

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0928772 B.C. Ltd. v. Ross*,
2024 BCSC 2217

Date: 20241206
Docket: S174615
Registry: Victoria

Between:

0928772 B.C. Ltd., 0960416 B.C. Ltd., 0960420 B.C. Ltd., 0960423 B.C. Ltd., 096425 B.C. Ltd., Craig Little on his own behalf and as Trustee of the Little Family Trust, and as Executor for the Estate of Rose Little, Timely Little Investments Ltd., John Kwari, Cecilia Kwari on her own behalf and as Trustee of the 2010 Kwari Family Trust, Paulita Majo Holdings Ltd., Maria Kwari on her own behalf and as Trustee of the Paul Kwari Family Trust, 0811348 B.C. Ltd., Penny Peng as Executor for the Estate of Victor Peng, Gordon Peng with Penny Peng as Trustees of the Peng Family Trust, Peng Investments Ltd., Gerry Poon on his own behalf and as Trustee of the Poon Family Trust, Susan Ann Poon, Trimex Holdings Ltd., Su-Min Hsu on her own behalf and on behalf of the Hsu Family Trust, Formosa Holdings Ltd., Matthew Takoski on his own behalf and as Trustee of the Takoski Family Trust, 0863184 B.C. Ltd., Linda Jesson, James Jesson on his own behalf and with Douglas Southerland as Trustees of the Jesson Family Trust, J. Jesson Capital Inc., Shelby Donald on her own behalf and as Trustee of the Donald Family Trust, Larkdowne Consulting Inc., 0928818 B.C. Ltd., 0947797 B.C. Ltd. and 0947800 B.C. Ltd.

Plaintiffs

And:

Lindsay Ross, L.A.C. Ross Law Corporation, My Wee World Enterprises Inc., Lindsay Ross and the Estate of Rolf Paterson as Trustees of both the 2012 Ross Family Trust and the Ross Family Trust, Joanne Lynne Ross and 096429 B.C. Ltd.

Defendants

Before: The Honourable Justice Jackson

Reasons for Judgment on Costs

Counsel for the Plaintiffs:	D.S. Mulroney M. Mulroney
Counsel for the Defendants:	W.E. Pedersen
Written Submissions of Plaintiffs:	August 28, 2024
Written Submissions of Defendants:	September 10, 2024
Reply Submissions of Plaintiffs:	September 18, 2024
Place and Date of Judgment:	Victoria, B.C. December 6, 2024

I. OVERVIEW

[1] On August 6, 2024, I issued trial Reasons for Judgment in this case, indexed as 2024 BCSC 1436 (the “Trial Reasons”). I will continue to use the same terms defined in the Trial Reasons in these Reasons except where noted. In the course of the Trial Reasons I found the Plaintiffs were the successful parties.

[2] The Plaintiffs seek an order of special costs in their favour against all of the Defendants, or in the alternative, costs at scale C with a 1.5 multiplier or uplift.

[3] The Defendants say the appropriate award is costs paid at scale B.

[4] For the reasons that follow I have concluded that the Defendants’ conduct during the litigation, including that of Joanne Ross, was reprehensible and warrants an award of special costs against all of the Defendants, jointly and severally, in favour of the Plaintiffs.

II. ISSUES

[5] There are two issues for determination related to costs.

- 1) In the circumstances of this case, is it appropriate to exercise my discretion to award special costs?
- 2) Should costs against Joanne Ross be assessed separately?

III. SPECIAL COSTS

A. **Applicable legal principles**

[6] Costs of a proceeding must be awarded to the successful party unless the Court otherwise orders: *Supreme Court Civil Rules* [*Rules*], R. 14-1(9). The Defendants do not argue for an order otherwise. The Plaintiffs are entitled to their costs of the proceedings.

[7] If costs are payable to a party, under the *Rules* or by order, those costs must be assessed as party and party costs in accordance with Appendix B of the *Rules*, unless, *inter alia*, the Court exercises its discretion to order that the costs of the

proceeding be assessed as special costs, or awards lump sum costs for the proceeding and fixes those costs under R. 14-1(15) in an amount the Court considers appropriate or awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under R. 14-1(15): R. 14-1(1)(b)(i), (c) and (d).

