

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wilson v. Koch*,
2025 BCSC 782

Date: 20250428
Docket: S212996
Registry: Vancouver

Between:

Matthew Timothy Wilson

Plaintiff

And

**Dorren Koch, Colin Jenkins (Deceased) aka Collin Jenkins,
Woody Kuraoka, and Century 21 Executives Realty Ltd.**

Defendants

And:

**Colin Jenkins (Deceased) aka Collin Jenkins
Woody Kuraoka, Steven Tate, and Century 21 Executives Realty Ltd.**

Third Parties

Before: Associate Judge Robertson

Reasons for Judgment

Counsel for the plaintiff:

N. Rayan
J. Pinnock, Articled Student

Counsel for the defendant, Doreen Koch:

J.D. Keeley

No other appearances

Place and Date of Hearing:

Vancouver, B.C.
December 4, 2025

Written Submissions:

January 6, 2025 and
January 13, 2025

Place and Date of Judgment:

Vancouver, B.C.
April 28, 2025

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Introduction

[1] The defendant, Doreen Koch, now deceased and represented by her estate (“Ms. Koch” or the “Estate”, as appropriate), brings this application to determine the scale of costs to which she is automatically entitled following a discontinuance of the plaintiff’s claims against her, pursuant to R. 9-8(4), which provides as follows:

(2) After a notice of trial is filed in an action, a plaintiff may discontinue the action in whole or in part against a defendant with the consent of all parties of record or by leave of the court.

...

(4) Subject to subrule (2), a person wholly discontinuing an action against a party or wholly withdrawing the person’s response to civil claim filed in response to a notice of civil claim of a party must pay the costs of that party to the date of service of the notice of discontinuance or the notice of withdrawal, as the case may be, and if a plaintiff who is liable for costs under this subrule subsequently brings a proceeding for the same or substantially the same claim before paying those costs, the court may order the proceeding to be stayed until the costs are paid.

[2] As a notice of trial had been filed, the discontinuance was obtained by court order pronounced April 24, 2024. At that time, the issue as to scale of costs was raised but not determined, such that the order included the following terms:

1. The plaintiff’s action is discontinued, with costs to the defendant Doreen Koch pursuant to Rules 9-8(4) and 14-1.
2. The parties may seek direction on the kind, scale and amount of costs payable.

[3] This application is being made under para. 2 of that order.

[4] The Koch Estate argues that the appropriate scale of costs is special costs, submitting that the conduct of the plaintiff in its prosecution of this case as against Ms. Koch rises to the level of conduct deserving of rebuke. The Koch Estate also seeks that those costs be assessed on a lump sum basis, at \$250,000.

Background

[5] In general, the claim brought by the plaintiff as against Ms. Koch was for specific performance of an alleged contract of purchase and sale whereby the

plaintiff sought to acquire the 10-acre farm owned by Ms. Koch in Lumby, B.C. (the “Property”), and alternatively, damages.

[6] At the time this litigation was commenced Ms. Koch was 90 years old with the Property having been in her family (previously owned by her parents) since the 1930’s, with Ms. Koch having lived there virtually her entire life.

[7] Ms. Koch had one son, Colin Jenkins (“Mr. Jenkins”) who predeceased her as a result of liver failure from Hepatitis C. Mr. Jenkins, and his illness and ultimate passing, figures prominently in this litigation.

[8] While acting as an attorney pursuant to either a power of attorney (the “First POA”) granted to him in 2002 or in 2018 (the “Second POA”), and as co-owner of the property by virtue of Ms. Koch having added him to title as joint tenant as part of her estate planning, Mr. Jenkins entered into the contract of purchase and sale with the plaintiff for the sale of the Property.

[9] However, his authority to do so is in issue given that:

- a) the First POA specifically provided that it would take effect only once Ms. Koch lacked capacity. There is no evidence that Ms. Koch lacked capacity in any way during any of the times material to this dispute. While she required some assistance with her personal care, she was able to fully manage her own affairs.
- b) The Second POA named Mr. Jenkins as primary attorney and her niece, Penney Treen (“Ms. Treen”) as her alternate attorney. While it had no limitation with respect to capacity, Ms. Koch’s evidence was that after the Second POA was executed she placed it into a safety deposit box at the bank and did not provide a copy to Mr. Jenkins or Ms. Treen for either of them to act upon it. At no time, it would appear, did any party to this litigation, other than Ms. Koch and, *possibly* Mr. Jenkins (there is no evidence he had it, but rather evidence that he had access to the safety deposit box), have the power of attorney in their possession. Specifically,

neither the plaintiff nor the realtors ever saw or obtained a copy of the Second POA during their dealings with each other, and only received it once it was produced in the course of this litigation, well after the events that give rise the litigation took place.

[10] Turning then to the events themselves, in March 2018, the plaintiff, a land developer of some sophistication, made an unsolicited offer to purchase the Property (the “Prior Offer”). The Prior Offer was made by the plaintiff’s realtor, who came to the property and discussed it with Mr. Jenkins and Mr. Kuraoka, a realtor who was also Mr. Jenkins’s long-time childhood friend. Ms. Koch was home at the time this meeting occurred, however it is unclear as to her involvement in the discussion about it. Ms. Koch’s evidence is that she only became aware of the Prior Offer during disclosure in this litigation. The Prior Offer never materialized into any agreement.

