

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VIS 1210 v. Ngai Estate*,
2025 BCSC 546

Date: 20250325
Docket: 210312
Registry: Victoria

Between:

The Owners, Strata Plan VIS 1210

Plaintiff

And:

**The Estate of Vun Wong Ngai, The Estate of Mui Tai Ngai,
Simon Yuk Hing Ngai, Tommy Yuk Fai Ngai, Amy Ying Yu Yan,
Shirley Ngai, Rainbow Tang and Alex Yuk Wah Ngai**

Defendants

Before: The Honourable Justice K. Wolfe

Reasons for Judgment – Costs

Counsel for the Plaintiff:

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Written Submissions of the Defendants:

January 9, 2025

Written Submissions of the Plaintiff:

February 10, 2025

Place and Date of Judgment:

Victoria, B.C.
March 25, 2025

Table of Contents

INTRODUCTION 3

ISSUES..... 4

ANALYSIS..... 4

 Issue 1: Did either side achieve substantial success?..... 4

 The legal principles for “substantial success” 4

 The parties’ positions 6

 Discussion 7

 The matters in dispute..... 7

 The importance of the issues and how the parties fared 10

 Issue 2: Appropriate scale of costs..... 15

CONCLUSION AND COSTS ORDER..... 15

Introduction

[1] On December 9, 2024, I issued reasons for judgment in the summary trial of this matter, indexed at 2024 BCSC 2232 [*Reasons*]. At summary trial, the parties sought significant costs awards against each other, including special costs on the basis that each considered the other's conduct (litigation and otherwise) to be deserving of rebuke. The parties made submissions in support of their costs positions, albeit in the absence of knowing the outcome of the summary trial. In the *Reasons*, I rejected both arguments for special costs and instead ordered each side to bear their own costs based on my initial assessment of divided success. However, I invited the parties to seek leave to make further written submissions on costs if they wished. The defendants sought leave and on December 13, 2024, I granted each side permission to make further written costs submissions on an agreed-upon schedule. I received main written submissions from each side; the defendants ultimately elected not to provide reply submissions.

[2] The defendants argue they were substantially successful when the relief sought by the plaintiff is compared to that ultimately granted, particularly in monetary terms. The defendants characterize the matter as one of greater than ordinary difficulty and seek an award of costs assessed at Scale C of Appendix B of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] or, in the alternative, costs at Scale B. Whichever scale the Court chooses, the defendants also seek an award of uplifted costs pursuant to s. 2(5) of Appendix B of the *Rules*, arguing the plaintiff advanced positions and engaged in behaviour that added to the complexity and expense of the litigation.

[3] The plaintiff opposes any award of costs to the defendants and denies any conduct that could justify an award of uplifted costs in the defendants' favour. Instead, the plaintiff asks the Court to award it costs at Scale C. The plaintiff says it was the substantially successful party if the analysis is properly focused on the matters in dispute, and their importance to the parties, rather than on a mathematical tally of the monetary awards made by the Court.

Issues

[4] There are two main issues before me. The first is whether either side was “substantially successful”, as that term is used in costs jurisprudence. If I conclude neither side achieved substantial success, my original costs order will stand and no further analysis is required. However, if I determine one side was substantially successful, I must then consider the appropriate scale of costs to award, and whether the circumstances warrant any greater amount of costs.

Analysis

Issue 1: Did either side achieve substantial success?

The legal principles for “substantial success”

[5] The parties agree on the legal principles regarding substantial success, but disagree on their application to this case. The legal principles are well-settled.

[6] The usual rule with respect to costs, as reflected in R. 14–1(9), is that the successful party is entitled to its costs of a proceeding unless a court orders otherwise. If a claim raises a single issue, or the nature of the dispute lends itself to a clear winner or loser, the analysis of who was successful may be straightforward. However, if a claim involves multiple issues or causes of action, and a party does not succeed on all matters in dispute, the question can be more complicated. In such cases, the Court will generally assess which party, if any, was “substantially successful” overall: *Gagne v. Sharpe*, 2015 BCSC 154 at paras. 26–27.

[7] In *Marquez v. Zapiola*, 2014 BCCA 35, at paras. 16 and 20, the Court of Appeal referred with approval to the articulation of “substantial success” set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref’d 2002 BCCA 454. At para. 46 of *Fotheringham*, Justice Bouck described a four-part inquiry a court might undertake to determine if a party has achieved “substantial success” and should be awarded their costs:

1. First, by focusing on the “matters in dispute” at the trial. These may or may not include “issues” explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those “matters” to the parties.

3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.

