

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *More Core Diamond Drilling Services Ltd.*
v. 973613 Alberta Ltd.,
2023 BCSC 282

Date: 20230228
Docket: S170014
Registry: Vancouver

Between:

More Core Diamond Drilling Services Ltd.

Plaintiff

And

973613 Alberta Ltd.

Defendant

Before: Registrar Gaily

Reasons for Decision

Counsel for the Plaintiff:

M.E. Young
H.D. Powell

Representative for the Defendant,
appearing in person:

J. Hynes

Place and Date of Hearing:

Vancouver, B.C.
January 6, 2023

Place and Date of Judgment:

Vancouver, B.C.
February 28, 2023

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INTRODUCTION

[1] This is an assessment of the special costs awarded by Justice Wilkinson to the plaintiff, More Core Diamond Drilling Services Ltd. (“More Core”), after a summary judgment hearing on October 9, 2020. In her oral reasons for judgment, *More Core Diamond Drilling Services Ltd. v. 973613 Alberta Ltd.*, 2020 BCSC 1760 (the “Summary Judgment”), Wilkinson J. determined that there was no genuine issue for trial and granted judgment of \$124,488 in favour of More Core. She also ordered that the defendant, 973613 Alberta Ltd. (“973”), and its representative, James Hynes, “shall pay to the plaintiff special costs in the action, jointly and severally” (Summary Judgment, para. 53(b)).

[2] 973 was represented by counsel until March 11, 2019, when Mr. Hynes, who is 973’s sole director, began representing the company himself. Justice Wilkinson found that Mr. Hynes “continuously and reprehensibly failed to follow *Rules of Court* and court orders, unnecessarily delaying the proceedings and causing [More Core] to incur extraordinary legal fees” and that his conduct warranted rebuke attracting special costs (Summary Judgment, paras. 48, and 50–51).

[3] More Core claims reimbursement of its total costs from November 17, 2016 to January 3, 2023 of \$120,601.59, which includes its taxable and non-taxable disbursements, as well as applicable taxes, based on the total amounts claimed in its amended bill of special costs (for the period from November 17, 2016 to May 17, 2022), and its supplemental bill of costs (for the period from May 17, 2022 to January 3, 2023).

[4] As detailed below, I have assessed the special costs payable by 973 and Mr. Hynes to More Core at \$81,460.30, and I have certified this amount on the blank certificate of costs provided at the assessment.

BACKGROUND AND PROCEDURAL HISTORY

[5] The facts of this case were not disputed. The parties are familiar with the procedural history of this case, so I will only summarize it here.

[6] More Core and 973 entered into a lease agreement dated January 22, 2014 (the “Lease”), under which More Core agreed to lease to 973 a mobile drill camp, made up of five drill camp units (trailers). 973 agreed to pay More Core a total of \$151,200 for the lease of the units, payable in monthly installments of \$3,150, for a term of 48 months. In February 2014, 973’s agents transported two of the camp units from More Core’s property to the agents’ property; the other three units remained with More Core and were never moved by 973 or its agents.

[7] Among other things, in the Lease, the parties expressly agreed that on default of payment under the Lease, the total amount owing on the Lease from the date of default to the end of the term was immediately due and payable by 973 (“Clause 18”). 973 made eight payments under the Lease up to August 2014, but failed to make any further payments (Summary Judgment, para. 3). In a letter dated July 21, 2015, More Core exercised its rights under Clause 18, and demanded 973 immediately pay the accelerated balance owing of \$124,488 (Summary Judgment, para. 19). 973 did not pay the balance owing.

[8] On November 17, 2016, More Core retained Miller Thompson LLP (“MT”) to pursue its claim under the Lease against 973. On January 3, 2017, More Core filed its notice of civil claim (the “Claim”), seeking damages for 973’s breach of the Lease. Given the terms of the Lease, the Claim is straight-forward and only four pages.

[9] 973 filed its response to the Claim on September 21, 2017 (the “Response”), admitting liability for breach of the Lease and that it was indebted to More Core for \$124,488 (Summary Judgment, para. 20). However, in the Response, 973 asserted that More Core’s claim was barred by provisions of the *Limitation Act*, S.B.C. 2012, c. 13, and that More Core had a duty to take reasonable steps to mitigate its damages under the Lease.

[10] On February 9, 2018, Justice Sewell heard together two applications brought by both parties in which 973 sought summary judgment dismissing More Core’s claim on the basis of the limitation period, and More Core sought to add Mr. Hynes as a defendant. In oral reasons released February 16, 2018, Sewell J. found that

through emails sent by Mr. Hynes to More Core in January and February 2015, 973 had acknowledged its liability under the Lease and it could not rely on the *Limitation Act* and he dismissed 973's application. He ordered that the costs for 973's application would be in the cause. Justice Sewell also dismissed More Core's application to add Mr. Hynes as a defendant. He ordered that Mr. Hynes was entitled to costs at Scale B of More Core's application to add him as a defendant, limited to a half-day hearing.

