTAL	**$384,948.37**

3. As to costs, I stated at paragraph 283:

> [283] If the parties wish to make submissions on costs, deductible amounts or any other issue, a telephone conference can be arranged to discuss how best to proceed.

4. The Respondent now seeks orders pursuant to an offer to settle dated March 3, 2021 and delivered March 8, 2021 (the "Offer"), that it be entitled to costs, and necessary and reasonable disbursements from March 8, 2021, or alternatively that each party bear their own costs from that date.

5. The issue is whether I should exercise my discretion and depart from the ordinary rule that JLS as the successful party in having been awarded damages, is entitled to her costs.

II. BACKGROUND

6. This proceeding arises from the Claimant being involved in a hit and run incident on October 29, 2014 wherein she suffered physical and emotional injuries including multiple fractures to her foot. She sought damages for non-pecuniary loss, loss of

earning capacity, past and future, cost of future care, an in trust award and special damages.

7. The Claimant settled her claim under section 24 of the ***Insurance (Vehicle) Act*** (the "**Act**") for the sum of $200,000, being the limit of liability of the Corporation as set forth in section 9(1) of Schedule 3 to the ***Insurance (Vehicle) Regulation*** (the "**Regulation**").

8. The parties agreed to resolve the balance of JLS's claim through arbitration in accordance with section 148.2 (1) of the **Regulation** (the "Arbitration"). The parties further agreed that the Arbitration would be conducted under the ***Supreme Court Civil Rules*** (the "**Rules**").

9. The Arbitration hearing took place over nine days between March 22 and April 1, 2021.

10. I summarized the respective positions of the parties at paragraphs 5 and 6 of the Award:

> [5] It is the position of the Claimant that the Collision irreparably altered the course of her life, both in terms of making worse an already precarious psychiatric condition, and leaving her with physical pain and limitations which have reduced her income earning capacity by thirty to fifty per cent.
>
> [6] The Respondent accepts that the Claimant sustained a significant physical injury to her foot, but says the psychiatric issues experienced by her following the Collision were largely a continuum of her pre-Collision condition.

11. The main area of dispute in the assessment of damages was loss of future earning capacity. At paragraph 246 of the Award I stated that the Claimant and Respondent agreed the appropriate way to assess this head of damage was the capital asset approach but they differed significantly on how that approach should be used.

12. The Claimant sought an award for loss of future earning capacity of between $450,000 and $500,000 whereas the Respondent would have limited the loss to $75,000. In the result I awarded $130,000 under this head of damage.

13. It is important to note I found the Claimant and her parents to be good witnesses, in that I found them credible in their evidence, although not always reliable. In particular I stated:

> [13] The fact I was able to conclude the Claimant was doing her best to give her evidence truthfully and accurately in the circumstances, made my task easier.
>
> [17] Notwithstanding those concerns, I was of the view that their inherent bias as parents did not override their obligation to give evidence truthfully and accurately as best they could.

14. Following delivery of the Award, the Respondent delivered a Notice of Application dated July 15, 2021 (the "Application") seeking an order that *"the full $200,000 paid to the Claimant pursuant to section 24 of the Act shall be deducted from the UMP Arbitration Award pursuant to section 148.1 of Part 10 of the Regulation to the Act"* [citations omitted]

15. The Claimant responded by asserting in her Application Response dated August 16, 2021 that the appropriate deductible amount was only $140,000, being what she said were her damages under section 24 with the balance of the $200,000 payment representing costs of that proceeding.

16. The Claimant also sought an order inter alia that she be entitled to costs of the Arbitration.

17. A hearing date was scheduled for August 24, 2021.

18. On the morning of the scheduled hearing, the Respondent delivered a pleading entitled Reply to Application Response (the "Reply"), wherein it abandoned the relief sought earlier in its Application by stating as follows:

The Respondent will not be pursuing the full $200,000 section 24 deductions, but with respect to costs will be relying on their previous Formal Offer to Settle.

19. The Respondent now agreed that the earlier payment of $200,000 made under Section 24 of the **Act** was comprised of $140,000 damages and $60,000 costs.

20. The Respondent then sought pursuant to Rule 9-1 (5) that it be awarded costs following delivery of its Offer (that is from March 8, 2021) or alternatively that each party bear their own costs from that date pursuant to Rule 9-1 (5) (a) .

