IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *JM Bay Properties Inc. v. Tung Cheng Yuen Buddhist Association,* 2025 BCSC 2281

Date: 20251120
Docket: S200718
Registry: New Westminster

Between:

JM Bay Properties Inc.

Plaintiff

And

Tung Cheng Yuen Buddhist Association

Defendant

Before: The Honourable Mr. Justice P. Walker

Reasons for Judgment Re Interest and Costs

Counsel for the Plaintiff: M.C. Stewart

Counsel for the Defendant: S.P. Grey

Place and Date of Hearing: Vancouver, B.C. November 6, 2025

Place and Date of Judgment: New Westminster, B.C. November 20, 2025

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Introduction

[1] These reasons address the remaining claims of the plaintiff, JM Bay Properties Inc. ("JM Bay") for interest and party-party costs following my determination at trial of its claims for damages resulting from the defendant's termination of a construction management contract ("Construction Management Contract") the parties entered into in September 2015. JM Bay no longer seeks a determination of its lien claim because the defendant has paid almost the full amount of the judgment. JM Bay has also withdrawn its claim for double costs.

[2] My determination of JM Bay's claims for damages against the defendant, Tung Cheng Yuen Buddhist Association ("Tung Cheng"), also involved an assessment conducted by Registrar Gaily in March 2024 that I ordered to be carried out per Rule 18-1(1) of the *Supreme Court Civil Rules* [*Rules*].

[3] These reasons should be read in conjunction with my prior reasons for judgment, which discuss in full, the nature of the dispute between the parties, the competing claims and defences, my findings of fact, and my ultimate determination of the amount JM Bay is entitled to recover from Tung Cheng. Those reasons are indexed at 2022 BCSC 81, 2022 BCSC 364, and 2025 BCSC 424 (the last of which attaches the report and certification ("Report") by Registrar Gaily issued on May 2, 2024).

Interest

Introductory Comments

[4] JM Bay claims that that it is entitled to the pre-judgment and post-judgment interest at the rates the parties agreed to in the Construction Management Contract as opposed to the rates set out in the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COI*].

[5] JM Bay relies on Article A-6.2 of the Construction Management Contract in support, reproduced below from its written submissions:

ARTICLE A-6 PAYMENT

> 6.2 Should the *Owner* [Tung Cheng] fail to make payments as they become due under the terms of the *Contract* or in an award by arbitration or court, interest at the following rates on such unpaid amounts shall also become due and payable until payment:
>
> .1 2% per annum above the prime rate for the first 60 days.
>
> .2 4% per annum above the prime rate after the first 60 days.
>
> Such interest shall be compounded on a monthly basis. The prime rate shall be the rate of interest quoted by
>
> Royal Bank of Canada
>
> For prime business loans as it may change from time to time.
>
> [Bracket insertion and underlining emphasis added]

Pre-Judgment Interest

[6] JM Bay's position is that pre-judgment interest at the contract rates begins to run when it issued its first invoice to Tung Cheng in January 2018 (for $185,661.97) and not its revised invoice it issued (in the much higher amount of $358,845.25) in the latter part of 2019. Those invoices are excerpted in 2022 BCSC 81 at paras. 46 and 49, respectively.

[7] JM Bay acknowledged in its reply oral submissions at this hearing, that the amounts due under the Management Consultant Contract when it issued its first invoice totalled $875 ($800 for the cost of transporting a temporary power pole and $75 for a tree protection sign; my findings and the awards are discussed at 2022 BCSC 81, paras. 111–114,165,166).

[8] However, the $800 and $75 invoiced amounts did not remain due once invoiced. They were satisfied from previous payments made by Tung Cheng, who paid JM Bay an initial deposit of $31,500 ($1,500 was on account of GST, which, counsel advised me, does not have to be remitted to the Canada Revenue Agency since the ultimate amount paid is on account of an award of damages), and paid two construction management fee invoices totalling in excess of $40,000 prior to its obligation to pay those two items.