[11] At the assessment, More Core's counsel, Megan Young, testified that the parties had agreed that the costs ordered by Sewell J. for More Core's application to add Mr. Hynes as a defendant, and the costs ordered by Justice Russell on December 18, 2019 (\$1,800 payable by 973 as More Core's costs throw away in any event of the cause) would be "a wash" and that they are not before me. (This agreement is also set out in Ms. Young's email to Mr. Hynes, dated May 30, 2022, Wynn Affidavit #4, Ex. A). More Core claims its costs for successfully defending 973's application as special costs, given that Sewell J. ordered that the costs would be in the cause.

[12] More Core provided its list of documents to 973 on October 30, 2018. On November 6, 2018, More Core applied for summary judgment returnable November 23, 2018 (the "Summary Judgment Application"). The application is 13 pages and was supported by the affidavit of one of More Core's principals, Sean Pownall (seven pages, plus exhibits). At the request of 973's counsel, More Core agreed to adjourn the application. On several dates in November and December 2018, as well as in January 2019, More Core requested 973's lists of documents, but none were provided. On several dates in January and February, 2019, More Core requested 973's response to the Summary Judgment Application, but 973 did not provide a response.

[13] On January 31, 2019, More Core set the Summary Judgment Application for March 12, 2019. On March 11, 2019, on behalf of 973, Mr. Hynes filed a notice of intention to act in person. At the hearing the next day, without filing an application or

providing More Core notice, Mr. Hynes sought an adjournment, which Justice Murray granted, but with conditions imposed on Mr. Hynes.

[14] More Core filed its case plan proposal on July 16, 2019, in advance of the case planning conference (“CPC”), noting that 973 had refused or neglected to sign the order of Murray J., despite repeated requests. When the parties appeared before Justice Groves for the CPC on August 23, 2019, he made several procedural orders, setting deadlines with which 973 had to comply (the “CPC Order”). However, the CPC Order was not entered until December 17, 2019. More Core had to file a requisition for the parties to appear before Groves J. to settle the CPC Order as Mr. Hynes had not responded to More Core’s request to endorse it. On December 2, Groves J. denied Mr. Hynes’s request to vary the terms of the CPC Order and settled the CPC Order. 973 never complied with the terms of the CPC Order.

[15] After the CPC Order was entered, More Core reset the hearing of the Summary Judgment Application for a half day on December 18, 2019. However, when the parties appeared before Russell J. on December 18, Mr. Hynes sought an adjournment asserting that the hearing of the application required more than two hours. Justice Russell adjourned the Summary Judgment Application, ordering that it be set down on a peremptory basis for four hours, and she ordered 973 to pay More Core’s costs thrown away of \$1,800 in any event of the cause.

[16] Although the Summary Judgment Application was reset for March 11, 2020, it was adjourned due to circumstances beyond the parties’ control. More Core requested Mr. Hynes’s availability for resetting it, but he did not respond until September 21, 2020, when More Core had set it for October 9, 2020 and reminded him of the upcoming hearing. At that time, Mr. Hynes advised More Core he was not available on October 9, but More Core advised it would refuse to agree to a further adjournment. Mr. Hynes did not seek an adjournment when the parties appeared before Wilkinson J. on October 9.

[17] Justice Wilkinson found that Mr. Hynes’s conduct warranted rebuke, summarizing it in the Summary Judgment as follows:

[50] The conduct warranting rebuke includes the following:

- a) Mr. Hynes has been obstructionist and non-cooperative, resulting in the plaintiff incurring extraordinary costs, as I noted. In the first two years, the defendant was represented by counsel. At that time, the plaintiff set down this application and the defendant requested an adjournment. This adjournment was likely warranted given the timing of the notice. The plaintiff agreed. The plaintiff reset the application for March 12, 2019. The day before that date, the defendant notified the plaintiff of its self-represented status. At the hearing on March 12, 2019, the defendant sought an adjournment without notice or materials or application to find new counsel. The defendant received that adjournment on conditions. Those conditions were that he provide counsel for the plaintiff with information about new counsel obtained by a certain date. When that date arrived, Mr. Hynes informed the plaintiff that the company was self-representing through him.
- b) Despite his prior representation that he was actively seeking out new legal counsel, Mr. Hynes now says his company has no income or assets and that is why it is actually self-represented.
- c) The defendant requested further extensions to conduct examinations for discovery and obtained an appraisal of the property, but now says it has no ability to pay for these.
- d) The plaintiff set down a case planning conference. At the case planning conference, the defendant requested further time to obtain appraisals and conduct an examination for discovery. The court made orders at that case planning conference to keep the defendant to timelines to obtain the appraisal and conduct the examination for discovery. He did not comply with those orders.
- e) There are numerous examples of Mr. Hynes failing to respond to communications with plaintiff's counsel or only responding in a very short time before a court date.
- f) When confronted with court dates, Mr. Hynes, on behalf of the defendant, repeatedly makes adjournment applications without notice or application.
- g) He has alleged he did not receive many of the communications, which has been disproven on the evidence before.
- h) For today's hearing, the plaintiff prepared materials to respond to an anticipated adjournment application and reasonably so, in my opinion. After the date was set, Mr. Hynes communicated to plaintiff's counsel that he had a prior engagement.
- i) The most recent reason for an adjournment of this hearing was that the defendant insisted that he required four hours for hearing of the matter because his submissions would be about two hours. The adjournment was granted for those very reasons so that he could be fully heard before the court. The defendant failed to file responsive materials. I permitted the defendant to make submissions pending my

decision on the Rule 9 6(3)(b) issue and Mr. Hynes' submissions today before me, including on costs, were less than 30 minutes in total.

