# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Chura v. Batten Industries Inc.,
2023 BCSC 1708

Date: 20230929
Docket: S174224
Registry: Vancouver

Between:

**Jackie Chura**

Plaintiff

And

**Batten Industries Inc.**

Defendant

Before: The Honourable Madam Justice Lyster

## Reasons for Judgment on Costs

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| Counsel for Plaintiff: | D. Mare |
| Counsel for Defendant: | P. Pulver |
| Further Submissions Received on Costs: | July 20, August 4 and August 11, 2023 |
| Place and Date of Judgment: | Vancouver, B.C. September 29, 2023 |

## Introduction

[1] In reasons for judgment indexed at *Chura v. Batten Industries Inc.*, 2023 BCSC 1040 (“Trial Reasons”), I dismissed the action of the plaintiff, Jackie Chura, for wrongful dismissal against her former employer, the defendant, Batten Industries Inc. (“Batten”). This decision should be read in conjunction with the Trial Reasons.

[2] At para. 324 of the Trial Reasons, I gave Batten leave to pursue its application for special costs by filing a written submission. Batten did so, and Ms. Chura responded.

[3] Batten seeks special costs of the proceeding, or in the alternative, uplift costs at Scale C, or in the further alternative, uplift costs at Scale B. Ms. Chura submits that Batten is entitled to only ordinary costs at Scale B.

[4] For the reasons that follow, I have concluded that Batten is entitled to 80% of its special costs of this proceeding.

## Background and Positions of the Parties

[5] In brief, this action arose of the termination of Ms. Chura’s employment on January 11, 2017. She filed her notice of civil claim on May 5, 2017, in which she claimed she was wrongfully dismissed. She claimed general, aggravated, special and punitive damages, claiming, among other things, that Batten breached its

obligation of good faith and fair dealing in its dealings with her, and was malicious, high-handed and unfair.

[6] Batten filed its response to civil claim on June 13, 2017. It pleaded that it had just cause to dismiss Ms. Chura due to her alleged misconduct, breach of trust, breach of fiduciary duty and breach of the duty of good faith. Batten also filed a counterclaim, seeking damages for breach of contract.

[7] The trial of this action was initially scheduled for five days. The trial began on May 17, 2021, and ballooned to 23 days in total, ending nearly a year and a half later on September 29, 2022.

[8] In my Trial Reasons, I held that Ms. Chura had engaged in workplace misconduct constituting just cause for termination. I found that she had breached her fiduciary duties, her duty of good faith and honesty, and had engaged in a "long-standing pattern of dishonesty and deceptive behaviour". I found in favour of Batten on its counterclaim, awarding damages totalling $16,262.78. I declined to order punitive damages against Ms. Chura.

[9] Batten now seeks special costs on the basis that Ms. Chura's conduct throughout the litigation is deserving of rebuke. It submits that she pursued a meritless claim and showed reckless disregard for the truth. Batten also submits that Ms. Chura made the resolution of the issues more complex by wiping clean the Surface Pro Batten had provided to her during employment, despite specific instructions by counsel for Batten not to do so, thereby preventing Batten from accessing business-related information stored on the Surface Pro. It also submits that Ms. Chura failed to disclose 600 pages of documents that a witness, Steven Arsenault, had provided to her husband, and which she was aware of, a failure which I held at para. 296 of the Trial Reasons had a "profound effect on the manner in which this trial unfolded". Batten also submits that Ms. Chura maintained unfounded allegations against Batten, and its principal, James Roberts.

[10] Ms. Chura submits in response that her conduct during the litigation did not rise to the level of being reprehensible and thus deserving of special costs. She submits that she was not primarily responsible for making the resolution of issues more complex, pointing to the fact that the majority of Batten's allegations against her were dismissed, and that she was successful in a mid-trial application to re-open her case: *Chura v. Batten Industries Inc.*, 2021 BCSC 2737 ("Mid-Trial Decision"). Ms. Chura submits that the trial was made longer and more complex than necessary by problems in Batten's evidence, relying to my conclusions with respect to the credibility and reliability of the evidence of Mr. Roberts and other Batten witnesses. Ms. Chura denies destructing or failing to disclose any evidence, submitting that there is no basis for imputing knowledge or control of Mr. Arsenault's document disclosure to her, and that Batten has not demonstrated that there was any business-related information on the Surface Pro. While Ms. Chura recognizes that I made adverse credibility-related findings against her, she submits that they were "the outcome of a series of findings that tipped the scales of credibility" in Batten's favour, and fall short of showing she had an improper motive. She submits that the dishonesty she was found to have engaged in was more akin to negligence or mistake and, therefore, not deserving of special costs being awarded against her.