[11] Subsequently, Mr. Kuraoka began attending at the Property more and more frequently to visit with Mr. Jenkins, with it being unclear how many of these were social visits given their prior friendship, and how many were to discuss a sale of the Property. Ms. Koch’s evidence was that she did not interact much with them during these visits, other than on a limited social basis such as to serve refreshments, as she would generally retire to her room and allow them some privacy. She had no reason to believe that the visits were anything other than social.

[12] On July 17, 2019, Mr. Jenkins executed an exclusive listing agreement with Mr. Kuraoka as seller’s realtor, with the notation “POA” beside his signature. Other listing documents, such as a property disclosure statement, were similarly executed during this time. None of the documents contain Ms. Koch’s signature. In addition, as indicated in the listing agreement, there was a condition that there be no “for sale” sign placed on the Property or near the driveway, as such there was no other indicator to Ms. Koch that the Property was being offered for sale.

[13] In January 2020 an issue arose with respect to the septic lines on the Property which caused them to back-up, which necessitated that Ms. Koch

temporarily move out of the Property. While there were various temporary moves, she eventually moved into Silver Springs, a seniors' assisted facility in Vernon, B.C.

[14] Shortly after her move, the plaintiff's realtor made an offer to purchase the Property for \$600,000 (the "February Offer") which was conditional upon the plaintiff also acquiring another parcel owned by a third party, adjacent to the Property.

[15] On February 24, 2020, the plaintiff's realtor emailed the plaintiff to advise that Ms. Koch needed to sign the contract and that he expected that Mr. Jenkins would be dropping it off, suggesting some knowledge as to Ms. Koch's ownership, but also that Mr. Jenkins had no authority to enter into the agreement without her.

[16] On February 25, 2020, Mr. Jenkins brought the contract to Ms. Koch at Silver Springs. Ms. Koch's evidence is that during this visit, Mr. Jenkins told her that the septic issue was unrepairable, and that to address the situation they would have to connect into the Lumby sewer system at a cost of \$70,000, and that since she could not afford that, they would "have to" sell the Property. Ms. Koch's evidence was that she executed what was provided to her by Mr. Jenkins, but believed what she was signing was a listing agreement, notwithstanding that she did not want to sell the Property. She did not understand that she was signing the February Offer. Her evidence is that she was under duress in signing it, and did not do so voluntarily.

[17] Thereafter, the septic system on the Property was ultimately repaired for a relatively modest amount, without any connection to the Lumby system being needed. Upon learning of the remediation, between May and July 2020, Ms. Koch began to request that she be able to return to the Property. She deposes that Mr. Jenkins refused those requests.

[18] The February Offer never became a condition free offer. Rather, on July 10, 2020, the plaintiff issued a new offer to purchase the Property for \$450,000, which was countered by Mr. Jenkins at \$490,000, with it being concluded at a sale price of \$475,000 (the "Sale Contract").

[19] Ms. Koch's evidence is that she had no specific knowledge of the Sale Contract, did not sign it, did not consent to it, and did not authorize Mr. Jenkins to act on her behalf in that regard. The only party to sign as seller was Mr. Jenkins.

[20] On July 15, 2020, Mr. Jenkins told Ms. Koch and Ms. Treen that he had sold the Property, with Ms. Koch's and Ms. Treen's evidence being that Mr. Jenkins told them that he needed the funds from the sale to be able to afford a liver transplant, without any particulars being given. By that time, Mr. Jenkins' health was failing. He passed away approximately one month later.

[21] On July 17, 2020, Ms. Koch moved back to the Property and, until her passing, continued to live there throughout the course of this litigation.

[22] Ms. Koch's evidence is that she first learned of the actual Sale Contract itself when, on July 22, 2020, the plaintiff visited her at the Property. Ms. Treen was in attendance. Ms. Treen's evidence is that she advised the plaintiff that Ms. Koch had no knowledge of, and did not consent to the sale. Upon learning of the Sale Contract, on July 24, 2020 the plaintiff retained counsel who, on July 31, 2020 caused a caveat to be registered against title to prevent any transfer of title. The caveat indicated that the Sale Contract was obtained without her knowledge or consent and her position that it was not enforceable as a result.

[23] In the interim, on July 25, 2020, Mr. Kuraoka came to the Property and asked Ms. Koch for a copy of the Second POA, which the evidence indicates was never given to him and, as noted, appears to have never been in his possession or the possession of the plaintiff or his realtors during any of their negotiations.

[24] Notwithstanding the caveat on title, and verbal notice given when the plaintiff attended at the Property on July 22, 2020 as to Ms. Koch's lack of knowledge and consent to the Sale Contract, the plaintiff formerly removed subjects on July 31, 2020, paid the deposit on August 4, 2020, and ultimately indicated that he was ready, willing and able to complete the transaction.

[25] Mr. Jenkins passed away August 11, 2020.