(Summary Judgment, para. 50).

[18] Justice Wilkinson initially agreed that she would assess the special costs (Summary Judgment, para. 57). On February 10, 2022, More Core filed the appointment to assess special costs, setting it for May 24, 2022. On May 5, 2022, Master Harper granted More Core leave to alternatively serve Mr. Hynes with the appointment and supporting materials.

[19] The parties appeared before Wilkinson J. for the assessment on May 24, 2022; however, because Ms. Young did not provide advance notice to Mr. Hynes that she would be testifying in defence of the special costs claimed, Wilkinson J. adjourned the assessment. Justice Wilkinson did not seize herself of the assessment (Wynn Affidavit #4, Ex. I).

[20] At a pre-hearing conference ("PHC") held in June 2022, Master Hughes ordered that the assessment be set for a full day based on Mr. Hynes's assertion that his cross-examination of Ms. Young would take "a couple of hours." Master Hughes also ordered Mr. Hynes to provide More Core's counsel with a written outline of the costs and disbursements he would be challenging at the assessment, and the basis for the challenge, by July 15, 2022. By November 22, 2022, Mr. Hynes had not endorsed the draft order of Master Hughes at the PHC (Wynn Affidavit #4, Ex. C).

POSITION OF THE PARTIES

[21] More Core's position is that the fees and disbursements it claims as special costs were proper and reasonably necessary to conduct the proceedings. More Core also submits it is entitled to its costs of the assessment assessed as special costs.

[22] At the assessment before me, More Core tendered the first and second affidavits of Ms. Young, sworn May 19 and 24, 2022, respectively, as well as the

fourth affidavit of Tanya Wynn, a legal assistant at MT, sworn January 4, 2023. More Core included in the hearing record copies of the pleadings and affidavits and orders in the proceedings from January 3, 2017 to May 5, 2022. Ms. Young testified at the assessment and was cross-examined by Mr. Hynes.

[23] In preparation for the assessment of special costs, Ms. Young created a “special costs worksheet”, showing the MT invoice by number and date, breaking out the amounts charged as fees, taxable and non-taxable disbursements, as well as the applicable taxes (PST and GST), the total invoice and whether it was paid, references to the line items in the bill of special costs, and the fees claimed on the bill of special costs. She also included a column indicating whether Mr. Hynes disputed the amounts claimed. The special costs worksheet was included in the hearing record. Ms. Young also included in the hearing record a “procedural history outline” up to December 31, 2022, which was modified from a similar chart Ms. Young had included in her written submissions on the Summary Judgment Application.

[24] In an email to Ms. Young dated July 15, 2022 (Wynn Affidavit #4, Ex. B), Mr. Hynes set out his objections to the bill of special costs as follows:

- November 17, 2016 to February 20, 2018 – I am contesting the entirety of the billing for this period and can specify the reasons for doing so.
- February 26, 2018 to March 12, 2019 – I am contesting the entirety of the billing for this period and can specify the reasons for doing so.
- May 5, 2019 to October 8, 2020 – I am not contesting the billing for this period.
- October 9, 2020 to present – I am contesting the entirety of the billing for this period and can specify the reasons for doing so.

[25] At the assessment, Mr. Hynes did not specify the reasons for his objections to the fees claimed by More Core as special costs in the periods noted above. He submitted that it was not reasonable that More Core was claiming approximately \$60,000 in special costs since the Summary Judgment, whereas it claims approximately \$70,000 in special costs for the period up to and including the

Summary Judgment Application. In the hearing record Mr. Hynes submitted separately, he included a copy of More Core's bill of special costs, as well as the transcripts of the proceedings before Wilkinson J. and Master Hughes.

ANALYSIS

[26] Rule 14-1 governs costs in civil cases. Under R. 14-1(1), costs must be assessed as party and party costs, in accordance with Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], unless specified circumstances exist. One of the excepted circumstances is when the court orders that costs be assessed as special costs: R. 14-1(b)(i).

[27] In *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 [*Le Soleil*], the Court of Appeal reiterated that special costs are not compensatory; they are punitive (para. 42). The purpose of special costs is to censure and deter litigation misconduct, not to compensate the plaintiff (*Le Soleil*, para. 42).

[28] Rule 14-1(3) provides that on an assessment of special costs, a registrar must allow those fees that were proper or reasonably necessary to conduct the proceeding, and consider all of the circumstances, including the following factors listed in R. 14-1(3)(b):

- (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;
- (ii) the skill, specialized knowledge and responsibility required of the lawyer;
- (iii) the amount involved in the proceeding;
- (iv) the time reasonably spent in conducting the proceeding;
- (v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;
- (vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;
- (vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;
- (viii) Rule 1-3 and any case plan order.

[29] In addition to R. 14-1(3), R. 14-1(5) governs the assessment of disbursements:

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

- (a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
- (b) allow a reasonable amount for those disbursements.