[8] Special costs are punitive and are imposed by the Court to sanction a party's reprehensible conduct during the litigation, as a means of disassociating itself from that conduct: *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at para. 42, leave to appeal to SCC ref'd, 39145 (1 October 2020) [*Le Soleil*]; *Garcia v. Crestbrook Forest Industries Ltd.*, 119 D.L.R. (4th) 740 at 745, 1994 CanLII 2570 (B.C.C.A.).

[9] The word "reprehensible" has a broad meaning and encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia* at 746–747. Improper pre-litigation conduct is not to be considered: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 133–134.

[10] Following a thorough review of the cases involving special costs, Justice Gropper outlined various principles involving special costs at para. 73 of *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352, which remain relevant today, including:

- 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.

See also *Sandhu v. Mangat*, 2019 BCCA 238 at para. 5 and *Puppet Killer Productions Inc. v. Industry Works Studios Inc.*, 2024 BCCA 135 at para. 22.

[11] The purpose of special costs is not to compensate the other party: *Le Soleil* at paras. 40–42. Nonetheless, special costs also enable a Court to substantially or fully indemnify a successful party, particularly where that party has incurred excessive costs due to misconduct on the part of the other party: *D’Atri v. Gonzalez*, 2017 BCSC 1244 at para. 55; *Everywoman’s Health Centre Society v. Bridges*, 54 B.C.L.R. (2d) 294 at 297, 1991 CanLII 5715 (C.A.); *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 at para. 49, leave to appeal to SCC ref’d, 38924 (20 February 2020).

[12] Special costs may be ordered for the entire litigation even if a party’s conduct was not reprehensible throughout: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 9, leave to appeal ref’d, 2012 BCCA 481. Nonetheless, while special costs are usually awarded for the whole proceeding, where such an award would be disproportionate, the Court has the discretion to award special costs with respect to particular steps in the litigation: R. 14-1(1)(b)(ii); *Gichuru v. Smith*, 2014 BCCA 414 at para. 91, leave to appeal to SCC ref’d, 36221 (16 April 2015).

[13] Justice Walker set out several circumstances where a Court may order special costs, although not an exhaustive list, in *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11,:

- (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.]

[14] In the course of her reasons in *Westsea*, Gropper J. made similar observations, noting reprehensible conduct may include the pursuit of meritless claims for some improper motive, abuse of the Court's process, sharp practice derogating from the rules of professional conduct and the rules of court, and misleading the Court.

[15] As all of these authorities make clear, each case involving a claim for special costs must be considered based on its own specific facts.

B. Analysis and Conclusion

[16] The Defendants argue it would be "unjust" to award special costs against Joanne Ross or any Defendant. They argue the Defendants did not engage in litigation misconduct, pursue their defences spuriously or frivolously, bring unnecessary applications, take unreasonable positions on pre-trial matters, or otherwise abuse the court's process, and that there is no evidence of incivility. They submit the Defendants simply put forth their defence to the Plaintiffs' claim and that they were "entitled to their day in court".

[17] I disagree. The Defendants applied to withdraw admissions at the eleventh hour, despite having had ample warning of the Plaintiffs' intention to rely on those

admissions. The Defendants failed to make reasonable admissions, including but not limited to the fact that the Rosses were insolvent during the relevant period. The Defendants failed to comply with their disclosure obligations under the *Rules*, and instead disclosed multiple relevant documents well into the trial. Both Lindsay Ross and Joanne Ross were evasive and unresponsive in giving their testimony, despite my repeated directions to the contrary. Their misconduct extended the length of the trial and required the Plaintiffs to undertake additional investigatory and preparatory processes that spanned several years and would have involved additional costs, all while MWW continued to hold shares for which the Individual Defendants knew they had not paid. That collection of conduct (at times for ease of reference in these reasons as “Litigation Tactics”) was reprehensible.

[18] The Plaintiffs also seek special costs on the basis that the Rosses’ testimony, at their examinations for discovery, was untruthful and concocted.

[19] The Defendants argue that special costs are not to be awarded simply because a witness has been found to have been untruthful in giving their testimony: *Unternaher v. Wheat Sheaf Inn Ltd.*, 1998 CanLII 6498, at para. 15, , 114 B.C.A.C. 299 (C.A.). I agree. Justice N. Smith made similar comments in *Gill v. Bassi*, 2016 BCSC 754 at paras. 13-16, pointing out there “is a difference between a party who deliberately attempts to mislead the court and a party who fails to prove a case on a balance of probabilities because his or her evidence is not accepted”. Where untruthful testimony is relied on as a basis for special costs “there must be evidence of some improper motive at play”: *Westsea* at para. 70. The Court of Appeal allowed the appeal in *Unternaher* to the extent of ordering special costs on the basis that the trial judge had found that two of the respondents who gave evidence at trial had concocted their evidence with respect to an issue that was critical to the issue of liability with the intention of misleading the Court: at paras. 11, 12, 15. Justice Burnyeat was similarly satisfied of an intention to mislead the Court in *S.S.G. Trucking Ltd. v. Standard Building Maintenance Ltd.*, 2000 BCSC 812 at paras. 6, 7, 11.