[26] The closing date under the Sale Contract was August 14, 2020; however, Ms. Koch refused to complete the sale on the basis that the Sale Contract was not enforceable as against her given her lack of consent.

Litigation Chronology

[27] The plaintiff filed its notice of claim on March 26, 2021, notably some eight months after the sale failed to close, notwithstanding that the relief being sought was specific performance.

[28] Responses were filed on May 6, May 7 and May 17, 2021. On May 25, 2021 Ms. Koch filed a third-party notice as against the other named defendants, those being the realtors acting for both the plaintiff and purporting to act for the vendors, and their brokerage (the two realtors were affiliated with the same realty office), with the response to that being filed June 14, 2021.

[29] On March 21, 2022, the plaintiff obtained an order to renew the notice of civil claim for 12 months, following which he filed a notice of discontinuance against two previously named defendants (the plaintiff's realtor and the brokerage firm) and, on June 10, 2022, filed an amended notice of civil claim to reflect the removal of the claims against those parties, correct an error in the spelling of the name of Mr. Kuraoka, and further particularize Mr. Kuraoko's alleged role.

[30] A Notice of Trial was first filed June 28, 2022, scheduling the matter for five days commencing May 15, 2023. Prior to that trial date Ms. Koch brought a summary trial application under R. 9-7, which was heard for 3 days (March 7 to 9, 2023) with the court finding the matter unsuitable for summary determination. The court made the following comments which are relevant to this application:

[35] ... [Ms. Koch] is clearly desirous of resolving these proceedings. That is entirely understandable, and the last thing that this Court wants to do is have [Ms. Koch] live out what is the latter years of her life enmeshed in litigation. At the same time, [Ms. Koch's] prejudice is mitigated by the fact that [Ms. Koch] is living in the Property. [Ms. Koch] is doing exactly what she wants. There is no suggestion that she is going to be ousted from the Property, unless the specific performance claim is successful. So, this litigation hangs over her head as an unpleasant black cloud, but ultimately the only real prejudice to

[Ms. Koch] is the cost of ongoing litigation, because she currently continues to live in the home on the Property with the assistance of Ms. Treen.

[36] ... I do not consider there to be any evidence before me that one party is intentionally dragging this matter out. In particular, I do not accept that there is an attempt by [the plaintiff] to make this litigation as expensive as possible, in order to facilitate his position. His counsel cooperated with respect to having the summary trial issue hived off, and there appears to be, generally, cooperation between counsel in terms of disclosure of documents and provision of affidavits. The one challenge that arises is that counsel agreed on a five-day trial date which, it seems to be agreed by everyone and certainly found by the court, to be totally insufficient with respect to all of the issues. So, that presents a problem, but I do not think that was done intentionally. As the claims have evolved, the matter has become more complicated and counsel was perhaps overly optimistic in terms of being able to fit this matter into a five-day trial.

...

[44] As I have indicated, this is truly a most unfortunate case. I understand why counsel for [Ms. Koch] attempted to bring it forward for resolution, given the costs of litigation and her client's circumstances. I was simply unable to conclude, based on the evidentiary record before me, that I can determine it summarily under R. 9-7. In the circumstances, I am going to make an order that costs of this application shall be at the discretion of the trial judge. Those are my reasons for judgment.

[emphasis added]

[31] Ms. Koch then sought, in order to preserve the May 2023 trial date given that 10 days would be insufficient to hear all matters, to have the issue as to the remedy of specific performance bifurcated. That order was not granted, with reasons being issued indexed at 2023 BCSC 659. Costs of that application were awarded to the plaintiff in any event of the cause.

[32] The May 2023 trial did not proceed given insufficient time. A new 15-day trial date was then secured for July 8, 2024.

[33] In December 2023, the plaintiff settled with the defendant realtors, and following that settlement, sought to discontinue the action against Ms. Koch.

[34] By application filed April 10, 2024 the plaintiff sought an order of discontinuance of his claim, as was required given that the notice of trial had been filed, seeking that costs would be assessed after the trial or "after resolution of all other issues in dispute".

[35] The next day, the Estate filed its own application to amend pleadings to properly name the Estate (with Mr. Treen as representative) and to amend its third party claims as against the realtors.

[36] The discontinuance order was made, as noted, on April 24, 2024 on the terms set out above given the Estate's position that costs ought to be awarded on a special costs basis.

[37] The subject application to determine the scale of costs was filed by the Estate on July 16, 2024.

[38] The July 2024 trial date was thereafter adjourned by the Estate, by consent.

[39] This subject application was originally scheduled for July 25, 2024, but was bumped due to lack of time, with it then being refiled, and rescheduled and coming on before me on December 4, 2024.