[30] The assessment ordered in R. 14-1(3) is an objective one of what a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill (*Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 at 319 (S.C.) [*Bradshaw Construction*]). Special costs are not necessarily the fees that the successful solicitor would recover from their client, but will usually be about 80%–90% of an actual bill (*Bradshaw Construction*, 319).

[31] As the factors set out in R. 14-1(3)(b) must be considered on this assessment, each will be addressed below.

(i) The Complexity of the Proceeding and the Difficulty or the Novelty of the Issues Involved

[32] This was not a complex proceeding and it did not raise any difficult or novel issues.

[33] In its Response, 973 admitted it was in default under the Lease, that the accelerated balance became immediately due and owing, and that it was indebted to More Core for \$124,488 (Summary Judgment, para. 7). Justice Sewell determined 973 could not rely on the provisions of the *Limitation Act* given Mr. Hynes’s emails. Justice Wilkinson found that the only live defence advanced by 973 was that More Core had failed to mitigate its damages; however, because 973 failed to file a response to the Summary Judgment Application, Wilkinson J. found that the issue was not properly before her (Summary Judgment, paras. 36 and 38).

(ii) The Skill, Specialized Knowledge and Responsibility Required of the Lawyer

[34] This file did not require extensive skill or specialized knowledge and was appropriately conducted by junior lawyers in their first few years of call.

[35] Ms. Young explained that when More Core retained MT in November 2016, a senior partner (now retired) was the responsible billing lawyer, but conduct of the file was delegated to Eric Ito, who was called to the bar in 2015. At the time, Mr. Ito's hourly rate was \$290. Natalie Pawson, who was then an articling student, also worked on the file with Mr. Ito; her hourly rate was \$175.

[36] Ms. Young completed her articles at MT and worked on the file as a student prior to her call in 2017. Ms. Young took conduct of the file from Mr. Ito in the summer of 2018; at the time, her hourly rate was \$300, but it increased to \$375 during the course of the proceedings. Ms. Young said she consulted with more senior lawyers about aspects of the file on occasion, but only the fees of Sarah Nelligan, a 2009 call, are included in the bill. The fees of MT's legal assistants and paralegals are also included in the bill of special costs.

[37] After the Summary Judgment was released, Ms. Young delegated most of the work associated with preparing the bill of special costs to Shawnee Monchalin, who was called to the bar early in 2021 and whose hourly rate was \$250, and to Holiday Powell, who was licensed in the United States, and called to the bar in B.C. in 2022. Ms. Powell's hourly rate was \$350.

(iii) The Amount Involved in the Proceeding

[38] 973 admitted that it was liable to More Core under the Lease for \$124,488. (The amount More Core claims in special costs is just over \$120,000, nearly matching the amount at issue in the proceeding.)

(iv) The Time Reasonably Spent in Conducting the Proceeding

(v) The Conduct of Any Party that Tended to Shorten, or to Unnecessarily Lengthen, the Duration of the Proceeding

[39] I have considered these factors together given that Wilkinson J. expressly found that Mr. Hynes's failure to follow the *Rules* and comply with court orders unnecessarily delayed the proceedings (Summary Judgment, para. 48).

[40] When 973 was represented by counsel, 973 did not respond to the nine requests More Core made for its list of documents from November 21, 2018 through February 27, 2019. Once Mr. Hynes began representing 973, he repeatedly failed to reply to More Core's requests that he endorse orders, that he provide his availability and schedule 973's examinations for discovery, or that he provide his availability for hearing dates.

[41] This case involved two substantive applications for which special costs are awarded: 973's application to dismiss More Core's claim, and More Core's Summary Judgment Application. However, because of Mr. Hynes's conduct, two last-minute adjournments were granted on dates intended for the hearing of the Summary Judgment Application. The parties attended the CPC before Groves J., but had to reappear before him a few months later, given Mr. Hynes refusal to endorse the order from the CPC and seeking to vary its terms.

[42] At the CPC in August 2019, Groves J. ordered Mr. Hynes to provide 973's list of documents by September 16, 2019, but Mr. Hynes never produced them. Justice Groves also ordered Mr. Hynes to conduct 973's discoveries by October 11, 2019. Although More Core agreed twice to extend the deadline for 973's discoveries (first to November 29 and then December 16, 2019), Mr. Hynes never took steps to schedule 973's discoveries.

[43] On December 18, 2019, Russell J. granted Mr. Hynes's request for an adjournment of the Summary Judgment Application and ordered it be set for a full day at Mr. Hynes's request. However, Mr. Hynes's submissions before Wilkinson J. were less than 30 minutes (Summary Judgment, para. 50). I note that this was

similarly the situation before me: after asserting at the PHC that his cross-examination of Ms. Young would take a few hours, resulting in the assessment being set for a full-day, Mr. Hynes's cross-examination of Ms. Young and his submissions on the assessment took approximately 30 minutes.

(vi) The Importance of the Proceeding to the Party whose Bill is Being Assessed and the Result Obtained

[44] More Core successfully obtained summary judgment against 973, but there was no further evidence before me of the importance of this proceeding to More Core.