## Analysis

### Law relating to Special Costs

[11] Rule 14-1(1)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 permits the Court to award special costs in certain circumstances. In *Garcia v. Crestbrook Forest Industries Ltd*. (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, Justice Lambert found that "reprehensible" conduct was the single over-arching standard for deciding whether special costs should be awarded. "Reprehensible" is a word of wide meaning, that encompasses scandalous or outrageous conduct, but also includes milder forms of misconduct deserving of rebuke.

[12] In *Westsea Construction Ltd. v. 0759553 B.C. Ltd.,* 2013 BCSC 1352, Justice Gropper conducted an extensive review of the authorities on special costs and set out the following key principles at para. 73:

> a) the court must exercise restraint in awarding specials 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.

[13] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Justice Walker provided the following non-exhaustive list of circumstances that may warrant a special costs order:

> (a) where a party pursues a meritless claim and is reckless with regard to the truth;
>
> (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
>
> (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
>
> (d) where a party made the resolution of an issue far more difficult than it should have been;
>
> (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
>
> (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
>
> (g) where a party brings a proceeding for an improper motive;

(h) where a party maintains unfounded allegations of fraud or dishonesty; and

(i) where a party pursues claims frivolously or without foundation.

[14] I have reviewed and considered all of the parties' submissions, but in my view, there are three aspects of Ms. Chura's litigation conduct that must be focussed on in assessing whether an award of special costs is appropriate: whether she was reckless with regard to the truth; whether she made the resolution of issues at trial far more difficult than it should have been; and whether she suppressed evidence or failed to disclose evidence. On the facts of this case, there is a significant degree of overlap between the latter two aspects, and I will deal with them together.



**Recklessness with regard to the truth**

[15] I turn first to a consideration of whether Ms. Chura was reckless with regard to the truth. In this regard it must be remembered, as stated by the Court of Appeal in *Grewal v. Sandhu*, 2012 BCCA 26, at para. 107, that "special costs are not awarded based on the acceptance or rejection of testimony. If it were otherwise, instead of being an extraordinary measure, special costs could be imposed whenever credibility was in issue". In *Behan v. Park*, 2014 BCSC 1982, at para. 49,Voith J. provided the following summary of when special costs may be warranted for false testimony:

i. false evidence that has been contrived, concocted or fabricated;

ii. with an intention to mislead;

iii. on an issue that is central to the matter before the court: and, which if accepted, would "drive [the opposing party] from the judgment seat.

[citations omitted]

[16] This was certainly a case where credibility was in issue, and there were problems with the credibility and reliability of almost all of the witnesses, in particular Ms. Chura and Mr. Roberts. At para. 12 of the Trial Reasons I averted to this issue, where I stated:

> I am entitled to accept some, none, or all of any individual witness' testimony. Given the problems with both Ms. Chura's and Mr. Robert's evidence, this is an important principle in this case.

[17] At para. 14, I summarized my view of Ms. Chura's evidence:

> [14] I have significant doubts about the credibility of much but not all of Ms. Chura's evidence. Her evidence about a number of matters, including the WebStager allegations, whether she traded products, and some expense issues, was not believable. I have been very cautious about relying on Ms. Chura's evidence, and have looked for corroboration where it can be found.

[18] In the course of the Trial Reasons I made a number of specific findings about Ms. Chura's evidence. For example, at paras. 97–98, I found her evidence about submitting a restaurant receipt to Batten for reimbursement for an expense she did not incur "inconsistent and lacked credibility". At paras. 99–104, I found her evidence about a custom fee expense in Mexico "inconsistent, confusing and ultimately unbelievable". At para. 249, I found her denial of the fact she traded Batten products for her own benefit "entirely unconvincing" and "damaging to her credibility generally". This is by no means an exhaustive list of the specific factual issues on which I found Ms. Chura's evidence to lack credibility.

[19] The most serious findings against Ms. Chura were with respect to her knowledge of the fact her husband would and did receive fees for the contract she induced Batten to enter into with WebStager. I did not believe her denial that she knew her husband would receive a finder's fee prior to WebStager being retained, nor her evidence that she did not know when she deposited two WebStager cheques that her husband was being paid for his services in relation to that contract. At para. 298 I found "Ms. Chura's attempts to obfuscate these facts deeply damaging to her credibility".

[20] Ms. Chura submitted that "the dishonesty found in the Decision is akin to negligence or mistake", and did not amount to the "intention to mislead" required for special costs. I accept that on some issues Ms. Chura may have simply been mistaken or confused. With respect to the crucial issues relating to her knowledge of her husband receiving fees for services rendered in relation to the WebStager

contract, however, I find that she intended to deceive the court. She intentionally obfuscated the facts in an attempt to avoid a finding that she was in a conflict of interest in failing to advise Batten that her husband would be paid.