Alleged Reprehensible Conduct

[40] The Estate argues that the plaintiff's conduct in pursuing this litigation was reprehensible for the following reasons:

- a) The plaintiff pursued this litigation despite knowing that the claim, particularly with respect to the specific performance relief being sought, had no merit. In this respect the Estate argues the plaintiff must have known there was no merit because:
 - i. Upon the Sale Contract not completing, and prior to filing this claim, the plaintiff was provided with various details of the family dynamics between Ms. Koch and Mr. Jenkins, including allegations as to elder abuse by Mr. Jenkins.
 - ii. The caveat had provided formal notice that Ms. Koch had not consented to the Sale Contract and that the principles of equitable fraud would provide a complete defence to the claim; and
 - iii. His claim for specific performance was not sustainable given that the plaintiff's stated purpose for acquiring the Property was strictly

commercial and given that there was, in the Estate's view, no element by which the Property could be said to be "unique" in character, damages were always an adequate remedy (assuming damages could be shown, which was disputed).

- b) In trying to overcome the limitations to the claim for specific performance due to the fact the Property was not unique, the Estate argues that the evidence presented by the plaintiff was mischaracterized, if not completely fabricated. Specifically:
- i. The plaintiff knew prior to filing its claim that the adjoining property, the sale of which to the plaintiff was a condition of the First Offer and a basis on which the Property was allegedly unique, had been sold to a different arm's length party;
 - ii. Upon the fact of the sale of adjoining property being revealed in the summary trial materials, the plaintiff changed its position by saying instead (although not amending pleadings) that the uniqueness was the result of the property being necessary to allow him a path to connect his own industrial property to the Lumby sewage system. However, there was no indication that the Property could be rezoned, and its approval was dubious given it is in a flood plain. Further, his claim that alternatives to that plan cost \$2M were false, as the alternative costs were closer to \$35,000 to \$300,000. Further, the plaintiff knew in May 2019 that the Village of Lumby had received grant money to service his industrial property at no cost, for sometime in the future.
- c) The plaintiff never introduced any evidence that his damages, assuming that specific performance was not available, were anything more than nominal, including in failing to serve its own expert reports. Instead, he served Ms. Koch's expert report back on her when preparing for trial. The only report provided by the plaintiff was a draft one, delivered on a without prejudice basis showing damages at \$10,000, plus \$345,000 for loss of

development although that latter “draft” opinion was suspect as, the Estate alleges, it failed to consider any costs for such development.

- d) The plaintiff knew that this litigation would cause a great deal of stress to Ms. Koch, an elderly woman, given threats that she would be ousted from her home.
- e) Examples of the plaintiff’s “reckless”, pursuit of this litigation include that the plaintiff:
 - i. refused to entertain or accept an offer made by Ms. Koch early in these proceedings;
 - ii. “vehemently” opposed the matter being determined at the summary trial application brought by Ms. Koch;
 - iii. Took the position that the court had adjourned the May 2023 trial date when the summary trial application was dismissed, which required the parties to reappear before the presider to obtain confirmation to the contrary;
 - iv. Opposed Ms. Koch’s suggestion to bifurcate the trial so that the issue as to specific performance could be determined in advance, in order to preserve the May 2023 trial date for that issue given concerns that five days was insufficient to determine all matters;
 - v. Forced the matter to go to trial (until deciding to discontinue) knowing that Ms. Koch could not afford nor “endure” litigation given her age, and emotional vulnerability after the death of Mr. Jenkins, which the plaintiff argued should be inferred because of the positions taken on, among other things, the summary trial application and bifurcation;
- f) Discontinued the claim against Ms. Koch, implicitly admitting that there as no merit to the claim against her; and
- g) Provided questionable evidence in that it lacked all credibility, including:

- i. Despite claiming to have little knowledge of the “inner workings” of Ms. Koch and her family, or her vulnerability, and claiming to have had no conversations himself with Mr. Jenkins, his realtor provided evidence that the plaintiff had made several verbal offers to Mr. Jenkins directly, and Ms. Koch’s social worker provided evidence that she described to his lawyer the issues as to elder abuse prior to his filing of the claim; and
- ii. Despite claiming during discovery to not know Ms. Koch or that she was an owner, being recorded in a phone conversation on May 3, 2019 with his realtor at which time the realtor stated “what has to happen for [Mr. Jenkins], and this is a morbid thing to say, is his mom’s got to pass away. And, when his mom does pass away, [Mr. Jenkins’] picture will be totally different; the dominoes will start falling into place at that time”, with the plaintiff later saying “I don’t know how long his mom’s going to last for. I mean, not that I wish anything upon somebody, but, I like... You know, it’s like, your probably right. That’s the catalyst, right?”.

[41] The plaintiff does not necessarily agree with the comments as to the lack of merit to its claims, including as to the relief of specific performance. The plaintiff also took issue with the admissibility of any evidence regarding pre-litigation matters at this application, particularly the transcript of the recorded May 3, 2019 telephone call. Regardless, it argues that its conduct was within the bounds of appropriate, litigation conduct.

[42] The plaintiff’s position is that his claims were supported by a reasonable factual basis: namely, he possessed a contract to convey Ms. Koch’s property to him, which he sued to enforce, the dispute being a legal argument over whether he was entitled to rely on that contract. Mr. Wilson did not make any “serious allegations” against Ms. Koch such as fraud. The complexity of the issues was not so excessive, nor was the importance of the litigation to the parties so great, that the case could be fairly be characterized as “unusual.” This was ordinary litigation which

fits squarely within the type of conduct that is contemplated by ordinary, Scale B tariff costs.