(vii) The Benefit to the Party Whose Bill is Being Assessed of the Services Rendered by the Lawyer

[45] MT successfully obtained summary judgment for More Core. Ms. Young testified that MT substantially discounted a lot of the work for More Core on this file. The discounts are reflected on the amended bill of special costs, which includes a column for "work amount", which Ms. Young described as the amount recorded by the lawyer or student, and a column for "bill amount", which Ms. Young testified reflects the amount MT actually charged More Core for the work performed.

[46] However, as I noted above, this file did not require any specialized knowledge or legal expertise and was appropriate for newly-called commercial litigators.

(viii) Rule 1-3 and Any Case Plan Order

[47] Rule 1-3 sets out that the object of the rules of civil procedure is to secure "the just, speedy and inexpensive determination of every proceeding on its merits", which includes conducting the proceedings in ways that are proportionate to the amount involved, the importance of the issues in dispute, and the complexity of the proceeding.

[48] In More Core's case plan proposal filed in July 2019, it stated that in its view, the matter was suitable for summary trial because it was "a debt claim pursuant to a lease and the sole question remaining in issue is the quantum of the debt."

Justice Wilkinson agreed. However, through Mr. Hynes's conduct in representing 973, the determination of this straight-forward matter took longer than was reasonable or warranted.

[49] I must also comment on proportionality in the context of the amount claimed by More Core as special costs, which at \$120,601.59 is almost equivalent to the \$124,488 judgment awarded to More Core. In my view, this cannot be considered proportionate to the amount involved in this claim, the straight-forward issue in dispute (whether the issue of mitigation was before the court where the defendant had not filed a response to the summary judgment application) and the complexity of the proceedings (the debt owing where the defendant admitted liability for default under the Lease).

THE BILL OF SPECIAL COSTS

[50] Without specifying any basis for it, Mr. Hynes objected to the entirety of the fees More Core claims from November 17, 2016 to February 20, 2018, and from February 26, 2018 to March 12, 2019. In her order, Wilkinson J. awarded More Core special costs "in the action"; she did not order costs at a different scale for the period 973 was represented by counsel. As registrar, I cannot look behind the order awarding special costs.

[51] More Core retained MT on November 17, 2016 and the Claim was filed less than two months later on January 3, 2017. Ms. Young testified that, given the amount owing by More Core under the Lease, it was more cost effective for junior lawyers to have conduct of the file than senior litigators. Mr. Ito, then a first-year call, and Ms. Pawson, an articling student, recorded approximately 20 hours between them to, among other things, prepare the Claim, and issue demand letters to 973's agents who were holding the two camp units for 973. After filing the Claim, Mr. Ito recorded approximately 3.5 hours on the file through March 13, 2017, which included time attempting to locate and communicate with Mr. Hynes as 973's representative before 973 retained counsel.

[52] Although 973 filed its Response on September 21, 2017, the amended bill of special costs does not reflect any further time recorded on the file from March 13, 2017 through the end of that year.

[53] More Core claims a total of \$5,034.14 in legal fees for this period (not including disbursements or taxes), as reflected in the special costs worksheet based on the invoices MT issued to More Core on December 30, 2016 and April 13, 2017.

[54] At the assessment, Ms. Young testified that through oversight, MT did not invoice More Core at all during the 2018 calendar year, although the work was ongoing. She testified that as a result of this oversight, all of the work performed on the file in 2018 was discounted (as is evident comparing the “work amount” and the “bill amount” columns for all of the 2018 entries).

[55] As I noted, More Core claims it is entitled to its costs to defend 973’s unsuccessful application to strike its claim, and that these should be assessed as special costs because Sewell J. ordered that they were in the cause. Mr. Hynes challenged the costs claimed during this period, without specifying the reason.

[56] The amended bill of special costs includes entries for Mr. Ito’s time on January 23, February 5–9, 16 and 20, 2018, as well as of an MT paralegal on February 6, 2018. Ms. Young’s evidence is that she (and others at MT) reviewed the draft bill of special costs and deleted entries related to More Core’s unsuccessful application to add Mr. Hynes as a defendant. I cross-referenced the entries on the amended bill of special costs to those in the January 31, 2019 invoice (which, as noted, encompasses all of 2018) (Young Affidavit #1, Ex. A).

[57] On January 23, 2018, Mr. Ito recorded 0.9 hours to “compile and organize authorities”, without further description, and MT charged More Core \$223.20. A copy of More Core’s unsuccessful application to add Mr. Hynes as a defendant is not included in the hearing record, but its response to 973’s application to strike its claim cites authorities. I assume as is standard practice between counsel that the parties agreed to file one book of authorities for both applications. On February 5–6, 2018,

Mr. Ito recorded a total of 11.2 hours to “Prepare application response (Defendant’s Summary Trial)” and “Finalize application response materials” (billing More Core \$2,777.60). On February 6, 2018, an MT paralegal recorded 0.2 hours for “Receipt of request for corporate search of 973613 Alberta Ltd. and provide search results to Eric Ito.” MT billed More Core \$28.80 for this. Although it may seem trivial, there is no further description to determine if this search was related to 973’s application or to More Core’s.

