

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oswald v. Start Up SRL*,
2023 BCSC 386

Date: 20230216
Docket: S166959
Registry: Vancouver

Between:

Nevil Oswald

Plaintiff

And:

Start Up SRL

Defendant

And:

Nevil Oswald and Narendra Mhamunkar

Defendants by Way of Counterclaim

Before: The Honourable Justice Giaschi

Oral Reasons for Judgment Re Special Costs Application

In Chambers

Counsel for the Plaintiff:

E.J.S. Aitken

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Narendra Mhamunkar:

A.P. Morrison

Place and Date of Hearing:

Vancouver, B.C.
June 6-7, 2022

Place and Date of Reasons for Judgment:

Vancouver, B.C.
February 16, 2023

[1] **THE COURT:** In reasons reported at 2020 BCSC 1730, I granted judgment to the plaintiffs in this matter and dismissed the counterclaim by the defendant. An appeal of that judgment was dismissed by the Court of Appeal in reasons reported at 2021 BCCA 352. The plaintiff and Narendra Mhamunkar (the "applicants") now apply for an order of special costs against the defendant or alternatively for increased or double costs at Scale C. The defendant opposes the applications. It accepts that the applicants are entitled to costs, but submits that those costs should be ordinary costs assessed at Scale B.

Facts

[2] The facts of the underlying action are fully set out in my reasons and in the reasons of the Court of Appeal. I summarize them briefly to provide context.

[3] The parties are all shareholders of ICTC Holdings Corporation ("ICTC").

[4] In July 2015, the defendant wanted to increase its shareholdings in ICTC and entered into agreements with two other shareholders to purchase their shares. The applicants became concerned about their position in ICTC once it became controlled by the defendant. They expressed their concern to the defendant and notified it that they would not consent to a re-organization unless an agreement was made guaranteeing the value of their shares. The parties then entered into a memorandum of understanding ("MOU").

[5] One of the issues at the trial was the validity and enforceability of the MOU. Start Up contested the validity and enforceability of the MOU on the grounds that there was no intention to contract, the MOU was merely an agreement to agree, and the terms of the MOU were too uncertain to render it a binding agreement. Start Up also alleged that the applicants had made various misrepresentations that gave rise to a right of rescission and, importantly, that these misrepresentations were made fraudulently. Start Up also advanced a counterclaim against the applicants for damages for fraudulent or negligent misrepresentation.

[6] The misrepresentations alleged by Start Up related to the financial statements of Hero Products India Private Limited ("Hero India"), a subsidiary of ICTC that was operated by the applicants. Specifically, Start Up alleged that, to the knowledge of the applicants, the 2014 financial statement misrepresented the financial status of Hero India. The misrepresentations included: unreported tax liabilities (VAT, income tax and service tax); unreported amounts owed by Hero India to the Employee's Provident Fund; bribes disguised as third-party payments; inaccurate recording and reporting of fixed assets and accounts receivable; inaccurate recording and reporting of advances to employees; and incorrectly assigned costs in the accounting records. In connection with these alleged misrepresentations, Start Up alleged that Mr. Mhamunkar had confessed to Mr. Rinero that a fictitious factory in Daman had been created to avoid payment of taxes, that bribes had been paid to Indian authorities, and that the accounting records had been falsified.

[7] The evidence at trial disclosed that, after the defendant had assumed control of ICTC, Hero India filed a criminal complaint against the applicants in relation to the alleged misrepresentations and sent a letter to customers of Hero India accusing the applicants of committing fraud against the company. The criminal complaint was withdrawn by Hero India on January 7, 2017, but a report was nevertheless issued by the assistant police inspector on June 8, 2020, effectively dismissing the complaint. I noted in my reasons that Mr. Sacchet and Mr. Rinero were unaware of the withdrawal of the criminal complaint until January 2019, approximately six months prior to the commencement of the trial.

[8] In my reasons I made adverse credibility findings against Mr. Sacchet and Mr. Rinero.

[9] In relation to Mr. Saachet, I found that "he attempted to colour and manipulate his evidence" (para. 15), that "at times he gave evidence that was clearly false" (para. 16) and that he had a "tendency to distort the facts" (para. 94). In relation to Mr. Rinero, I found that his evidence "was wholly unreliable and not credible" and that he "clearly considered that it was his job to do what was necessary to achieve a

favourable result for Start Up” (para. 17). I also found that he “knowingly” prepared spreadsheets that “contained multiple and patently obvious errors and exaggerations” and that he “gave untruthful evidence about [the] alleged confession by Mr. Mhamunkar” (para. 18), a confession which was a foundation for many of Start Up’s allegations.