[21] Ms. Chura's role in inducing Batten to enter into the WebStager contract was central to my conclusion that Batten had just cause to terminate her employment. At para. 317, I held:

> [317] In my view, Ms. Chura's misconduct in relation to WebStager, standing alone, would be sufficient to constitute just cause for the termination of her employment. Her dishonesty and self-dealing went to the heart of the employment relationship, and was fundamentally and directly inconsistent with her obligations to her employer.

[22] While I found Ms. Chura to have engaged in other forms of workplace misconduct, it is possible that, had I accepted her evidence with respect to the WebStager contract, the result in this action might have been different. For example, it might well have changed my assessment of her credibility on other issues. Ms. Chura gave false evidence with respect to an issue that was central to the matter before the court, which, if accepted, might well have driven Batten from the judgment seat.

**Making the resolution of issues far more difficult**

[23] I turn to the question of whether Ms. Chura made the resolution of the issues in this case far more difficult than they ought to have been, including by suppressing evidence or failing to disclose evidence.

[24] As mentioned, this trial was scheduled for five days but ended up taking 23 days. There were a number of reasons for this, not all of which can be laid at Ms. Chura's feet. Batten chose to pursue 28 different allegations of wrongdoing, some of which had little or no evidentiary foundation. For example, at para. 122 I found that Batten had not established any impropriety with respect to Ms. Chura seeking reimbursement for a pair of pants she tore at work. At para. 196, I found that the Capilano Suspension Bridge expenses were all properly incurred. At para. 253, I found no misconduct in respect of Starbucks reloads. With respect, Batten took a

scattergun approach to its allegations of misconduct by Ms. Chura which led to large amounts of court time having to be spent on allegations which I held to be unfounded.

[25] The circumstances surrounding Ms. Chura being permitted to reopen her case to call Mr. Arsenault as her witness certainly led to increased court time and delay. As I stated in the Mid-Trial Ruling at para. 34, both parties bore some responsibility for that situation arising, and it could have been avoided had they made different litigation choices. As stated at para. 41, it was open to either party to call Mr. Arsenault as their witness, and had either of them done so, the trial would have proceeded in a more orderly fashion.

[26] As discussed in both the Trial Reasons and the Mid-Trial Ruling, the way in which Mr. Arsenault chose to disclose documents related to WebStager caused significant problems in the orderly and efficient resolution of that significant issue. At para. 7 of the Mid-Trial Ruling I wrote:

> [7] There were ongoing issues with respect to documents the defendant had requested from Mr. Arsenault. Mr. Arsenault provided some documents to Mr. Chura during the trial which were ultimately entered into evidence. He then produced through his counsel some documents to counsel for the plaintiff which were also introduced into evidence. He then produced, I believe, two tranches of documents to both parties through their counsel. All of this occurred in the course of the May and June dates of this trial.

[27] At para. 23 of the Mid-Trial Ruling I commented on the consequences of Mr. Arsenault's conduct on the trial:

> [23] This trial was scheduled for five days. We are now on day 15 and we will not conclude today. While there are a number of reasons this trial has been so extended, one of them is certainly the ongoing issues related to Mr. Arsenault being called as a witness and Mr. Arsenault's curious choices with respect to the production of documents. Mr. Arsenault's decisions to disclose documents in dribs and drabs, the ways in which he has chosen to disclose those documents, and the timing of those disclosures have required Ms. Chura to be recalled to the stand twice for further cross-examination and have certainly interfered with the orderly and expeditious conduct of this trial.

***Failure to disclose documents***

[28] Mr. Arsenault was not a party to this action, and Ms. Chura has not been held responsible for all of his actions. Batten submits, however, that Ms. Chura is responsible for failing to disclose the documents Mr. Arsenault provided to Mr. Chura prior to and during the trial. It submits that she was undoubtedly aware of and had access to those documents, and was under a legal obligation to disclose them. Batten submits that had the WebStager documents been disclosed promptly, rather than at strategic moments during the trial, the course of this litigation would have been very different, avoiding multiple mid-trial applications, Ms. Chura being recalled to the stand twice, and additional days of trial.

[29] Ms. Chura submits in response that it is unclear on what basis she can be imputed with knowledge and control of Mr. Arsenault's document disclosure. She submits that the vast majority of the documents, which ended up being unfavourable to her case, could and should have been located by Batten had it made better efforts to search its own computer systems and records. She submits there is simply no evidence she was in control of or in possession of the documents disclosed by Mr. Arsenault during the course of the trial.