[20] However, the Plaintiffs do not seek special costs simply because the Rosses gave testimony this Court found to be untruthful. The Plaintiffs seek special costs on the basis that “the purpose of [their] concerted and false testimony was clearly to defeat the plaintiffs’ valid claims”. The Plaintiffs argue the Rosses gave false evidence, including about the existence of an alleged escrow agreement, which I found was a fiction, and denying their insolvency, which they had concocted in an effort to defeat the Plaintiffs’ claim.

[21] I agree. I found there was no escrow agreement, and that any request by Mr. Ross to either Ms. Sparling or Mr. McRae to work on such a document “was a sham and a desperate effort by Mr. Ross to conceal his intentional default which he had failed to disclose, and to justify, minimize, and try to remedy that default after the fact”: Trial Reasons at para. 391. The Rosses’ testimony about the escrow agreement was an effort to mislead the Court with the intention of defeating the Plaintiffs’ claim. Further, Mr. Ross endeavoured, during his testimony, to perpetuate the sham that the failure to finalize the (fictional) escrow agreement was the fault of his junior associates, Ms. Sparling and Mr. McRae. I agree with the Plaintiffs that testimony is “independently reprehensible”.

[22] The Rosses’ conduct, both in giving false testimony in an effort to defeat the Plaintiffs’ claim, and in their Litigation Tactics, was reprehensible. Both constituted an abuse of the process of the court. I find the conduct was done with the intention of gaining advantage in the litigation.

[23] The Plaintiffs’ argument that I should consider Mr. Ross’s “extensive history” of ignoring his legal obligations and forcing creditors, including CRA, to take action or judgment before he would pay debts owing, is evidence that relates to pre-litigation conduct, and in my view is not properly taken into account in considering whether a special costs order is appropriate.

[24] Similarly, although I agree with the Plaintiffs that the June 2012 PFS and the April 2013 PFS were false and prepared with an intention of being misleading, I consider the preparation of those documents to be pre-litigation conduct, and

therefore I will not take it into account in assessing whether an award of special costs is appropriate. However, the Rosses' testimony at trial, aimed at supporting the reliability of those two documents, included testimony I find they each knew to be untrue, was given in an effort to defeat the Plaintiffs claim, and in my view is another example of their reprehensible conduct. It perpetuated their pre-litigation efforts to mislead and introduced it into the proceeding.

[25] The Defendants seek to resist an award of special costs on the basis that the Plaintiffs "received real estate assets with an estimated value in excess of \$10 million... [and] ... the significant benefit of Mr. Ross' office in preparing and structuring the [TL and PKS] deals, and the efforts of both Mr. and Ms. Ross for two and a half years after closing towards the operations, including the renovation and opening of the spa by Ms. Ross, and being involved in other committees to enhance the investment". They also argue the Plaintiffs have benefitted financially by being able to keep "investment from [MWW] of \$50,000 to Sidney and the \$105,000 investment paid into Parkside" and that they "ought not to be awarded special costs as a bonus or further compensation for their success at trial". The Defendants argue the Individual Plaintiffs and their respective companies and trust entities are all "wealthy" and "can spread the cost of litigation amongst themselves and likely write off as business expenses" and that "the Rosses on the other hand are a single family of two parents and two children" and that "special costs in the circumstances would have an outsized and overly punitive effect on their family".

[26] This argument is not persuasive and I reject it for several reasons. First, it is premised on numerous facts which I do not accept. Mr. Ross structured the TL and PKS investments in a manner that benefitted himself and other Defendants and preferred his interests over those of the Plaintiffs who were his clients. All of the Individual Plaintiffs had particular areas of expertise and brought something to the table for the benefit of the TL and PKS investments. The Rosses' testimony of their contributions to the TL and PKS investments is not reliable. His children are adults.