Legal Framework

Jurisdiction

[43] When the matter initially came on for hearing I inquired as to the jurisdiction of an associate judge to determine the scale of costs in these circumstances. The parties had no specific argument for or against my jurisdiction, and agreed to me proceeding.

[44] Section 11.3(2) of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 sets out the jurisdiction of an associate judge. It provides:

An associate judge has, subject to the limitations of section 96 of the *Constitution Act, 1867*, the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that an associate judge is not to exercise that jurisdiction.

[45] The *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*) provides:

96. The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

[46] Practice Direction 50 deals with the associate judges' jurisdiction and, specifically, at para. 3 sets out the matters over which an associate judge is not to exercise jurisdiction, including granting relief where the power to do so is conferred expressly on a judge by a statute or rule. Further, at para. 5, it provides:

Subject to constitutional limitations and to the direction set out in paragraph 3, an associate judge has jurisdiction to hear applications under the Rules of Court, including applications for approval of sale in foreclosure proceedings.

[47] Here, the determination of the scale of costs is being sought under R. 14-1(b) by which "the court" may order that costs be assessed as special costs, and by

virtue of the discontinuance order granted having regard to the costs provisions in R. 9-8(4).

[48] As such, an associate judge has jurisdiction to make the assessment as sought, it being an order brought under the Rules, without the jurisdiction being expressly conferred upon a judge.

[49] Further, in my view, the scale of is not, strictly speaking, a final order, but rather one that is ancillary to the final order. While the order as to scale is typically made by the presider who makes the final order, that is a function of logistics and efficiency.

[50] Where, as is this case here, the scale is being recoverable as a matter of course due to a discontinuance there is no presider who would have had the familiarity and benefit of the full evidence on the merits such that, as a matter of efficiency, they would necessarily hear the application as to scale, and the matter may proceed as an ancillary determination to the discontinuance itself, and the entitlement to costs that arises under the Rules.

[51] Neither of the parties disagreed with that analysis and agreed to having the matter proceed before me.

Special Costs

[52] While costs are governed by R. 14-1, the scale of costs is discretionary.

[53] As suggested in *Nouhi v. Pourtaghi*, 2023 BCSC 306 (“*Nouhi*”) at paras. 66 and 67, given that R. 9-8(4) provides no guidance as to the manner in which costs are to be awarded on a discontinuance, special costs are available.

[54] In the frequently cited case of *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 (“*Mayer*”), Justice Walker provided an overview of special costs:

[8] Special costs are awarded where a litigant engaged in reprehensible conduct. The purpose of an award of special costs is to chastise a litigant. Special costs are punitive in nature and encompass an element of deterrence. A wide meaning is given to the word “reprehensible”. The term

represents a general and all encompassing expression of the applicable standard for an award of special costs. “Reprehensible” conduct includes conduct that is scandalous, outrageous, or constitutes misbehaviour, as well as milder forms of misconduct that in a court’s view deserves reproof or rebuke. In determining whether the conduct of a party is reprehensible, courts may consider whether the conduct complained of is a type from which it should seek to dissociate itself.

[9] In *Garcia* at 747, Lambert J.A. described the standard to be met in order to justify an award of special costs:

... 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.

[10] The need for courts to disassociate themselves from misconduct is so important that special costs may be awarded even when the successful party does not have to pay legal fees. In *Fullerton* at para. 29, the Court of Appeal stated that “[s]ince the rationale for the award is to penalize, it matters not that the successful party does not have any legal fees to pay”.

[11] Special costs may be ordered in the following circumstances:

- (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.

[Citations omitted]

[55] In *Nouhi*, the defendant was successful on its counterclaim and entitled to costs arising from that, as well as from a discontinuance made by order at the commencement of the trial in respect of its primary claim. The defendants sought that those costs be determined on a special costs basis, referencing comments by the trial judge in his trial reasons as to the plaintiff having “weaponized the litigation”, given that his vast financial resources far outweighed those of the defendants, essentially making the proceeding a “David versus Goliath type affair”.

[56] A similar argument is made by the Estate in this application, namely that the plaintiff’s conduct was reprehensible in that he, in general, used his position of strength, financially and otherwise, to pursue litigation of no or nominal merit, in an attempt to leverage Ms. Koch into a resolution or to give up her rights, including through the positions taken as to that resolution, namely opposing summary trial and the bifurcation application.

[57] While the plaintiff argues that much of the evidence being relied upon to establish that is irrelevant given it relates to pre-litigation conduct, the Estate relies on the findings in *Nouhi* at para. 71 that the court is entitled to look at such extraneous, but relevant, factors which go to a party’s motive to pursue its litigation.

[58] On the basis of those comments, I found the pre-litigation conduct admissible, but only for that limited purpose.