[30] A party that fails to disclose critical documents may have special costs awarded against them. In *Laface v. McWilliams*, 2005 BCSC 1766, at para. 39, Justice Kirkpatrick held that such conduct, standing alone, was deserving of an award of special costs. At para. 40, she held that, had the evidence been disclosed early in the litigation, the course of the litigation would have been very different, and awarded special costs against the non-disclosing party for the entire proceedings.

[31] In the Trial Reasons, I addressed Ms. Chura's knowledge of the documents Mr. Arsenault sent to her husband at para. 294:

> [294] The documents disclosed included emails Mr. Arsenault had sent to Mr. Chura on several different days prior to and during the trial; however, Ms. Chura claimed not to have received them and that she had "no idea" they were sent. I do not believe this evidence. In fact, Mr. Arsenault sent 600 pages of emails to Mr. Chura before and during the trial, despite refusing to provide them when asked by counsel for Batten**.** Mr. Arsenault admitted that

> he could have provided the documents as requested back in 2018. Mr. Arsenault was trying to assist Ms. Chura by providing these documents to her husband, and not to Batten.
>
> [emphasis added]

[32] This is a finding that Ms. Chura did know that Mr. Arsenault had sent Mr. Chura documents before and during the trial. I agree with Batten that Ms. Chura had access to the documents in question, and was legally obliged to disclose them promptly. She failed to do so, leaving it open for Mr. Arsenault to disclose them in dribs and drabs at strategic moments in the trial.

[33] While it is possible that some of the WebStager documents might have been found by Batten within its own files with greater diligence, some of these documents were solely within the possession and control of the Churas and/or Mr. Arsenault. In particular, Mr. Arsenault disclosed the cancelled cheques from WebStager to Mr. Chura, some of them bearing Ms. Chura's endorsement signature. These were crucial documents which Batten had no access to other than by Mr. Arsenault or the Churas disclosing them. As discussed at paras. 297–98 of the Trial Reasons, their disclosure, and its timing, had a very significant effect on the course of this litigation, as they proved both that WebStager did pay Mr. Chura for services rendered, and that Ms. Chura knew that fact. They could have and should have been disclosed by Ms. Chura and she failed to do so.

***Destruction of evidence***

[34] Batten submits that Ms. Chura's conduct in deliberately wiping the Surface Pro clean before she returned it to counsel for Batten amounted to the deliberate destruction of evidence, and made the resolution of this action more difficult than it otherwise should have been. Ms. Chura submits in response that it has not been shown that there was any potential business-related information on the Surface Pro, that her admitted conduct in wiping it clean was not a breach of any professional obligation or Rule, and that the miscommunications and confusion surrounding the Surface Pro are far from reprehensible.

[35] I dealt with the Surface Pro at paras. 255–264 of the Trial Reasons. At para. 262 I held that I did not believe Ms. Chura's evidence with respect to the Surface Pro. At para. 264, I concluded:

> [264] I find that Ms. Chura did not return the Surface Pro, not because it was a gift, but because she had both personal and business-related information on it. In direct contravention of Batten's demand in the June 13, 2017 letter, she wiped the Surface Pro clean, meaning that Batten did not have access to whatever business-related information had been stored on it. This is important, both with respect to Ms. Chura's credibility generally and specifically with respect to the WebStager allegations which I will be addressing shortly.



[36] I found that there was at least some business-related information on the Surface Pro. To the extent it is unknown what precisely was saved on the Surface Pro, that is solely due to Ms. Chura wiping it clean, thereby making it impossible for Batten to determine what relevant information might have been deleted by her.

[37] Ms. Chura's conduct amounted to spoliation. In *Holland v. Marshall*, 2008 BCCA 468, at para. 59, Justice Rowles described spoliation, and the available remedies for it, as follows:

> [59] In a legal context, the term spoliation refers to the destruction, mutilation, alteration or concealment of evidence. The harm to the trial process that spoliation can cause is well-recognized. The more difficult problem is finding an appropriate remedy for spoliation. The sanctions or remedies available to litigants who suffer due to spoliation include procedural remedies, evidentiary presumptions, contempt proceedings and costs orders. Preventive measures may also be taken through preservation orders.

[38] The submission that because Ms. Chura's conduct did not breach a particular Rule or professional obligation that it was not reprehensible has no merit. The deliberate destruction of evidence cuts to the core of the court's ability to resolve disputes fairly. In my view, the deliberate destruction of potentially relevant evidence is reprehensible conduct which merits an award of special costs.