[10] I determined that the MOU was a valid and enforceable contract for the sale of the applicants' shares at a specified price and determined that there were no misrepresentations that invalidated the contract. The applicants were granted an order of specific performance of the MOU, and the counterclaim of Start Up was dismissed.

[11] Start Up unsuccessfully appealed the trial judgment on the issue of the validity and enforceability of the MOU. The appeal did not concern the determinations I made regarding the alleged fraudulent or negligent misrepresentations.

Submissions

[12] The applicants submit that special costs are appropriate on the basis that Start Up advanced wide-ranging claims of fraud and criminal conduct that impugned the integrity of the applicants. They submit that these allegations were part of a larger campaign to discredit the applicants and took up a substantial amount of the trial time. They say that Start Up had many opportunities to re-evaluate and withdraw the fraud allegations but maintained the allegations right up to the end of the trial. They say the allegations of fraud were completely unfounded and note the adverse credibility findings that were made in respect of Start Up's main witnesses, Mr. Sacchet and Mr. Rinero. Ultimately, they submit that, in the circumstances, the conduct of Start Up was reprehensible and special costs are warranted.

[13] Start Up submits that special costs are not warranted. It says it had good reason to plead and pursue the allegations of fraud and that the fact it was unsuccessful is not by itself a basis for an award of special costs. It says more is required such as whether the allegations were obviously unfounded, recklessly

made, pursued for some improper motive, or made out of malice. It says none of these factors are present here. Additionally, it says the negative credibility findings involving its witnesses do not give rise to an award of special costs without more.

Legal Principles

[14] Rule 14-1(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, provides:

If costs are payable to a party under the *Supreme Court Civil Rules* or by order, those costs must be assessed at party and party costs in accordance with appendix B unless any of the following circumstances exist:

...

(b) the court orders that the costs of the proceeding be assessed as special costs.

...

[15] The leading case on special costs is *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (BC CA), where Justice Lambert wrote, at para. 17, that the single standard supporting an award of special costs is that the conduct in question properly be characterized as reprehensible, a word of wide meaning encompassing scandalous or outrageous conduct or milder forms of misconduct deserving of reproof or rebuke.

17 Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[16] More recently in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, at paras. 56 to 57 [*Smithies*], Justice Goepel observed that *Garcia* remains the leading case. He also noted that special costs are punitive and are awarded where the court seeks to dissociate itself from the impugned conduct.

[56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young* 1993 CanLII 34 (SCC), [1993] 4 SCR 3 at 134–138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.

[57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special cost awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":

[17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leungin* awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[17] At paras. 128-134 of *Smithies*, Goepel J. also held that special costs should only be awarded to punish reprehensible conduct during the course of the litigation and that pre-litigation conduct should not be considered.

[18] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, at para. 73 [*Westsea*], Justice Gropper summarized the principles applicable to an award of special costs as follows:

[73] I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

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

[Emphasis added.]

[19] Justice Gropper further noted in *Westsea* that although meritless claims alone will not attract special costs, meritless claims pursued for an improper motive will.

[42] Meritless claims alone will not attract special costs. This proposition was affirmed in the Supreme Court of Canada decision *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9. Madam Justice Arbour, writing for the Court, held that an unsuccessful attempt to prove fraud or dishonesty does not inexorably lead to the conclusion that the unsuccessful party should be held liable for solicitor-client costs (para. 26).

[43] However, meritless claims that are pursued for some improper motive have generally attracted special costs.

(See also: *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181 at para. 53; *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2003 BCCA 268 at paras. 3-5)

[20] Likewise, in *FFS HK Ltd. v. P.T. 25 (Ship)*, 2011 BCSC 1418, at paras. 10-11, Justice Wedge addressed meritless claims and special costs noting particularly that a failure to reassess and to recognize deficiencies in one's case can attract special costs.