[59] In *Nouhi* the court found that the plaintiff’s “war chest” was designed to “prosecute, or more properly persecute” the defendant, with the underlying foundation, or motive, of the claim being revenge or malice, not the recovery of money he honestly believed had been taken from him and his company. The specific conduct on which the court relied upon in *Nouhi* to order special costs in respect of the claim was, however, much more than his motivation. The litigation conduct that gave rise to the award was described by the court as follows:

- a) the plaintiff's wrongful encumbrance of the Properties; the only vehicle which the defendants could use to meaningfully defend the actions against them and pursue their own claim;
- b) the seeming disinterest in moving the action properly forward and simply leaving the defendants in the untenable position of having to make applications for removal of the certificate of pending litigation ("CPL") on three separate occasions;
- c) the allegations of dishonest conduct without any meaningful objective evidence that such was sustainable and, even when such was noted to the plaintiff in reasons issued earlier in the proceedings, the plaintiff persisted with amendments which although legally sufficient to sustain the reinstatement of the CPLs, were not supported by any evidence other than bare assertions made by the plaintiff in affidavits sworn in support of the reinstatement of those CPLs.
- d) The multiple actions commenced by the plaintiff in Missouri as against the defendants, and as against the defendant's daughter for claims that appeared to have little merit.

[60] In *Nouhi*, the improper and unfounded allegations of fraud and dishonesty, coupled with, at best, arguments disclosing a vague connection to the property in issue, resulted in the court finding the conduct to be similar to that noted at para. 25 of *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 ("*Garcia*"), and deserving of a special costs award, for the discontinued claim:

If the proceedings are taken, not in the reasonable expectation of a satisfactory outcome, but in order to impose the burden of the proceedings themselves on the opposing party in circumstances where one party is financially much stronger than the other, then the absence of merit, coupled with the improper motive is ... a combination which may well amount to reprehensible conduct sufficient require an award of special costs.

[61] However, in both *Garcia*, at para. 23, and in *Rayner v. British Columbia Coast Pilots Ltd.*, 2023 BCSC 373, at paras. 60 to 62, the court confirmed that lacking merit

is not, on its own, sufficient grounds to make an order for special costs. Rather, there must be “something more” such as allegations of fraud and an improper motive, or improper motive in advancing the proceedings themselves.

[62] As to the additional factor here, that being the financial imbalance between the parties, in *Tanious v. Empire Life Insurance Co.*, 2019 BCCA 329 at para. 82, such an imbalance was a sufficient basis to award special costs. In finding that to be the case, the Court of Appeal recognized that that the law of costs has evolved to the point that a judge may consider a litigant’s challenging personal and financial circumstances, including the availability and nature of counsel’s services, and award special costs even where there is no reprehensible conduct.

[63] However, as the plaintiff noted, *Tanious* involved litigation where the imbalance arose from litigation itself, i.e. where a plaintiff sought to recover disability benefits that were denied under an insurance policy with the defendant. The court specifically had regard to the policy objectives of ensuring access to justice, particularly in claims such as that in issue in *Tanious*. In dismissing the appeal of the special costs award, the Court of Appeal specifically referenced that the decision was being made given “the unique nature of the particular contractual relationship in question”, and interests of justice in that case.

Increased Costs

[64] During submissions, I asked the parties to address whether or not increased costs should be ordered if I were to find that the conduct of the plaintiff did not rise to the level required to support a special costs order.

[65] The parties provided written submission on this point.

[66] In its submissions, the Estate argued its primary position, namely that special costs were appropriate, should prevail but, in the alternative, that “should the Court decline to award special costs, the Applicant submits that uplifted costs should be awarded at Scale C.” In their written submissions, the Estate largely sought to re-argue the issue of special costs, augment the argument for lump sum costs and

argue waiver of privilege. The written submissions went well beyond the issue I directed the parties to address, namely whether increased costs pursuant to s. 2(5) of Appendix B to the Rules applied to this matter.

[67] I only considered those portions of the Estate's arguments as to increased costs, as to do otherwise would allow the Estate to bolster its original arguments (and add a further one as to Scale), and deprive the plaintiff of a proper opportunity to respond given the page limits I put in place on the response submissions.

[68] The authority for awarding increased costs, or a lift in costs, is contained in Section 2(5) of Appendix B to the Rules:

(5) If, after it fixes the scale of costs applicable to a proceeding under subsection (1) or (4), the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value for each unit allowed for that proceeding, or for any step in that proceeding, be 1.5 times the value that would otherwise apply to a unit in that scale under section 3 (1).

(6) For the purposes of subsection (5) of this section, an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed under subsection (1) or (4).

[69] In *Nouhi*, the court found that the conduct of the plaintiff in its capacity as defendant by counterclaim did not rise to the level necessary for a special costs order in respect of the counterclaim matters given that the plaintiff was entitled to mount a "robust defence" and its conduct in advancing the claim was not necessarily imported into its defence of the counterclaim. Nonetheless, the continued assertion of financial misconduct by the defendant after the decision to discontinue the original claim on that basis, as well as certain trial strategies (refusing to respond to a notice to admit, lengthening the trial, repetitive filing of CPL's to effectively prevent the ability to make use of equity to litigate, last minute amendments, significant delay occasioned by a "lackadaisical attitude towards the litigation", and failure to file a trial brief) was worthy of some rebuke. Thus, the court ordered that the costs for the counterclaim would be multiplied by 1.5 as provided for in s. 2(5) of Appendix B.