Second, the Rosses did not “pay” \$100,000 towards the PKS deal. The Trial Reasons include the following:

[507] The Defendants argue that if the Plaintiffs succeed, the financial contributions they made should be repaid. The Plaintiffs made that offer. It was not accepted. I am not inclined to order the \$100,000 allocated to the Rosses’ contribution post-closing be “repaid” to the Defendants. The Individual Plaintiffs permitted that amount to be credited to the Rosses as a result of Mr. Ross’ screaming and bullying at a meeting that took place immediately after his default had been discovered. They were shocked, and understandably extremely anxious given the situation in which Mr. Ross had placed them. Their acquiescence was not free and voluntary. It was the only choice the Individual Plaintiffs were given. It was a Hobson’s choice. I will not hold them to it.

[508] Further, the allocation was permitted based on Mr. Ross’ representation that his firm had a specific amount of legal fees outstanding. I am not satisfied, based on the evidence, there was any basis for that representation. Mr. Ross could not recall any tabulation of staff time being done before the concerns about his legal fees were raised. He could not provide any specificity about where the figure for the amount of legal fees presented came from. Mr. McRae had not been instructed to, and did not, keep track of his time in any detail. Mr. Ross simply asked him, after PKS had closed, how much time Mr. McRae had spent on PKS “in general terms”. Similarly, Mr. Ross and Ms. Sparling had a very general discussion about what magnitude or percentage of Ms. Sparling’s time had been spent on the PKS deal, but she had not been asked to and did not add up the hours worked. Instead, Mr. Ross simply inquired how much time she “felt” like she had put into the transaction. There was no evidence that she, Mr. McRae or Ms. Gable were ever asked to review any statement of account or document setting out their time to confirm its accuracy.

[Emphasis added.]

[27] While the Rosses were credited \$100,000 towards their PKS financial obligation, they did not pay that amount. Rather the credit was based on Mr. Ross’ assertion that he had accumulated *bona fide* outstanding statements of account for legal fees in excess of that amount. Mr. Ross’ evidence on that point is unreliable and unsupported by objective independent evidence.

[28] Third, no authority was cited for the principle that the financial impact of a special costs award, or a party’s (alleged) inability to pay, is a factor to be considered in determining whether to exercise discretion in favour of making an award of special costs. The case law supports the conclusion that the analysis

focusses on whether there has been reprehensible conduct from which the Court wishes to disassociate itself. In my view, the importance of the Court doing so is no less pronounced simply because the party found to have engaged in the reprehensible conduct may be of lesser financial means than the successful party, or because the parties who were successful outnumber the parties who were defeated. In my view, any such “punitive effect”, arising from the alleged concentration of a special costs award on a smaller number of unsuccessful parties, would not be relevant.

[29] Fourth, while I made factual findings with respect to the Rosses’ financial insolvency during the relevant period (the time period beginning when Mr. Ross began engaging with each of the Individual Plaintiffs about the TL and PKS investments and ending shortly after the PKS transaction closed) I do not have evidence that would enable me to make a finding with respect to their current financial situation.

[30] Finally, and perhaps most evidently, special costs awards are intended to be punitive. They are a sanction for reprehensible behaviour.

[31] The Defendants did not argue only certain steps in the proceeding should be assessed as special costs, and I see no basis in fact or principle to do so.

[32] I recognize that special cost awards are exceptional and not all forms of misconduct justify an award of special costs: *Westsea* at para. 73. However, I have concluded that the Rosses’ misconduct was sufficiently reprehensible that it is worthy of reproof. I conclude it is an appropriate exercise of my discretion to order special costs of the proceeding as a sanction for that behaviour.

IV. JOINT AND SEVERAL COSTS AWARDS

A. Applicable legal principles

[33] In multi-party litigation, the variety of potential circumstances makes a firm rule regarding an order of costs impossible of formulation: *Seaport Crown Fish v. Vancouver Port Corp.*, 2000 BCSC 68 at para. 33. The Court has a broad discretion

to fashion an order of costs consistent with the *Rules* and responsive to the circumstances of the case: *Seaport Crown Fish* at para. 33.