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[9] At the conclusion of the trial, instead of dismissing for lack of proof (given the significant deficiencies in JM Bay's evidence) JM Bay's claims for construction management and rezoning work fees and anticipated loss of profit, I ordered an assessment (and certification) by the Registrar of quantum of those claims (see 2022 BCSC 81 at paras. 52–91, 115–123, 159–161).

[10] Otherwise, I dismissed JM Bay's numerous other claims for certain reimbursable and miscellaneous expenses, legal costs, and damages for breach of a dispute resolution clause and termination without cause (see, e.g., 2022 BCSC 81 at paras. 92–110, 112–114, 124–129, 130–143, 144–150, 167). Its claims for interest and a builder's lien were adjourned. The interest claim was adjourned pending Registrar Gaily's assessment and certification; the builder's lien claim was adjourned pending further submissions, including citation of appropriate legal authorities dealing with whether the services of a construction manager are lienable under the *Builders Lien Act*, S.B.C. 1997, c. 45 (see 2022 BCSC 81 at paras. 151–158).

[11] At the assessment, the parties advised Registrar Gaily that they settled JM Bay's rezoning work fee claim (advanced at over $40,000) for $6,000. For the construction management fee claim, JM Bay advised Registrar Gaily that it had no additional evidence to tender beyond that adduced at trial and conceded its fee of 7.5% was to be based on actual construction costs of $60,000, resulting in the consequential assessment and certification of a vastly reduced fee, reduced from an amount predicated on 7.5% of a construction budget of $7.7 million to $4,500.

[12] Registrar Gaily was unable to certify the amount of the anticipated loss of profit claim (Report at paras. 50–73,76) and referred it back to me for determination, which I did on March 12, 2025 (2025 BCSC 424).

[13] JM Bay also confirmed in oral submissions at this hearing that the other amounts for which it ultimately received an award on March 12, 2025 (per 2025 BCSC 424) – its construction management fee, fee related to its rezoning efforts, and its claim for anticipated loss of profit (premised in part on its claim for a

construction management fee) – are not amounts due under the terms of the Management Consultant Contract and instead are amounts due under a court award, which would attract post-judgment interest.

[14] Even assuming that Tung Cheng's obligation to pay JM Bay's construction management fee claim of $4,500 and its rezoning work fee of $6,000 arose when Registrar Gaily certified it on May 2, 2024, a position not advanced by JM Bay, Tung Cheng's deposit and previous payments were more than sufficient to satisfy those amounts.

[15] Thus, I agree with Tung Cheng that there are no amounts owing on account of pre-judgment interest.

Post-judgment Interest

[16] Tung Cheng accepts that it owes post-judgment interest at the rates set out in Article A-6.2 on the amounts certified by Registrar Gaily ($4,500 for JM Bay's construction management fee and $6,000 for rezoning work fee) and the amount I awarded JM Bay for anticipated loss of profit ($152,727.50). Tung Cheng's position is that post-judgment interest does not begin to run until March 12, 2025, when I issued my reasons in 2025 BCSC 424. It also points out that it paid a further $120,000 on July 27, 2025, satisfying close to the full amount of the award to JM Bay.

[17] As noted above, JM Bay did not assert that post-judgment interest begins to run when Registrar Gaily issued her report certifying the claims for construction fee and rezoning work fee.

[18] Thus, Tung Cheng is obligated to pay post-judgment interest per Article A-6.2 commencing March 12, 2025, on the awards for the construction management fee ($4,500), rezoning work fee ($6,500), and loss of anticipated profit ($152,727.50), net of its prior deposit and payments (net of $875 for pole transportation and tree protection sign).

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[19] The calculation of pre-judgment interest must also take into account Tung Cheng's further payment to JM Bay of $120,000 on July 27, 2025 (which, I am told, satisfied nearly the full amount of the award to JM Bay).