21. The hearing date was reset to September 10, 2021 to allow the Claimant time to respond.

22. By Application Response dated September 3, 2021, the Claimant maintained her position that she was entitled to costs of the Arbitration.

23. The Offer in question was dated March 3, 2021 and stated in relevant part as follows [all sic]:

> The defendant offers to pay the plaintiff the **all-inclusive** amount of **TWO HUNDRED, TWENTY THOUSAND DOLLARS** ($220,000.00), **NEW MONEY** for UMP (the "Settlement Payment"), after taking into account Part 7 benefits paid or payable, pursuant to section 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 and any advances paid to date, in satisfaction of this proceeding in its entirety. For clarification, this offer contemplates payment under the Underinsured Motorist Protection provisions in Part 10 of the *Insurance (Vehicle) Regulation* and any Part 7 benefits that are paid or to become payable in the future.
>
> This Settlement Payment includes court ordered interest assessed to the date of the delivery of this offer and excludes costs.
>
> Upon acceptance of this offer to settle, the parties agree that:

1. The defendant is entitled to their costs of the action at Scale B and necessary and reasonable disbursements from the date of delivery of this offer assessed in accordance with Rule 14-1 of the Civil Rules; and

2. The plaintiff agrees to execute and deliver a Full and Final Release in respect of the defendant in this action.

This offer to settle incorporates and is subject to the terms and conditions contained in the Appendix A "Standard Terms and Conditions of Settlement" attached hereto.

Appendix A
Standard Terms and Conditions of Settlement

6. Upon acceptance of this offer to settle:

b. the parties shall pay the costs that they have agreed to pay consequent upon the acceptance of this offer to settle;

24. The Offer was delivered to Claimant's counsel by letter dated March 8, 2021, which read as follows:

> Please see the defendant's attached Formal Offer to Settle the plaintiff's UMP and Part 7 claim for $220,00 all-in New Money. This amount does not include the $200,000 already paid out to date. In the event the Arbitrator makes an award for cost of future care, the defendant will seek deductions as per s. 83 of the Insurance (Vehicle) Act.

25. The Arbitration hearing was scheduled to commence March 22, 2021.

26. On March 18, 2021, counsel for the Claimant sent to counsel for the Respondent an email seeking clarification as to the terms of the Offer, and in particular:

(a) whether the Offer amount was in addition to the section 24 settlement amount,

(b) whether it was meant to include a release of Part 7,
(c) whether costs for the Arbitration were payable to the Claimant, and
(d) what section 83 deductions were contemplated.

27. Counsel for the Respondent was able to provide clarification that the Offer amount was in addition to the section 24 amount and Part 7 was to be released, but not whether the Claimant was entitled to costs.

III. POSITION OF THE PARTIES

28. The parties disagreed not only on whether the Offer should be taken into account when exercising my discretion in respect to costs, but whether the Offer was more or less than the amount of the Award.

29. The position of the Respondent was that the Offer of $220,000 taken together with the previous section 24 payment of $200,000, provided the Claimant a total settlement amount of $420,000, in exchange for a release of all claims against the Respondent, being section 24 of the **Act**, and Parts 7 and 10 of the **Regulation**.

30. Additionally the Respondent submitted in oral argument that the terms of the Offer provided the Claimant with her costs of the Arbitration to the date of delivery of the Offer.

31. Simply put, the Respondent asserted that the combined Offer amount of $420,000.00 plus costs of the Arbitration was greater than the Award amount of $384,948.37.

32. The Respondent concluded by submitting that the Offer was one that ought reasonably to have been accepted by the Claimant, such that I should exercise my discretion in accordance with Rule 9-1.

33. The Claimant approached the situation differently.

34. She submitted that the terms of the Offer were unclear, ambiguous, and confusing to evaluate. She asserts the ambiguity was not clarified by the Respondent and therefore the Offer was not one that conformed to the requirements of Rule 9-1.

35. The Claimant further argued that in any event the value of her Award was greater than the value of the Offer.

36. The Claimant submitted that as a result of the section 24 payment, she received $140,000.00 on account of damages. The total damages awarded were $384,948.37, meaning she received an additional sum of $244,948.37 by going through the Arbitration hearing. Given the Settlement Payment set out in the Offer was $220,000, the Claimant asserted she did better by proceeding through the Arbitration hearing than she would have done by accepting the Offer, even after Part 7 benefits were taken into account.