[58] The amended bill of special costs indicates that on February 7–8, 2018, Mr. Ito recorded 12 hours to “Draft written submissions for applications defending summary judgment” and “Finalize submissions defending application to dismiss action” (charging More Core \$2,790). The time reflected on the amended bill of special costs for these entries is reduced by three hours from that on the invoice (Young Affidavit #1, Ex. A, p. 10). On February 9, 2018, the amended bill of costs includes four hours Mr. Ito recorded to “Prepare for and attend summary judgment application” (reduced from the eight hours on the MT invoice) and MT billed More Core \$992. On February 16, 2018, Mr. Ito recorded one hour to “Attend court to receive oral reasons for judgment”, which is the same time recorded on the MT invoice, and the “bill amount” is \$248. The amended bill of special costs also includes Mr. Ito’s entry of February 20, 2018 for 0.3 hours to “E-mail correspondence to [973’s former counsel] regarding form of order made at hearing”, which is the same as the MT invoice. The “bill amount” is \$74.40.

[59] By my calculation, More Core claims \$7,134 before taxes as special costs for the legal fees incurred to defend 973’s application to strike its claim. However, I find that some of this time necessarily included time spent pursuing More Core’s unsuccessful application, evidenced in the narrative for Mr. Ito’s entries of February 16 and 20, and the entry of the paralegal, and should be discounted.

[60] Ms. Young testified that she took conduct of the More Core file from Mr. Ito in June 2018, incurring the bulk of the fees claimed as special costs during the period from February 26, 2018 through March 12, 2019.

[61] Based on the MT invoices of January 31, 2019, February 28, 2019, and March 31, 2019, I calculate the total fees claimed by More Core as special costs during this period to be approximately \$21,000 (before tax).

[62] During the period from February 26, 2018 through March 12, 2019, Mr. Ito recorded 4.3 hours as he transitioned conduct of the file to Ms. Young, and MT billed More Core \$992 for his work. The narrative for his entries on the amended bill of special costs includes conferring with and instructing a student regarding service of materials in late February and early March 2018, as well as meeting with Ms. Young in June 2018 to brief her on the Summary Judgment Application.

[63] From June 20, 2018 through March 12, 2019, Ms. Young recorded 79 hours and MT billed More Core \$18,927.20 for her work on the file. After an articling student initially drafted the notice of application (for which MT did not bill any time), Ms. Young's entries reflect that she took over preparing the Summary Judgment Application materials, reviewing the relevant law, and drafting the supporting affidavits in consultation with the clients. She also recorded time preparing More Core's list of documents, which were provided to 973 in October 2018.

[64] Ms. Young testified that because she was a newly-called lawyer at the time, she consulted with Ms. Nelligan, a partner with experience in debtor-creditor law, to review the application materials and advise on strategy. The amended bill of special costs shows that Ms. Nelligan recorded a total of 1.9 hours on November 2 and 6, 2018, assisting Ms. Young with the Summary Judgment Application materials, as well as another 0.6 hours on January 29, 2019 strategizing with Ms. Young. More Core was billed \$782 for Ms. Nelligan's work.

[65] Under the Lease, 973 agreed to "costs associated with the order, delivery and installation of the Camp; costs associated with the re-delivery of the Camp upon termination of the Lease Agreement for any reason; and costs incurred by More Core to discharge any lien or adverse claim against the Camp" (Pownall Affidavit #1, November 6, 2018, para. 6 and Ex. A).

[66] Ms. Young testified that by the summer of 2018, 973's agents still held More Core's two trailers. 973's agents had retained counsel and demanded payment from More Core for their storage costs, as well as for costs to remove the trailers from their property. Ms. Young and Mr. Ito both recorded time addressing the demands of 973's agents, negotiating with the agents' counsel, and strategizing More Core's response. Ms. Young testified they were concerned 973's agents would sell the trailers. The amended bill of special costs includes time entries for MT paralegals and legal assistants relating to searches of the personal property registries ("PPR") in Alberta and BC, as well as preparing and registering More Core's interest in the trailers in the PPR. MT billed More Core \$368.80 for the work of the MT paralegals and legal assistants.

[67] Mr. Hynes did not submit that the fees incurred for the issues involving 973's agents should not be included as special costs. Based on the terms of the Lease to which 973 agreed, I find that these entries were within the scope of the remedies available to More Core for which 973 was responsible upon default of the Lease and properly included in the bill of special costs.

[68] More Core originally set the Summary Judgment Application for hearing on November 23, 2018, but agreed to adjourn it at the request of 973's former counsel. It was set for hearing on March 12, 2019.

[69] By March 12, 2019, Ms. Young was fully prepared to proceed with the Summary Judgment Application. By this point, the total fees claimed as special costs by More Core from the date it first retained MT amount to over \$30,000. Although represented by counsel up to March 11, 2019, 973 had not filed a response to the Summary Judgment Application, nor had it provided More Core with its list of documents, despite being repeatedly asked to do so.

[70] I have discounted the amount claimed as special costs by More Core for the period from November 17, 2016 to March 12, 2019, and I find that a total fee of \$25,000 was proper and reasonably necessary to conduct the proceeding in the circumstances. To this point, this case was a straight-forward dispute under an

equipment lease involving a claim for accelerated damages in an amount that is not large by commercial standards, where the defendant had admitted liability for defaulting under the lease, and the issue of a limitation period raised by the defendant had been resolved in the plaintiff's favour.