[20] Counsel advised me that they would calculate the interest amount once they receive these reasons; I will leave it to them to determine the total amount of post-judgment interest that Tung Cheng is obliged to pay.

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Costs

The General Rule

[21] The general rule is found in the *Rules*, which provide that costs follow the event: "Subject to subrule (12) [which is irrelevant in this case], costs of a proceeding must be awarded to the successful party unless the court otherwise orders" [comment in brackets above added]: Rule 14-1(9); *Culos Development (1996) Inc. v. Baytalan*, 2024 BCSC 1634 at para. 6.

JM Bay's Position

[22] JM Bay's position is that it is entitled to the costs of this action. It says that even though some of its claims were dismissed and it obtained judgment in an amount less than it sought, that is not a proper basis to deprive it of its costs: see *Loft v. Nat*, 2014 BCCA 108 at para. 49. It maintains that it enjoyed "substantial success" as discussed by Justice Bouck in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 on the "key" issues that took up much of the trial, i.e., determining the actual construction costs, JM Bay's claims for a construction management fee and rezoning work fee, and its claim for anticipated loss of profits.

Tung Cheng's Response

[23] Tung Cheng's position is that the circumstances of this case engage the "court otherwise orders" excepting language in Rule 14-1(9).

[24] It disputes JM Bay's claim that it enjoyed substantial success and instead argues that there was divided success in the result.

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[25] Tung Cheng agrees with JM Bay that much of the trial was taken up with the “key” issues and claims – costs of construction (including whether there was *consensus ad idem* to a construction budget) and the quantum of JM Bay’s construction management and rezoning work fees and claim for loss of anticipated profits.

[26] In opposing a full costs award, Tung Cheng does not rely simply on the fact that many of JM Bay’s claims were dismissed. Instead, it submits that its defences to the key issues and claims were successful and served to limit what it described as JM Bay’s unduly inflated claims.

[27] By way of example:

(a) Tung Cheng correctly points out that it established there was no agreement reached concerning the construction budget, which in turn led to the significant reduction in the amount of the award for the construction management fee claim. JM Bay put the construction management fee claim at 7.5% of an alleged revised construction budget of $7.7 million; ultimately the claim was settled at $4,500;

(b) JM Bay’s rezoning work fee claim, originally advanced at over $40,000 was settled at $6,000; and

(c) although it argued before Registrar Gaily that the loss of anticipated profit claim was less than the amount that was ultimately awarded, Tung Cheng’s position before Registrar Gaily concerning the overhead component of that claim prevailed, leading to my ultimate assessment of the quantum of that claim at just under half of the amount JM Bay sought (JM Bay’s claim was presented at trial in the amount of $316,320.30: 2022 BCSC 81 at para. 49; Report at paras. 20–73; 2025 BCSC 424 at para. 38).

[28] Where there is divided success, an order that each side shall bear their own costs is typically made: *Culos* at para. 7, citing *Meade v. Armstrong (City)*, 2018

BCSC 528 at para. 20; *Staley v. Squirrel Systems of Canada Ltd*, 2012 BCSC 954 at para. 17.

[29] Tung Cheng does not seek that order and instead submits JM Bay should only be entitled to costs for half of the trial. Otherwise, it submits that an award to JM Bay of costs for the entire proceeding would result in an unduly punitive and unjust result.

When to Depart from the General Rule

[30] When should the general rule outlined in Rule 14-1(9) be departed from?

[31] In his analysis of Rule 14-1(9) in *Culos*, Justice G.P. Weatherill cited, at para. 10, the decision of Chief Justice Finch in *Sutherland v. Attorney General of Canada*, 2008 BCCA 27, decided under prior rules of this court. In *Sutherland*, Finch C.J.B.C. said at para. 26 that "special considerations" may deprive a successful litigant of an order for payment of its costs.