37. The Claimant noted that in addition to her Award amount, she is entitled to pre-judgment interest, and her Part 7 claim remains extant. Under the terms of the Offer, interest was included in the Settlement Payment and she was required to provide a release of her Part 7 claim.

38. In summary, the Claimant submits that she should be entitled to her costs of the Arbitration in accordance with the ordinary rule.

IV. LEGAL FRAMEWORK

39. The applicable *Rules* in respect to costs are Rule 9-1 and Rule 14-1.

40. Rule 14-1 (9) provides that unless the court otherwise orders, the successful party must be awarded costs of the proceeding.

41. The party seeking to displace the ordinary rule has the burden of persuasion that the rule should be displaced: *Giles v Westminster Savings and Credit Union*, 2010 BCCA 282 at para. 75.

42. Rule 9-1 deals specifically with Offers to Settle. Rule 9-1 (4) provides that the court may consider an offer to settle when exercising the court's discretion in relation to costs.

43. However for the Rule to be invoked, the applicant, in this case the Respondent, must establish that the Offer complies with the Rule: *Gill v. McChesney,* 2018 BCSC 1378 at para. 15.

44. An "offer to settle" is defined in Rule 9-1 (1):

> **Definition**
>
> (1) In this rule, "**offer to settle**" means
>
> (c) an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
>
> (i) is made in writing by a party to a proceeding
> (ii) has been served on all parties of record, and
> (iii) contains the following sentence: "The.... [part(ies)] ....reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding"

45. In addition to having to comply with the formal requirements particularized in Rule 9-1 (1) (c), the offer to settle must be clear and unambiguous. Plain language should be used and colloquialisms or idioms that are understood by a limited audience should be avoided: *Park v Donnelly*, 2018 BCSC 219 at paras 25 and 55.

46. The underlying rationale for the requirement that the offer to settle be clear and unambiguous was discussed in *Anderson v. Routbard,* 2007 BCCA 193 at para. 16:

> [16] It is common ground that in order to comply with Rule 37, an offer has to be clear and unambiguous. In essence, the person receiving the offer must be able to determine, or readily ascertain, precisely what s(he) is being offered.

47. The legislative policy behind the provisions concerning offers to settle is to encourage settlement of disputes by awarding a party who makes a reasonable offer and to

penalize the party who declines to accept the offer: *Currie v McKinnon* 20212 BCSC 1165 at para. 12.

48. Assuming that the offer to settle meets the requirements of Rule 9-1 and is clear and unambiguous, Rule 9-1 (5) sets out a broad range of costs options that may be available to the court when an offer to settle has been made, including inter alia Rule 9-1 (5) (d):

> **Cost options**
>
> (5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:
>
> (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.

49. Rule 9-1 (6) then references the considerations that may be taken into account in making an order under Rule 9-1 (5):

> **Considerations of court**
>
> (6) In making an order under subrule (5), the court may consider the following:
>
> (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

50. The first factor of whether the offer to settle ought reasonably to have been accepted is not based upon reference to the ultimate award, but rather whether at the time the offer was open for acceptance, it would have been reasonable for it to have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

51. The Court in *Hartshorne* went on to address the factors relevant to the assessment of reasonableness in the party's decision to decline the offer:

> [27] Instead, the reasonableness 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.
>
> Emphasis added

52. I would add that for an offer to be easily evaluated, its terms must be clear and unambiguous. Ease of evaluation is inextricably linked and dependent upon certainty of terms. In *Park v. Donnelly*, at para. 58, the Court stated:

> [58] It is difficult for litigants to make a careful assessment of an offer if the terms of that offer and/or its language are ambiguous.

V. ANALYSIS

53. It is common ground that the Offer met the formal requirements set out in Rule 9-1 (1) (c). Where the parties differ is whether the terms of the Offer were "clear and unambiguous".

54. The Claimant's principle argument in support of its assertion that the Offer was not clear and unambiguous is directed towards how the issue of costs was dealt with, both in respect to the section 24 claim and the UMP arbitration proceedings.