[10] Most decisions involving special costs awards are not particularly helpful because they are fact driven. However, *Concord Industrial Services Ltd. v. 371773 B.C. Ltd.*, 2002 BCSC 900, is instructive. Special costs were ordered where a party displayed “reckless indifference” by failing to acknowledge early on that its claim was manifestly deficient. The Court held at para. 27 that the plaintiff’s failure to come to terms with that manifest deficiency at an early stage of the proceedings constituted “the sort of reckless indifference to the legitimate interests of the defendant as is envisioned by the authorities which cite reprehensible conduct as a basis for awarding special costs”.

[11] I also find instructive the comment of Hall J.A. in *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 16 concerning the function of costs in the litigation process:

[16] It seems to me that the trend of recent authorities is to the effect that the costs rules should be utilized to have a winnowing function in the litigation process. The costs rules require litigants to make careful assessments of the strength or lack thereof of their cases at commencement and throughout the course of litigation. The rules should discourage the continuance of doubtful cases or defences. This of course imposes burdens on counsel to carefully consider the strengths and weaknesses of particular fact situations. Such considerations should, among other things, encourage reasonable settlements.

[21] Additionally, in *Solex Developments Co. Inc. v. Taylor (District of)*, 1998 CanLII 5104 (BC CA); and *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 [*McLean*], it was held that special costs may also be awarded where the plaintiff’s case is so weak it amounts to misconduct. At para. 26 of *McLean*, Justice MacKenzie wrote:

[26] An additional basis for an award of special costs arises because the plaintiff’s case was so weak it was bound to fail. In *Solex Developments Co. v. Taylor (District)* (1998), 1998 CanLII 5104 (BC CA), 60 B.C.L.R. (3d) 53

(C.A.), an award of special costs was upheld on this ground. Madam Justice Southin said at paras. 26 and 27:

I consider this was a proper case for special costs, but not for the reasons of the learned judge which are founded on what the appellant did to collect evidence before bringing the proceedings and of what she considered its improper purpose or motive in seeking to set aside the approval.

It can, in my opinion, be misconduct in litigation, as that phrase is used in the authorities, to persist with a claim under the *Judicial Review Procedure Act*, a claim which in this case affects someone else's private right, when it is plain that, in the circumstances, the claim is bound to fail. Once the appellant knew from the affidavit of Mr. Scriba that, in fact, the spirit of the *Waste Management Act* was being observed by the respondent, it ought to have accepted that it could not succeed.

[22] Unproven allegations of fraud often attract special costs, but the result is not automatic. In *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 SCR 303, at para. 26, Justice Arbour wrote that unsuccessful allegations of fraud will only attract special costs when the party making the allegations had access to information that established mere negligence as opposed to dishonesty or fraud.

26 In *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs “are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties”. An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to “reprehensible, scandalous or outrageous conduct”. However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: See, generally, M. M. Orkin, *The Law of Costs* (2nd ed. (Loose-leaf)), at para. 219.

[23] In *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 [*FANUC*], at para. 7, Justice S.K. Ballance observed that unsuccessful allegations of fraud made frivolously or without foundation will also attract special costs.

- [7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271); *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (CanLII), [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.
- [24] Other cases have held that the factors to consider are whether the allegations of fraud were recklessly made, pursued for an improper motive, made out of malice, or were otherwise an abuse of the court's process: *Westsea* at para. 42; *Lim v. Zhu*, 2019 BCSC 88, at para. 114; *Huang v. Li*, 2021 BCSC 280, at para. 32 [*Huang*].
- [25] Special costs can also be awarded against a corporation for the acts of its officers. In *FANUC*, at para. 22, Ballance J. rejected any argument that a corporation was shielded when one of its officers fabricated evidence.
- [22] One of IHI's arguments is that it was entitled to pursue its claim for fraudulent misrepresentation based on the evidence of Abi-Rached, its chief operating officer, which it says was not inconsistent with certain relevant documents. What IHI appears to be arguing is that the willingness of its high ranking officer to fabricate self-serving testimony to support its bogus claims should somehow shield the company from liability for special costs. That is an untenable proposition.
- [26] More recently, in *Concord Pacific Acquisitions Inc. v. Oei*, 2021 BCSC 129, at paras. 86-87 [*Concord Pacific*], Justice Voith, as he then was, noted that special costs are often awarded against corporate entities, and he adopted and approved the quotation from para. 22 of *FANUC*.