[71] At the assessment, Mr. Hynes confirmed that he “does not contest the billing” for the period from May 5, 2019 through October 9, 2020. More Core claims approximately \$30,000 in fees for this period (based on the entries on the amended bill of special costs, the total is \$29,745.16). Although Mr. Hynes does not “contest the billing”, I must still assess whether the fees were proper and reasonably necessary to conduct the proceedings in the circumstances.

[72] Ms. Young was the primary biller recording 107.7 hours on the file from May 13, 2019 through October 9, 2020. Ms. Young testified that MT continued to discount the bills to More Core because the fees were “getting unwieldy and close to the claimed amount” owing on 973's default of the Lease.

[73] I reproduced Wilkinson J.'s summary of Mr. Hynes's conduct during this period and summarized it above. Ms. Young testified that once Mr. Hynes began representing 973, she had to spend more time on the file than would normally be required to move the matter forward to the hearing, accounting for the time she recorded.

[74] For example, after the CPC on August 23, 2018 through to December 2, 2018 (when the parties appeared before Groves J. to settle the CPC order), Ms. Young recorded approximately 20 hours, most of which was dedicated to communicating with Mr. Hynes in attempts to schedule 973's examinations for discovery and to schedule the appraisal of the three trailers on More Core's property sought by Mr. Hynes. Mr. Hynes never conducted examinations for discovery and did not follow through with an appraisal.

[75] From March 4 through March 11, 2020 the day the Summary Judgment Application was scheduled to be heard, Ms. Young recorded approximately 32 hours

preparing for the hearing, which included time spent researching the consequences of a defendant's failure to file a response to a summary judgment application, the awarding of costs against non-parties, and the awarding of special costs. She also recorded time on March 10 (12.9 hours), which included drafting written submissions.

[76] Between the adjournment on March 11 and October 9, 2020, Ms. Young recorded a further 36.5 hours, the majority of time recorded in early October leading up to the reset Summary Judgment Application. Ms. Young testified that she had anticipated that Mr. Hynes would seek an adjournment, so she prepared an argument in that event, which takes up approximately five of the 21-page submission. Ms. Young testified that given Mr. Hynes's request for a longer hearing, she felt it was reasonable and prudent to prepare thorough written submissions. She submitted that Wilkinson J. relied on her written submissions, which is reflected in the Summary Judgment.

[77] I find that the total fees claimed by Ms. Young for preparing for the Summary Judgment Application in March, as well as again in October, exceed what a reasonable client would pay a reasonably competent lawyer in the circumstances. Although she was still a junior lawyer in her first three years of practice, by March 11, 2020, Ms. Young was fully prepared for the hearing. However, she recorded more time preparing for the reset hearing in October 2020 than she had leading up to the March hearing. While I appreciate that she anticipated an adjournment application, which accounted for some of her time, the other issues should have been familiar to her and should not have required so much additional preparation time.

[78] Accordingly, I have discounted the amount claimed and find that a reasonable amount in the circumstances for the period from March 12, 2019 through October 9, 2020 is \$25,000.

[79] Accordingly, I find that More Core is entitled to \$50,000 in legal fees as special costs from November 17, 2016 through October 9, 2020.

[80] More Core claims approximately \$42,000 in legal fees as its special costs since Wilkinson J. issued the Summary Judgment (\$26,902.68 in the amended bill of special costs, plus another \$15,000 in the supplemental bill of special costs).

Ms. Young testified that in the supplemental bill of special costs, which is for the period from May 17, 2022 through January 3, 2023, the \$15,000 claimed as special costs in legal fees has been discounted from the \$24,000 in fees actually recorded.

[81] Mr. Hynes objects to all of the costs claimed by More Core as special costs from October 9, 2020 to the present.

[82] At the assessment, in her reply submissions, Ms. Young submitted that the costs of the special costs assessment should be assessed as special costs, based on Wilkinson J.'s order and reasons for judgment.

[83] In the Summary Judgment, Wilkinson J. stated that in *Gichuru v. Smith*, 2014 BCCA 414 [*Gichuru*], “the Court of Appeal confirmed the usual rule that special costs will be awarded for the whole proceeding and I do not see a reason to depart from that rule in the case before me” (Summary Judgment, para. 52). She then ordered that 973 and Mr. Hynes shall pay More Core “special costs in the action” (para. 53).

[84] In *Le Soleil*, released six years after *Gichuru* in late February 2020, the Court of Appeal determined that there is no general rule that a party is entitled to special costs of the costs assessment; whether a party is entitled to special costs of the assessment is a matter of discretion (*Le Soleil*, para. 137). In *Le Soleil* at para. 139, the Court of Appeal held that “if the court orders the costs of the proceeding to be paid on a special costs basis, part of the proceeding is the assessment of the costs, and it follows from the order that the registrar is to allow the costs of the assessment as special costs”.

[85] More Core did not cite *Le Soleil* in its written submissions, referring only to the “usual rule” from *Gichuru*. Although Wilkinson J. did not cite *Le Soleil* in the Summary Judgment, I find it is reasonable to infer that in stating that she did not “see a reason to depart from that rule [that special costs will be awarded for the

whole proceeding] in the case before me” and ordering “special costs in the action”, Wilkinson J. intended that costs of the assessment in this proceeding were to be assessed as special costs.