55. The Claimant's argument is two pronged.

56. She first points to the following two provisions contained in the Offer that relate to costs:

> "The Settlement Payment includes court ordered interest assessed to the date of the delivery of this offer **and excludes costs.**
>
> **Upon acceptance of this offer to settle**, the parties agree that:
>
> 1. **The defendant is entitled to their costs of the action** at Scale B and necessary and reasonable disbursements **from the date of the delivery of this offer** assessed in accordance with Rule 14-1 of the Civil Rules;
>
> Emphasis added

57. Additionally the following term found in Appendix A, being Standard Terms and Conditions of Settlement, bears on the issue:

> 6.
>
> b. **the parties shall pay the costs that they have agreed to pay** consequent upon the acceptance of this offer to settle.
>
> Emphasis added

58. The Claimant asserts that while there was reference to the defendant (sic) being entitled to its costs from the date of delivery of the Offer, the terms of the Offer were silent as to any entitlement of the Claimant to her costs leading up to delivery of the Offer. The concern of the Claimant was that if she accepted the Offer, she would not be entitled to any costs in relation to the Arbitration proceeding.

59. The Respondent suggested in oral argument that the words ".....and excludes costs" should be taken to mean that the Claimant's costs of the Arbitration were in addition to the Settlement Payment.

60. I cannot accept the interpretation suggested by the Respondent.

61. Words are to be given their plain and ordinary meaning. To read the words "and excludes costs" as saying, without more, that the Claimant was entitled to her costs up until delivery of the Offer, leads to an interpretation that is not supported by the wording used.

62. The omission of any reference to costs up until delivery of the Offer, followed by express wording that the Respondent was to receive its costs going forward, leads one more reasonably to the conclusion that the Claimant was not entitled to her costs prior to delivery of the Offer.

63. As set forth in Appendix A, the parties were to pay "the costs they have agreed to pay".

64. The interpretation sought by the Respondent does not in my view accord with a term that is "clear and unambiguous".

65. The second prong in support of the Claimant's submission that the terms of the Offer were unclear and ambiguous relates to the Respondent's changing position in respect to the composition of the $200,000 payment made in relation to the section 24 claim.

66. It is important to keep in mind the principle set out in *Hartshorne* that the relevant time for the evaluation and assessment of an offer to settle is at the time the offer to settle is open for acceptance.

67. The Claimant submitted that she was forced to guess whether for the purpose of assessing the Offer, she was taken to have received $140,000 or $200,000 on account of damages in relation to the $200,000 payment.

68. The Claimant made the point that she took steps to clarify what she saw as ambiguity in the Offer in respect to costs, through her counsel's email of March 18, 2021 to Respondent's counsel.

69. I note that in seeking clarification, Claimant's counsel took the opposite approach to that of counsel in *Gill v McChesney*, at para. 26, where the Court stated it was ironic counsel raised no issue of ambiguity upon receipt of an offer to settle, but when faced with an application pursuant to Rule 9-1, argued that the offer was ambiguous.

70. The evidence before me was that in response to the March 18, 2021 email, Claimant's counsel was advised that the Offer did not provide for costs, because costs were intended to be covered by the previous $200,000.00 payment.

71. It was indicated that inquiries would be made as to whether any costs were to be offered separately for the UMP process and whether the deductible amount for the Offer was to be $140,000.00 or $200,000.00.

72. There was no evidence of any further discussion on the issue.

73. I pause here to say that in my view the Offer made by the Respondent was a genuine attempt to settle the Claimant's claim. I also accept that the combination of a section 24 settlement, an ongoing UMP claim, and costs that may or may not have been paid or might be paid, would create added levels of complexity to the formulation of an offer to settle.

74. However that complexity does not detract from the burden of persuasion resting with the party making the offer to settle to do so in a way that is clear and unambiguous.

75. As an observation, the difficulties in the Offer appear to have been caused by the co-mingling of the assessment of damages with the issue of costs, or what could be viewed as "mixing apples and oranges".

76. I made mention in paragraph 14 herein to the Respondent seeking an order that the full $200,000.00 be deducted from the amount of the Award as a deductible amount pursuant to section 148.1 (1) (a) of the **Regulation**.

77. The Claimant responded by seeking costs of the Arbitration, resulting in the Respondent retreating from its initial position and agreeing with the Claimant that only $140,000.00 was to be deducted and that in respect to costs, the Respondent "...will be relying on their previous Formal Offer to Settle".

78. The limit of the Corporation's liability in respect to a section 24 claim is $200,000.00. It made sense that having already paid $200,000.00, the Respondent would seek to have that amount deducted in accordance with section 148.1 (1) (a) of the **Regulation**.