[32] Citing the Court of Appeal's decision in *Loft* at para. 49, Weatherill J. identified factors to consider in departing from the general rule to include: (a) misconduct in the course of the litigation; (b) a failure to accept a formal offer to settle; and (c) where the court rules against the successful party on one or more issues that took a discrete amount of time at trial.

[33] It is only the third factor that could be engaged in this case.

[34] In respect of that factor, Finch C.J.B.C. said in *Sutherland*:

> [27] In the case at bar, the defendants were ultimately successful in defeating the plaintiffs' claim in its entirety. Thus, unless special circumstances can be established that would warrant depriving the defendants of an award of costs following trial, the defendants should receive their costs.
>
> [28] One exception to the general rule for costs is set out in Rule 57(15) of the ***Rules of Court.*** As noted above, this rule provides that:
>
> The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding.

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> [29] A plain reading of the rule appears to give the judge a broad discretion to award costs to an unsuccessful party, or to deny costs to a successful party, with respect to an identifiable issue or part of the proceeding. As with every discretionary power, it must be exercised on a principled basis.
>
> [30] ***British Columbia v. Worthington (Canada) Inc.*** is the leading case with respect to the application of Rule 57(15). It affirms that under Rule 57(15) the Court has full power to determine by whom the costs related to a particular issue are to be paid. As Esson J.A. states in ***Worthington***, the discretion of trial judges under Rule 57(15) is very broad, and must be exercised judicially, not arbitrarily or capriciously. There must be circumstances connected with the case which render it manifestly fair and just to apportion costs.
>
> [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
>
>> (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>>
>> (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>>
>> (3) it must be shown that apportionment would effect a just result.
>
> [Bold in original; underlining emphasis added]

[35] *Sutherland* was applied by Justice Goepel to Rule 14-1(9) in *Loft*:

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

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> [50] Costs are very much a matter of the trial judge's discretion. In the circumstances of this case, the basis upon which that discretion was exercised was in error. That said, the trial judge remains in the best position to determine the proper costs order and to what extent, if any, the offer to settle that was made in this case should impact on costs. …
>
> [Emphasis added]

[36] An example of the approach taken in applying the third factor is in *McDougall v. Knutsen*, 2023 BCSC 826 at paras. 5, 8–12.

[37] In *Fotheringham*, the case relied on by JM Bay in its oral submissions (also decided under prior rules of this court), Justice Bouck set out a four-step inquiry in considering whether to apportion costs, which involves, in part, whether a party enjoyed "substantial success":

> [46] Based on the above interpretation of Rules 57(9), 57(15) and ***Gold***, a decision to award or not award costs after a trial might follow a four step inquiry.
>
> 1. First, by <u>focusing on the "matters in dispute" at the trial</u>. These may or may not include "issues" explicitly mentioned in the pleadings.
> 2. Second, by <u>assessing the weight or importance of those "matters" to the parties</u>.
> 3. Third, by doing <u>a global determination</u> with respect to all the <u>matters in dispute and determining which party "substantially succeeded," overall</u> and therefore won the event.
> 4. Fourth, <u>where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order"</u> that the winning party be deprived of his or her costs and each side then bear their own costs.
>
> [Bold in original; underlying emphasis added]

[38] Justice Bouck described substantial success as "75% or better":

> [45] ***Gold*** now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, <u>substantial success is about 75% or better</u>. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
>
> [Bold in original; underlying emphasis added]

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[39] Although decided under prior rules of court, *Fotheringham* has been applied to Rule 14-1(9): *Robinson v. Realm Energy International Corporation*, 2015 BCSC 2425 at paras. 11, 14–18; *Culos* at para. 9, citing *Aulakh v. Nahal*, 2018 BCSC 719 at para. 19.