B. Analysis and Conclusion

[34] The Defendants argue a court order for special costs against Ms. Ross would be extraordinary, particularly because there was no cause of action claimed against her. They take the position that Ms. Ross' participation in the litigation was "inevitable as a shareholder and director of [MWW] and as a witness in respect of the transactions in question" but that "she did not instigate the litigation or counterclaim against the Plaintiffs". The Defendants point out that no relief was sought against her except for a claim for costs "should she take steps to defend or deny the claim or the relief sought". The Defendants argue Ms. Ross' personal participation in the lawsuit was minimal and that her inevitable and limited role are circumstances that would render a joint costs award unjust. They argue costs should be separately assessed as against Ms. Ross.

[35] I disagree.

[36] Ms. Ross' involvement was not minimal. She was a key witness for the Defendants. She gave evidence about numerous key facts, critical to the Plaintiffs' case. In the Trial Reasons, I noted the differences between the concepts of reliability and credibility: at paras. 91-96. My findings with respect to Ms. Ross' evidence are set out in the Trial Reasons and include the following:

[113] Ms. Ross is also not a credible witness. Her testimony suffered from many of the same frailties as the testimony of Mr. Ross, including a memory I find was intentionally selective. In addition, there were inconsistencies between her trial testimony and the testimony she gave at her examination for discovery. Further, Ms. Ross testified the personal financial statement(s) she prepared, on which I find she knew the TL and PKS lenders would rely, was accurate. It was not. Her reasons for believing it was accurate were implausible. I will return to the personal financial statements of Ms. Ross later in these Reasons.

[114] With one exception, by the end of her cross-examination I had concluded I could not rely on Ms. Ross' testimony as being truthful. The exception is that where Ms. Ross made admissions adverse to the Defendants' interests, including, but not limited to, her admissions that at the time the TL transaction closed: (i) she could not afford to pay her required

financial contribution, (ii) she did not pay the required contribution, and (iii) she did not tell any of the Individual Plaintiffs she had not paid that contribution, I believe those admissions.

[37] The Plaintiffs made Ms. Ross a party because she is someone affected by the relief sought.

[38] I find Ms. Ross' evidence was intended to mislead the Court, by supporting the testimony of Mr. Ross, in an effort to bolster his credibility, with the intended consequential effect of defeating the Plaintiffs' claim. That she failed to do so does not alter what I find was her intention.

[39] The circumstances of the case before me are distinguishable from those in *Seaport Crown Fish*, where Madam Justice Saunders, then of this Court, dismissed one plaintiff's claim for damages and was able to isolate and quantify the amount of time that had been allocated to that issue. In my view, no such isolation and quantification is appropriate in this case.

[40] All of the Defendants, including Ms. Ross, filed a single response to the notice of civil claim. They were jointly represented at trial. They shared and pursued a common interest and strategy in the proceeding. Ms. Ross's involvement was integrated into all of the issues.

[41] Ms. Ross had many choices about how she could have participated, or not participated, in the proceeding. As I found in the Trial Reasons at para. 516:

I agree with counsel for the Plaintiffs that Ms. Ross "joined fully in the defence of this action" and had ample opportunity since the action was filed and served to seek legal advice as to how to proceed. Ms. Ross did not seek to be released as a defendant in the action. She did not seek to interplead the shares of MWW. She fully participated in the litigation. She consented, along with her company and the other Defendants, to various orders made in the course of the litigation, including the consent order of April 21, 2021 which provided future trial dates would be peremptory on the Defendants given the previously scheduled trial had been adjourned at their request. She consented to be examined for discovery. She, along with the other Defendants, applied to amend their response to civil claim.

[42] In my view, an order that the special costs award be joint and several among all of the Defendants is warranted based on the facts of this case and the proper exercise of my discretion.

V. ASSESSMENT OF COSTS BY THE TRIAL JUDGE

[43] The officer before whom costs are assessed is a Registrar: R. 14-1(4). However, a judge may fix the amount of costs, including the amount of disbursements: R. 14-1(15); *Gichuru* at para. 96. The Court of Appeal confirmed at para. 102 of *Gichuru* that where a judge makes a determination of special costs, they are to consider the same non-exhaustive list of factors prescribed in R. 14-1(3)(b). This means that the judge must allow those fees that were proper or reasonably necessary to conduct the proceeding and consider all of the circumstances, including:

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

[44] In their submissions the Plaintiffs advised that “whatever costs order is made, we would thereafter seek directions and an opportunity to persuade the court to have the trial judge assess” rather than the Registrar. If the parties cannot agree on

that issue and the Plaintiffs wish to pursue such an order, they may submit an online request to appear before me to address the issue.

“V. Jackson, J.”