79. It was not clear to me why the Respondent changed positions as and when it did. The most likely explanation as best I can ascertain, is that the step was taken to bring clarity to the terms of its Offer, albeit after the fact. In saying this, I do not suggest there was anything untoward in this action. The issue is the extent to which, given the timing, I can take the additional clarity into account on the questions before me.

80. In my view it was necessary for the Claimant to know with reasonable certainty, at the time she was required to make her assessment as to whether the Offer ought reasonably to be accepted, what amount the Respondent was saying she had received on account of damages: *Park v Donnelly*, at para 61.

81. At the relevant time, that question remained unanswered.

82. The uncertainty in the Offer on this important question at the time the Offer was delivered, was then effectively confirmed by the change in position of the Respondent on this application.

83. I conclude therefore that the Offer was not clear and unambiguous on this material point, and on that basis alone, I would not exercise my discretion to consider the Offer in relation to costs.

84. I further add that even if the Offer were to be viewed as clear and unambiguous, the considerations set out in Rule 9-1(6) tend to favour the Claimant's position that the Offer should not be considered in relation to costs.

85. I have already referenced the statement in *Park v. Donnelly* that it is difficult to make a careful assessment of an offer to settle if its terms are ambiguous. Given the uncertainty in terms, I have concluded this was not an offer which the Claimant ought reasonably to have accepted as per Rule 9-1(6)(a). It would not be a reasonable decision to accept an uncertain offer.

86. Second Rule 9-1 (6) (b) sets out the consideration that the relationship between the terms of settlement and amount of the final judgment may be taken into account. I agree with the Claimant that the value of the Offer was less than the value of the Award

87. The Claimant was awarded damages of $384,948.37. Given the agreement that she had received damages of $140,000.00 in her section 24 settlement, the Claimant bettered her position by $244,948.37. This amount was greater than the all- inclusive Settlement Payment of $220,000.00 "for UMP only".

88. This is the result even when Part 7 mandatory benefits are deducted, following the approach taken in *Rab v. Prescott* 2021 BCSC 1206 at para. 44.

89. As set out in paragraph 31 herein, the Respondent's position was that the collective value of the Offer being $420,000 plus costs of the Arbitration was greater than the amount of the Award, being $384,948.37. In my view, this approach does not take into account the fact that $60,000 of the $420,000 was for costs previously paid. As such and if one is to compare 'apples and apples', the value of the Award being $384,948.37, is greater than the net collective value of the Offer being $360,000.

90. The complexity in the calculations would suggest that the Offer was not "easily evaluated", as referred to in *Hartshorne*.

91. I also agree with the Claimant that as part of her Award, she is entitled to pre-judgment interest and her Part 7 claim remains extant. These 'benefits' although likely small, do serve to increase the value of her Award, as compared to what she would have received by accepting the Offer.

92. Finally Rule 9-1 (6) (c) sets out that the relative financial circumstances of the parties may be a consideration to take into account in making an order under Rule 9-1(5). While the Claimant's financial circumstances paled in comparison to those of the Respondent, there is no suggestion this disparity was taken advantage of in the conduct of the proceedings: *Vander Maeden v. Condon* 2014 BCSC 677 at para. 34.

93. This factor does not favour either party and has no bearing on the exercise of my discretion in relation to costs.

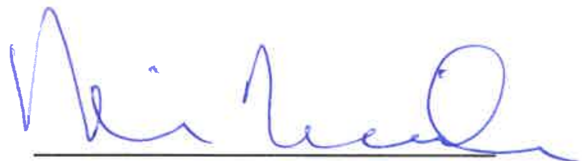
VI. CONCLUSION

94. In summary I conclude that the Offer was not clear and unambiguous, and its limitations were not sufficiently clarified. Furthermore I have concluded that the Offer was not one which ought reasonably to have been accepted by the Claimant, and that in any event, its value was less than the value of the Award.

95. Given my findings, I am not prepared to depart from the ordinary rule that the Claimant is entitled to her costs, as mandated by Rule 14-1 (9).

96. I thereby dismiss the Application of the Respondent and order that the Claimant be entitled to her costs of the Arbitration on a party and party basis. For greater clarity, the Claimant is awarded costs on a party and party basis of the UMP proceeding, but only to the extent that such costs have not been dealt with in the section 24 settlement.

DATED: October 8, 2021



Dennis C. Quinlan, QC
Arbitrator