[40] In *Aulakh*, Justice Skolrood (as he then was), said, at para. 18, the 75% approach to substantial success taken by Bouck J. in *Fotheringham* applied to the analysis under Rule 14-1(9). He also cited the decision of Justice Russell in *Conseil-scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCSC 105, who, at paras. 25–30, also applied the four-step and substantial success approach set out in *Fotheringham*.

[41] In *Gagne v. Sharpe*, 2015 BCSC 154, also cited with approval by Russell J. in *Conseil-scolaire* at para. 26, Justice B.D. MacKenzie, said at para. 26 that "the notion of substantial success is most useful in cases where a party may not necessarily succeed on all matters in dispute, but less useful in cases where a clear winner or loser may be readily determined by the nature of the dispute itself".

[42] Substantial success was also applied by the Court of Appeal to Rule 14-1(9) in *Stearman v. Powers*, 2017 BCCA 165 at paras. 59 and 65. At para. 65, Justice Willcock said success should be "measured in broad terms" and the court "should not finely parse issues".

Analysis

[43] I agree with the parties that JM Bay's claims concerning the amount of the construction budget and whether it was agreed to, for its construction management and rezoning fees, and for loss of anticipated profit were the key issues and claims that consumed much of trial. They were inter-related issues discrete from many of JM Bay's other claims that were not referred to Registrar Gaily but dismissed at 2022 BCSC 81. I also agree with Tung Cheng's submission that its ongoing defences, which it concedes evolved during the trial, had a significant impact on the ultimate disposition.

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[44] I disagree with JM Bay that it should be entitled to a full costs award on the basis that it received a judgment in its favour. This is not a case where JM Bay enjoyed substantial success on any of its claims. To the contrary, I find that, with the exception of its position as to the ultimate quantum of the loss of anticipated profit claim, Tung Cheng ultimately enjoyed substantial success in resisting JM Bay's asserted claims. For the loss of anticipated profit claim, Tung Cheng's ultimate position regarding the overhead issue wrapped up in that prevailed, leading to an award of less than half the amount JM Bay sought at trial.

[45] However, Tung Cheng does not seek a costs award, nor does it ask that JM Bay be denied all of its costs. Its position is that JM Bay should only be permitted to recover one-half of its trial costs (including the assessment before Registrar Gaily).

[46] When looking at it in broad terms, as per *Stearman*, I am satisfied that Tung Cheng's approach to costs appropriately reflects the time spent on the various issues and claims at trial, the evolution of its various defences, and its substantial success. It is, I find, a principled approach that results in a fair, appropriate, and just costs award in this case.

[47] The total time taken up for trial (excluding the costs and interest hearing) was 13 days (May 31, June 1-3, 7-11, December 1-3, 2021 and February 25, 2025). The assessment before Registrar Gaily, which is treated differently under the tariff in the *Rules*, took two days (March 13-14, 2024).

[48] Thus, in conclusion, JM Bay is entitled to recover party and party costs at Scale B, for half of that time, 6½ days of trial and one day of time before Registrar Gaily.

[49] Tung Cheng's position concerning interest and costs at this hearing prevailed. However, it did not ask for costs in the event its position succeeded. In these circumstances, I order each side to bear their own costs to attend at and prepare for this hearing.

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Summary

[50] Pre-judgment interest – there are no amounts which Tung Cheng must pay on account of pre-judgment interest.

[51] Post judgment interest –Tung Cheng shall pay post-judgment interest, commencing March 12, 2025, on the awards for construction management fee ($4,500), rezoning work fee ($6,500), and loss of anticipated profit ($152,727.50), net of its deposit of $31,500 (since GST is not required to be remitted) and its two prior payments (net of $875 for pole transportation and tree protection sign), at the rates set out in Article A-6.2 of the Construction Management Contract.

[52] Entitlement to party and party costs – JM Bay is entitled to its costs at Scale B for 6½ days of trial and one day for the assessment before Registrar Gaily. The parties shall bear their own costs for attending at and preparing for the interests and costs hearing.

"Walker J."