[70] At para. 19 of *Prokam Enterprises Ltd. v British Columbia Farm Industry Review Board*, 2023 BCSC 606 the court summarized the relevant considerations in making an order for increased costs, as taken from *Boissonault v. Marler*, 2021 BCSC 678 at paras. 53–58 as follows:

- a) The purpose of increased costs is to provide an indemnity, not to punish;
- b) increased costs may only be awarded if there are unusual circumstances such that awarding costs on the standard fixed scale would result in a grossly inadequate or unjust award;
- c) “unusual circumstances” include:
 - i. positions or behaviour which have added to the complexity of the litigation;
 - ii. the importance of the matter to a party;
 - iii. misbehaviour by a party that added to the expense incurred by the party claiming costs;
 - iv. the degree of disparity between costs calculated at Scale B and actual legal fees incurred;
 - v. actions taken in bad faith, disobedience of courts processes, incivility, frivolity, and impertinence; and
- d) when increased costs are awarded on the basis of misconduct, it need not be reprehensible conduct.

[71] As noted in *Heffel v. Cole*, 2023 BCSC 2140, at para. 25, what constitutes “unusual circumstances” is a fact-based inquiry driven by the nature of the litigation and the conduct of the parties. Further:

[27] As Watchuk J. noted in *Roussy* at para. 66, these factors overlap with those applicable to an award of special costs, with the difference being that the purpose of uplifted costs (formerly referred to as “increased costs”) is not

to punish, but to indemnify. Since the purpose of an uplift is to *compensate* a party for unnecessary expense caused by another's litigation misconduct, such an award may be appropriate even if that misconduct does not rise to the level of being "reprehensible" and therefore deserving of the punitive award of special costs.

[72] However, as noted in s. 2(6) of Appendix B, the fact that there is a disparity between actual legal costs incurred and recoverable costs on the ordinary scale is not a basis on its own to justify an order for increased costs. There must be something more, there must be unusual circumstances to support the order.

[73] A party's conduct can, however, constitute unusual circumstances if it is deserving of some form of rebuke, but less than that required for special costs: *Ding v Canam Super Vacation Inc.*, 2024 BCCA 102 at para. 212.

Analysis and Conclusion

[74] The Estate framed the underlying rationale for its position on this application as follows:

There are no words to adequately describe the emotional and personal impacts of this litigation on Ms. Koch and Ms. Treen. To be blunt, it is an absolute tragedy that Ms. Koch spent the last three years of her life embroiled in litigation, fighting to keep her home which she worked her whole life to obtain.

It is a further tragedy that Ms. Koch passed away before this matter ended, living in a state of depression, fearful that she would lose her home. Towards the end of her life she would have night terrors, imagining that the plaintiff was going to come into her room and take her from her bed in the night.

Conversely, now, after nearly four years of litigation, in the absence of an enforceable contract without a rational claim for specific performance and incurring, at most, nominal damages, the plaintiff wants out of this litigation and seeks to walk away with minimal consequences, i.e. party and party costs.

[75] Ms. Treen swore an affidavit in support of the application going to the emotional distress this litigation caused to Ms. Koch, and how negatively it impacted the last few years of her life.

[76] The tragedy of Ms. Koch's final years being consumed first with the death of her son, Mr. Jenkins, followed by the sad legacy he left by entering into the Sale

Contract and stress of litigation that consumed the final years of her life is incontrovertible. However, the sympathy that the court may have to Ms. Koch's circumstances are not dispositive of this matter. Further, this is not a unique case based on a contract such as that found in *Tanious*, such that it would be in the interests of justice to make an order for special costs on that basis.

[77] No particular factor, whether that be questionable merit, financial imbalance, or an aggressive litigation strategy would, having regard to the above authorities and circumstances of this case, be sufficient on its own to support an order for special costs.

[78] In its written submissions, the Estate pointed to the following factors which it argued were deserving of rebuke to the extent that special costs would be warranted:

- a) The plaintiff's pursuit of a meritless claim with "reckless regard" to the truth;
- b) The plaintiff's "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- c) The plaintiff's conduct in making the resolution more difficult than it should have been;
- d) The plaintiff's financial superior position without any reasonable expectation of a favourable outcome;
- e) The plaintiff's continuing pursuit of a "weak case" and "meritless claim" after it was drawn to the plaintiff's attention that it was without merit; and
- f) The plaintiff's pursuit of a claim without foundation.

[79] Although stated a number of different ways, the relevant circumstances come down to the plaintiff being a sophisticated party of superior financial means to Ms. Koch, who was herself a very sympathetic defendant, prosecuting his claim in a

zealous and aggressive manner including in presenting evidence that arguably lacked credibility, despite the claim being of questionable merit.

[80] The specific litigation conduct pointed to by the Estate is:

- a) The refusal to reasonably consider an offer;
- b) The opposing to the summary trial application;
- c) The refusal to agree to bifurcate the trial; and
- d) Giving evidence, or presenting a case based on evidence, which called into question the plaintiff's credibility.