[86] The issue before me is whether the special costs claimed by More Core for the assessment were proper and reasonably necessary in the circumstances. As the Court of Appeal stated in *Gichuru*, “the fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable” (para. 105). In this case, I find that the costs claimed by More Core in relation to the assessment of special costs are not reasonable in the circumstances, nor are they proportionate to the judgment obtained by More Core, and I have discounted them.

[87] Ms. Young testified that she and her MT colleagues spent a great deal of time preparing the bills of special costs and preparing for the assessment. In the period between October 16, 2020 and May 24, 2022, Ms. Young recorded approximately 54 hours (roughly 31 hours recorded on the amended bill of special costs and 23 hours on the supplemental bill of costs). She recorded a further 42.5 hours from May 24, 2022 through January 3, 2023. The total number of hours Ms. Young recorded on the assessment is close to 95 hours, discounting an hour or so for the preparation of Wilkinson J.’s order. Ms. Young recorded four hours preparing for and attending the PHC before Master Hughes on June 24, 2022, which accounts for a fraction of the roughly 38 hours she billed between May 24, 2022 and January 3, 2023 related to the assessment of the special costs.

[88] Ms. Monchalin recorded 66.4 hours, and Ms. Powell recorded 33.9 hours to January 3, 2023, as set out on both bills of special costs. In addition, the supplemental bill of special costs includes the fees of Steven Evans (2.6 hours at \$390 per hour) and Caitlin VanDuzer (2.8 hours at \$250 per hour). Ms. Young testified that some of the time recorded by an articling student, Ms. Monchalin and Ms. Holiday was written off and there was no evidence before me that Ms. Young and Ms. Powell were billing for their time appearing before me at the assessment on January 6, 2023.

[89] Ms. Young testified that they ensured that every single one of the 195 entries on the amended bill of special costs had a corresponding email or memo to support it, and she reviewed the bills to confirm this because she does not have affidavits from the other lawyers who worked on the file.

[90] While I appreciate the efforts and preparation of Ms. Young and her MT colleagues on this assessment, and I acknowledge that Mr. Hynes's objections to the bills set out in his email of July 2022 were broad and not particularized, by my calculation, the MT lawyers spent approximately 200 hours preparing for the assessment of special costs. I reiterate the Court of Appeal's statement that "the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall" (*Gichuru*, para. 155).

[91] I find that the fees claimed by More Core in relation to the assessment of special costs are not objectively reasonable in the circumstances of this case and must be reduced. The purpose of ordering special costs is to rebuke the conduct of the party liable for the special costs, but it is not a windfall to the successful party. While Mr. Hynes's failure to particularize his objections to the special costs claimed accounts for some of the increased preparation needed, Ms. Young's failure to provide the required notice to Mr. Hynes accounted for Wilkinson J.'s adjournment of the assessment when originally scheduled.

[92] I find that a reasonable fee for the period of time since Wilkinson J. released the Summary Judgment, covering the preparation for and appearance at the assessment from October 10, 2022 to the present is \$20,000 and I reduce the fees claimed by More Core during this period accordingly.

DISBURSEMENTS

[93] On the amended bill of special costs, More Core claims \$2,425.80 in disbursements (which is the total of taxable and non-taxable disbursements, as well as any applicable taxes). The invoices supporting these disbursements are exhibited to Ms. Young's Affidavit #1 (Ex. B and C). More Core also claims a total of \$634.50

in non-taxable disbursements on the supplemental bill of costs, supported by the invoices exhibited to Ms. Wynn's Affidavit #4 (Ex. G).

[94] Ms. Young testified that the disbursements claimed on the supplemental bill of special costs relate to filing fees, as well as obtaining the transcript of the PHC before Master Hughes. She also testified that she reviewed all of the disbursements listed in the amended bill of special costs, removing any that in her opinion were not related to Wilkinson J.'s order.

[95] I have reviewed the evidence of the disbursements claimed on both bills of special costs and agree that they reflect filing fees, BC Online searches, and transcripts. I find that the disbursements claimed by More Core on its amended bill of special costs and the supplemental bill of costs were necessarily and properly incurred and that the amount of \$3,060.30 is reasonable.

CONCLUSION ON COSTS

[96] Rule 14-3(a) requires that I only allow fees that were proper or reasonably necessary to fulfil the retainer. As noted in *Bradshaw Construction*, this is an objective assessment. This was not a complex matter, although it was clearly prolonged by Mr. Hynes's conduct. However, as I have detailed above, I have found that the fees claimed by More Core as special costs for preparing for the assessment of special costs are not reasonable and proportionate in the circumstances of this case.

[97] I have determined that More Core is entitled to legal fees amounting to \$70,000 as special costs of the action. I have calculated the applicable taxes at \$8,400, for a total of \$78,400 in fees.

[98] I have allowed the disbursements claimed on both the amended bill of special costs and the supplemental bill of costs, in the amount of \$3,060.30.

[99] I have certified the special costs payable by 973 and Mr. Hynes at \$81,460.30. More Core may arrange to pick up the completed certificate of special costs from the registry.

“Registrar Gaily”