[86] First, special costs are awarded against corporate entities, often with little or no discussion of whether the dishonest or reprehensible behaviour of its witnesses can be attributed to the entity itself. See e.g. *Equus v. Sage*, 2003 BCSC 1783; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29; *XY, Inc. v. International Newtech Development Incorporated*, 2012 BCSC 319, aff'd 2013 BCCA 352; *Binary Environments Ltd. v. Batyka*, 2014 BCSC 919; *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2014 BCSC 2214, aff'd 2015 BCCA 170; *Imbamar S.A. v. Coutinho & Ferrostaal GmbH*, 2015 BCSC 2218; *Otal v. Azure Foods Inc.*, 2019 BCSC 1510.

[87] The issue that Concord seeks to raise was, however, squarely addressed in *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724. In that case, Justice Ballance awarded special costs against both the corporate plaintiff (“IHI”) as well as personally against its chief operating officer, Dr. Abi-Rached, who was not a named party. In awarding special costs against IHI for Dr. Abi-Rached’s misconduct, Ballance J. said: ...

Analysis

[27] Start Up submits that it had good reason to plead and pursue the allegations of fraudulent misrepresentations and that the allegations were not obviously unfounded, recklessly made, pursued for some improper motive, or made out of malice. It says there was some evidence of suspicious circumstances supporting the allegations and that there were reasonably advanced. Start Up relies in particular of on the following as justification for the allegations, which are derived from para. 7 of Part 5 of its application responses:

- a) On October 6, 2015, tax auditors appeared at the offices of Hero India, and the audit resulted in a reassessment requiring Hero India to pay INR 46 million;
- b) On October 5, 2015, Mr. Oswald resigned from his position, and there were legitimate reasons to believe his recognition had been backdated. His resignation was followed shortly thereafter by the resignation of Mr. Mhamunkar on October 27, 2015;
- c) Mr. Mhamunkar had confessed to paying bribes and falsifying accounting records. (An allegation which I note is not accurate as I found that Mr. Mhamunkar made no such confession.);
- d) Start Up commenced its intensive investigation into the fraud allegations on July 1, 2016, before a demand for payment under the MOU had been made. (I note that I found the investigation was conducted in the fall of 2015 and into 2016, not July 1, 2016. In any event, it was before formal demand was made under the MOU, which I found occurred on April 23, 2016.); and

- e) Start Up initiated its criminal complaint before the commencement of the action in this matter on July 29, 2016.

[28] Although I accept that some of these circumstances may have been suspicious to Start Up, I do not agree that the circumstances justified the allegations made or justified the maintaining of the allegations right up to the conclusion of the trial.

[29] The allegations advanced by Start Up against the applicants were, as the applicants submit, wide ranging and very serious. The allegations were of misrepresentations contained in the financial statements of Hero India and involved alleged conduct that was criminal, namely defrauding Hero India, engaging in a multiyear tax fraud; and the paying of bribes to Indian authorities.

[30] The central piece of evidence proffered in support of the allegations was the testimony of Mr. Rinero that Mr. Mhamunkar admitted to paying bribes, to falsifying accounting records, and to the existence of a sham factory. In my reasons at paras. 208, 209, and 250-260, I rejected Mr. Rinero's evidence of this confession on various grounds, including that it was uncorroborated by any contemporaneous written records, that his evidence was inconsistent with an email he wrote to Mr. Mhamunkar immediately following the alleged confession; and that his evidence at trial differed in important respects from his evidence at examination for discovery.

[31] Start Up submits that I merely preferred the evidence of the applicants over that of Mr. Rinero and Mr. Sacchet and that this does not equate to a meritless claim. I accept this as a general proposition, however, where evidence is rejected because it is intended or designed to mislead the court or is tendered for an improper motive, special costs are available. In *Concord Pacific*, at paras. 46-47, Voith J. wrote:

[46] There is a significant distinction between, on the one hand, evidence that is given by a witness and is merely rejected by the court and, on the other hand, evidence that is intended or designed to mislead or is otherwise put forth for an improper purpose. Only the latter form of conduct warrants the court's rebuke: *Westsea* at paras. 70-72; *Mayer* at paras. 12-15; *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at para. 73.

[47] In *Brown v. Lowe*, 2002 BCCA 7 at para. 149, Justice Southin said: “To give false evidence relating to the matters in question at any stage of the proceedings is a grave matter. By ‘false’, I do not mean ‘erroneous’; I mean knowingly untrue.”