[81] I address each of those factors as follows:

- a) The impact of the offer was not argued in oral submissions to any degree. The court was not taken to the offer, and notably no alternative argument was made by the Estate that the offer was one which, if special costs were not available would give rise to double costs;
- b) With respect to the two applications, the plaintiff argues that the decision to bring each of those applications was Ms. Koch's. Thus, to the extent the Estate has been put to increased legal costs, that is a result of Ms. Koch's own making. Further, I note that in each of those applications the court had the discretion to make the orders sought. Consent of counsel would not necessarily have been dispositive of the outcome of either of those applications. In any event, it would be difficult to find that the positions taken by the plaintiff in those applications were "reprehensible" when the plaintiff was successful on each of them.
- c) As to the last, while I share much of the Estate's concerns as to the credibility of the plaintiff, I cannot find that there was the type of dishonest conduct in the litigation that rises to the level necessary to make an order

for special costs, particularly where there was no trial on which the evidence, and inconsistencies, could be fully tested.

[82] In the Estate's submission, while each individual factor may not rise to the level of "reprehensible" conduct referenced in the various decisions for special costs, taken collectively, particularly with the questionable merit and financial imbalance, they do.

[83] The plaintiff did not dispute that there was a significant financial imbalance between himself and Ms. Koch. However, as to the merit, despite that there is some question as to the strength of the plaintiff's claim, I cannot find that the litigation was brought for an improper purpose. There is insufficient evidence to find that, to use the words of the court in *Mayer*, the claim was prosecuted "not with the reasonable expectation of a favourable outcome", but to "impose a financial burden on the opposing party".

[84] At most, the evidence shows that the plaintiff's motives in pursuing this claim amount to the plaintiff's own desire to achieve its own commercial benefit or financial gain through the acquisition of the Property. Although his pursuit of the claim had the effect of imposing a financial burden on the opposing party, a reality in most litigation, I cannot find that it amounted to an improper one.

[85] However, taken collectively, the questionable merit, the financial imbalance, and the aggressive positions all caused an increase in the financial burden to Ms. Koch, who at all times the plaintiff knew was particularly vulnerable to those costs and the stress of litigation, is conduct deserving of some rebuke.

[86] However, it is not of the level to give rise to special costs.

[87] In this respect, the comments of the court in *Tanious* do bear repeating in terms of the evolving nature of costs, with the general approach that parties ought to be encouraged to move litigation matters moved through the courts in as efficient as a manner as possible. It is also notable that the Rules specifically provide that concepts of proportionality inform the court's application of the Rules.

[88] Having regard to the totality of the circumstances in this case, I find this is an appropriate matter for an increased costs award.

[89] Those circumstances include the plaintiff's conduct in:

- a) pursuing this claim without regard to Ms. Koch's circumstances including her vulnerability and the financial imbalance between the parties, particularly with respect to his continued claims for specific performance once it was known that the Property was no longer necessary for the purposes originally sought, knowing the importance to Ms. Koch that she retain the Property.
- b) Taking an approach to the litigation which was cavalier as to the evidence being given; and
- c) Taking an approach to the litigation which increased the costs of litigation (for example, not reasonably answering the notice to admit, and not filing the discontinuance until after the original trial date had passed such that expert fees had to be incurred by Ms. Koch) that lacked proportionality to their likely "best case" in terms of damages.

[90] Finally, there is a significant disparity between the legal costs incurred and what an ordinary costs award would provide, notwithstanding that some of those costs lie at the feet of the Estate's own litigation strategy.

[91] In this respect, the evidence of the Estate is that its recoverable costs (assuming all steps and applications are included) under Scale B would be approximately \$25,000. With a lift (although it is not clear if that is by virtue of the 1.5 multiplier as opposed to a change to Scale C as referenced in the Estate's submissions) they would be approximately \$38,000. The special costs were sought in the amount of \$250,000, even applying what is described by the Estate's counsel as a "low bono" hourly fee.

Order

[92] I order as follows:

The Estate is entitled to its costs of these proceedings, except where costs have otherwise been awarded in favour of the plaintiff, but including this application and any assessment, on a Scale B basis, subject to a 1.5 multiplier.

[93] For clarity, if the Estate is found to be entitled to costs on any taxation of its bill of costs, those costs shall also be increased, and subject to the 1.5 increase, with such amount being agreed to by counsel, or by taxation before the registrar.

[94] As to the costs for the summary trial application, as there was a discontinuance by the plaintiff it seems to follow that costs for that application are part “of these proceedings”, meaning that the Estate should be entitled to the costs for that application also at Scale B, subject to the 1.5 lift.

[95] I can see no basis on which the Estate would be entitled to its costs related to the bifurcation application given that the order for costs to the plaintiff was made “in any event of the cause”. While I agree with the Estate that as a result of the discontinuance the “cause” is effectively in the Estate’s favour, I cannot re-write that order as suggested by the Estate.

[96] To be clear, I make no orders that seek to interpret, or re-frame, the orders arising from the earlier applications, but provide these latter comments in the event they may provide some assistance to the parties. If the parties are unable to agree to that interpretation they ought to seek further clarification or directions from those presiders.

“Associate Judge Robertson”