[39] I have found that Ms. Chura has engaged in a variety of reprehensible conduct that merits an award of special costs. In particular, I have found that she gave false evidence on a matter that was central to this action, namely her

knowledge of the fact her husband would be and was paid for the WebStager contract. I have also found that she knew about and had access to the critical documents Mr. Arsenault gave to Mr. Chura prior to and during the trial, and failed to disclose them, promptly or at all. I have also found that she deliberately destroyed potentially relevant evidence by wiping the Surface Pro clean prior to returning it to Batten via its counsel.

[40] Ms. Chura submits, relying on my decision denying Batten's application for punitive damages, that she has "suffered enough", and that the court should therefore exercise restraint and refrain from ordering special costs. For its part, Batten submits that I was incorrect in declining to order punitive damages, and failed to give sufficient weight to the harm it suffered due to Ms. Chura's conduct.

[41] With respect, both parties appear to misunderstand the relationship of my decision not to award punitive damages to Batten to the present application for special costs. At para. 323 of the Trial Reasons, I declined to order punitive damages. In so holding, I stated that "In my view, Ms. Chura has been sufficiently punished for her misconduct by the termination of her employment and the damages I have ordered on the counterclaim". That was a conclusion that punitive damages were not warranted because her workplace misconduct had been sufficiently punished by losing her employment and being ordered to pay damages to Batten.

[42] The purposes of punitive damages are distinct from the purposes of special costs. Both are alike in that they are punitive and not compensatory in nature. But they are entirely different in what conduct they are intended to punish. Punitive damages are awarded for conduct related to the cause of action, while special costs are awarded for litigation conduct. This bright line distinction was drawn by the Court of Appeal in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, where Groberman J.A. concluded at para. 134:

> Special costs should be reserved to punish and deter reprehensible conduct in the course of litigation. Pre-litigation conduct should not be considered in determining whether such an award is appropriate. There are other suitable mechanisms to censure pre-litigation conduct.

[43] In *Chhina v. Rebecca L. Darnell Law Corporation*, 2021 BCCA 430, at para. 55, the Court of Appeal emphasized the distinction between the two, stating:

> [55] In my opinion, highly reprehensible conduct that relates to or arises from the cause of action, rather than the manner in which the litigation is conducted, is the kind of conduct that may ground an award of punitive damages. Given the bright line established by this court in *Smithies* for special costs, it is important for trial judges to consider whether the misconduct of a party is rationally connected to the purpose of punitive damages or more properly suitable for special costs.

[44] Ms. Chura's conduct in the workplace did not warrant the exceptional remedy of an award of punitive damages. Her litigation conduct in this proceeding was sufficiently reprehensible to warrant an award of special costs.

**Whole or partial award of Special Costs?**

[45] I have concluded that Ms. Chura's litigation conduct warrants an award of special costs. It remains to be determined whether special costs should be awarded for the entirety or only part of the proceedings.

[46] As stated by the Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 [*Gichuru*], at para. 91, "While special costs are usually awarded for the whole proceeding, it is open to a judge to make a partial award if of the view that it would be disproportionate to award special costs for the entire proceeding". One of the cases referred to by the Court in *Gichuru* was *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1772, in which Justice Myers held that awarding special costs of the entire proceeding would be disproportionate, and only ordered special costs for some specific steps in the litigation. In *Concord Pacific Acquisitions Inc. v. Oei*, 2021 BCSC 129 [*Concord Pacific*], at para. 112, Justice Voith awarded the defendants 80% of their special costs of the proceeding and the trial. In arriving at this conclusion he noted at para. 109 that the court has the ability to award special costs for all or part of a proceeding, and that the latter can arise where the party being awarded special costs contributed to delay or another issue in the proceeding. He awarded 80% on the basis that it appropriately addressed both the egregious conduct of the plaintiff, and the deficiencies in the defendants' document production.

[47] Ms. Chura submits that if this court determines that special costs are warranted, they should be for only one-third of the proceeding.

[48] I have concluded that an award of 80% of Batten's special costs of the proceeding and trial is appropriate. Batten's scattergun approach to its allegations of misconduct against Ms. Chura needlessly lengthened this proceeding, as did its failure to advise that there was any uncertainty that it would call Mr. Arsenault as a witness, when it knew that Ms. Chura was relying on them doing so. An award of 80% of its special costs sufficiently rebukes Ms. Chura for the reprehensible conduct she engaged in, while recognizing that Batten contributed to the needless length of this trial. As in *Concord Pacific*, I consider that Batten should receive the costs of this application on the usual basis, as there is nothing that would warrant an award of special costs against Ms. Chura in relation to this application.

"L.M. Lyster J."

LYSTER J.