[32] In my reasons I found that Mr. Rinero’s evidence was “wholly unreliable and not credible”, that he “clearly considered that it was his job to do what was necessary to achieve a favourable result for Start Up”, and that he gave “untruthful” evidence about the confession. In other words, I found that he intentionally gave evidence that was designed to mislead the court for the improper purpose of doing whatever was necessary to achieve a favourable result for Start Up. This is not merely preferring the evidence of one witness over another. Rather, this is exactly the type of conduct that attracts special costs.

[33] Similarly, I also found that Mr. Sacchet attempted to colour or manipulate his evidence and that at times he gave clearly false testimony: paras. 15-16.

[34] In my view, it was reckless of Start Up to make the allegations of fraud at the outset. Other than the alleged confession, there was no evidence proffered in support of the particulars of the fraud. In my reasons, I repeatedly commented on the lack of any evidence from persons in India with knowledge of the alleged particulars. At para. 189, I made the overriding comment that the evidence was far from complete, that no one from India with first-hand knowledge of the events was called to testify at the trial, and that the reporting from India was not fulsome. Given the lack of evidence, it was reckless for Start Up to make such serious allegations.

[35] More significantly, it was reckless for Start Up to continue with the allegations right up to the end of the trial. In January of 2019, Start Up became aware that the criminal complaint in India had been withdrawn two years earlier and that a report had been prepared dismissing the complaint 18 months earlier. This should have put it on notice that there was something fundamentally flawed with the information it was receiving from India. However, despite amending its pleadings in mid-April, Start Up did not withdraw the allegations of fraud. It continued to maintain the

allegations and offered the flimsiest of evidence in support of them. This is conduct deserving of rebuke.

[36] Start Up submits that special costs should not be awarded because the applicants are not professionals, and the reputational consequences of the failed allegations are less severe. This submission is based on *Huang*, at para. 32, where Justice Adair said:

[32] I have not been persuaded that Dr. Huang's conduct in relation to Daqi Li qualifies as "reprehensible" so as to justify rebuke by the court through an award of special costs. While the allegations of fraud against Mr. Li lacked a reasonable foundation, this, in my opinion, is not enough to justify an award of special costs here. Without meaning any disrespect to Mr. Li, he is not in the position of a professional person (such as a lawyer, for example) for whom the reputational consequences of an unfounded or reckless allegation of fraud can be very serious. I am also not persuaded that, as between Dr. Huang and Daqi Li, there is evidence of improper motive or abuse of the court's process.

[37] I do not accept that Adair J. intended to restrict special costs awards to professional persons. There are many cases where non-professional persons are awarded special costs. In the circumstances of her case, special costs may not have been warranted. That is the most I can take from para. 32 of *Huang*.

[38] In any event, although it is of course true that Mr. Oswald and Mr. Mhamunkar are not professionals, I do not accept that there is an absence of reputational consequences here. The misrepresentation allegations are very serious, as they involve, among other things, a multiyear tax fraud and payment of bribes. Mr. Oswald and Mr. Mhamunkar are businessmen. I have no doubt but that these allegations have caused them reputational damage.

[39] Start Up also submits that if special costs are awarded, they should be awarded for only part of the action. It argues that the action involved two separate issues; the validity and enforceability of the MOU and the claim of misrepresentation. It says it would be disproportionate to award special costs for the entirety of the action. I do not agree. The issue of the validity and enforceability of the MOU was relatively uncomplicated and did not involve a significant amount of evidence. In

contrast, the allegations of misrepresentation took up the vast majority of the trial time and should never have been advanced or should have been abandoned well before trial.

[40] In conclusion, it is my view that the allegations of fraudulent misrepresentation made by Start Up were unfounded and recklessly made and maintained. Further, Mr. Rinero intentionally gave false evidence to mislead the court. Collectively, this is conduct deserving of rebuke, and the applicants are entitled to special costs for the entirety of the action.

[41] I add that in reaching this result, I do not take into account Start Up's conduct in initiating the filing of the criminal complaint or in the sending of the letter to customers of Hero India. These events predated the litigation and are not relevant considerations on this application for special costs. What is relevant, however, is that Start Up made the same or similar allegations right up to the end of the trial.

[42] In view of my decision on special costs, I do not need to address the alternative relief raised in the applications.

[43] Accordingly, the applicants are entitled to special costs of this proceeding to be assessed by the registrar, if the parties cannot otherwise agree.

[44] ...

[45] The special costs award will include the costs before the registrar, if any.

“Giaschi J.”