

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Humphrey v. B.L. Resort Ltd.*,
2025 BCCA 352

Date: 20251007
Docket: CA49838

Between:

James Lyman Humphrey and H6 Enterprises Ltd.

Appellants
(Petitioners)

And

B.L. Resort Ltd.

Respondent
(Respondent)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Fisher
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated
April 2, 2024 (*Humphrey v. B.L. Resort Ltd.*, Victoria Docket S230654).

Oral Reasons for Judgment

Counsel for the Appellants: J.A. Bloomenthal

Counsel for the Respondent: G.P.G. Deshon
S.M. Lundy

Place and Date of Hearing: Victoria, British Columbia
October 7, 2025

Place and Date of Judgment: Victoria, British Columbia
October 7, 2025

Summary:

In the underlying proceeding, the appellants seek various remedies against the respondent under s. 227 of the Business Corporations Act. Following the appellants' application to amend their petition, the chambers judge delivered oral reasons for judgment granting the proposed amendments in part. In addition, although not sought by the respondent and not the subject of submissions, the

chambers judge ordered special costs against the appellants. The appellants appeal the award of special costs.

Held: Appeal allowed. The chambers judge erred in making an award of special costs in a procedurally unfair manner and without justification. The appellants had no notice and no opportunity to make submissions on the issue. The chambers judge made no findings, and the record contains no evidence, to justify such an award. The parties will bear their own costs of the application below and of the appeal.

MARCHAND C.J.B.C.:

Introduction

[1] In the underlying proceeding, the appellants seek various remedies under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, against the respondent.

[2] On April 2, 2024, the chambers judge delivered oral reasons for judgment immediately following the hearing of the appellants' application to amend their petition. The purpose of the proposed amendments was, among other things, to plead material facts and law in support of a suspension of the applicable limitation period under s. 25 of the *Limitation Act*, S.B.C. 2012, c. 13. The application was granted, in part. The chambers allowed the amendments in relation to the personal appellant but not in relation to the corporate appellant.

[3] Although not sought by the respondent and not the subject of submissions, the chambers judge ordered special costs against the appellants. His reasons were brief. He held:

[9] In the circumstances, I am going to award special costs to the respondents given that this matter should have come on a lot sooner. Perhaps this was anticipated, in any event, given the partial success insofar as the corporate petitioner is concerned.

[4] The appellants appeal the award of special costs. They submit the chambers judge erred by:

1. failing to provide sufficient reasons for the special costs order;
2. exercising his discretion arbitrarily without making a finding the appellants engaged in reprehensible conduct warranting rebuke, or identifying any

other exceptional circumstances warranting special costs;

3. misapplying, failing to apply, or disregarding the principles governing special costs; and
4. denying the appellants' right to procedural fairness in making the order without providing notice or the ability to make submissions on special costs.

[5] If the appeal is granted, the appellants seek an order substituting an award of costs of the application below in their favour in place of the award of special costs against them. In the alternative they seek an order that the parties bear their own costs.

[6] Sensibly, the respondent takes no position on whether the chambers judge erred. However, if the appeal is granted, it asks that it be awarded the costs of the application in the court below or, in the alternative, that the parties bear their own costs.

Discussion

[7] An award of special costs is a discretionary award that demands a high degree of deference. On appeal, awards of special costs may be set aside "if the judge misdirected [themselves] on the law, made an error in principle, made a palpable and overriding error on a factual matter, or the award is clearly wrong": *Malik v. Eagle Mountain Farms (A Partnership)*, 2021 BCCA 379 at para. 26, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27; *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 33.

[8] The law governing awards of special costs is well-established. In *Sebok v. Babits*, 2022 BCCA 2 at para. 35, this Court endorsed the following non-exhaustive summary of the relevant principles, in part, as follows:

- The single standard for the awarding of special costs is that the conduct in question be properly categorized as "reprehensible";
- The word "reprehensible" has a wide meaning, encompassing scandalous or outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke;
- In order for an award of special costs to be justified, the circumstances must be exceptional. Something more than lack of merit of the claim or defence is required, such as improper

allegations of fraud, an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves;

- The purpose of awarding special costs is punitive and to express the court's disapproval of the party's conduct;

...

- The court must exercise restraint in awarding special costs; and

...

[9] This Court has also recognized “the punitive nature of special costs demands some degree of procedural fairness. An opportunity to respond to a claim for special costs must generally be provided”: *Gichuru v. Pallai*, 2018 BCCA 78 at para. 88, leave to appeal to SCC ref'd, 38123 (31 January 2019).

[10] Respectfully, here, the chambers judge erred in making an award of special costs in a procedurally unfair manner and without justification. The appellants had no notice the chambers judge was contemplating making an award of special costs and no opportunity to make submissions on the issue. Further, the chambers judge made no findings, and the record contains no evidence to justify such an award. I would therefore allow the appeal and set aside the award of special costs.

[11] The main issue is what order should replace the award of special costs.

[12] In all the circumstances, I would order that the parties bear their own costs of the application in the court below. No application would have been necessary if the appellants had filed amendments prior to setting down a hearing on the merits of the petition. On the other hand, the respondent opposed all relief until the hearing of the application when it expressed it was not opposed to the amendments in relation to the personal appellant. Without commenting on the import of the amendments allowed by the chambers judge, success was divided on the application with amendments permitted in relation to the personal appellant but disallowed in relation to the corporate appellant.

[13] I would also order the parties bear their own costs of the appeal. Neither side is responsible for the chambers judge's unilateral and unjustified imposition of special costs and success was divided in relation to the issue of costs in the court below.

[14] **FISHER J.A.:** I agree.

[15] **EDELMANN J.A.:** I agree.

[16] **MARCHAND C.J.B.C.:** The appeal is allowed, the special costs order is set aside, and the parties shall bear their own costs of the application in the court below and of the appeal.

“The Honourable Chief Justice Marchand”