4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

[8] At para. 45 of *Fotheringham*, Justice Bouck held that, as a "rough and ready guide", substantial success amounts to success of "about 75% or better" when all disputed matters are viewed globally. Substantial success is measured in broad terms, rather than by finely parsing the issues: *Stewart v. The Owners, Strata Plan KAS 2601*, 2020 BCSC 941 at para. 13, citing *Stearman v. Powers*, 2017 BCCA 165 at para. 65. The Court may consider a broad array of factors, including the nature of the matters in dispute, their relative importance, and how each party fared in the resolution of those matters: *McKnight v. Hutchison*, 2022 BCCA 94 at para. 8; *Fotheringham* at para. 60. The Court is not required to determine success with mathematical precision, nor to engage in a mathematical comparison of the amount claimed to the amount awarded: *Reid v. Reid*, 2017 BCCA 191 at para. 9; *Fotheringham* at para. 45. As Justice Branch stated at para. 16 of *Wallace v. Pichichero*, 2021 BCSC 2347:

Substantial success is not determined by tallying the number of issues and evaluating success on each issue or by comparing dollar amounts. It is determined by evaluating success on the issues of substance.

[9] While there may be additional cost considerations in family law cases, there is no dispute that the same basic costs principles (including the concept of "substantial success" where there are multiple causes of action) apply equally to all general civil litigation matters: *Gagne* at paras. 25–34; *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at paras. 91–92. The Court's assessment of costs is highly discretionary, although that discretion must of course be exercised judicially and in accordance with the *Rules* and established principles: *Gichuru v. Purewal*, 2021 BCCA 91 at para. 13. If no party enjoys "substantial success", the Court may order each party to bear their own costs, or may award the more successful party (as determined by their success on the more important and time-consuming issues) a portion of their costs: *Marquez* at para. 17.

The parties' positions

[10] The defendants submit they were substantially successful on the summary trial. The defendants say that, in the *Reasons*, their position on the merits was “completely vindicated on all the matters in dispute”, to the extent that a trial was “unnecessary by any reasonable measure”: defendants’ written argument on costs at para. 8. In support of this position, the defendants rely primarily on the fact that the plaintiff sought orders totalling more than \$1.035 million, yet only obtained orders requiring the defendants to pay an estimated \$3,928.71, or about 0.37 percent, of the original amount claimed. On this basis, the defendants submit they were “over 99% successful”, well in excess of the 75 percent threshold set out in *Fotheringham*: defendants’ written argument on costs at para. 17.

[11] The defendants say further the plaintiff “failed to prove any contested matter in dispute” as the defendants “admitted liability on the issues where liability was found”: defendants’ written argument on costs at para. 18. In this regard, the defendants say that as they offered to pay for the cost of “strata records”, that should not be considered a matter in dispute. Even accepting that the defendants are liable to pay an as-yet undetermined amount for time spent by Mr. Richard Haliburton to assist the strata corporation to put its affairs in order, the defendants say the degree of the plaintiff’s recovery on its claim of over \$1 million is “truly *de minimis*”: defendants’ written argument on costs at paras. 19–20. In that context, the defendants maintain they were substantially successful.

[12] The plaintiff submits first that, despite there being multiple issues, it should be viewed as having succeeded on the “primary issue of substance” in the matter (see *O’Connor v. Mills*, 2024 BCSC 804 at paras. 10–11, citing *Wallace* at para. 16). Specifically, the plaintiff says the core of its claim was that the defendants failed to fulfill multiple statutory and fiduciary obligations they owed to the strata corporation. The plaintiff says the Court rejected the defendants’ positions that they either satisfied all of their obligations or that the alleged obligations did not arise. Instead, the plaintiff says the *Reasons* demonstrate the Court found multiple failures on the

part of the defendants, “not all of which were minor” (*Reasons* at para. 180). For that reason, the plaintiff says it succeeded on the primary issue of substance.

[13] In the alternative, the plaintiff says an analysis of the various matters in issue, their importance and the outcomes on each yields the same result: that the plaintiff was substantially successful, particularly on the matters of greater significance. The plaintiff acknowledges it was not successful on all matters in dispute, but submits it was successful on the more critical issues, including both preliminary issues (e.g. whether the Court should defer to the jurisdiction of the Civil Resolution Tribunal) and substantive issues (e.g. whether the first annual general meeting (“AGM”) held by the defendants met the necessary requirements under the *Strata Property Act*, S.B.C. 1998, c. 43 [SPA]). The plaintiff says the defendants’ arithmetic calculations do not reflect the proper legal test, and on an application of the proper test for substantial success, the plaintiff is entitled to its costs.

Discussion

[14] To begin, I do not accept the plaintiff’s position that there was one “primary issue of substance” on the summary trial. While the overarching theme of the plaintiff’s action was that the defendants failed to fulfill their statutory and fiduciary obligations to the strata corporation, the plaintiff advanced multiple different causes of action (subject to different legal tests) and sought multiple forms of relief, only some of which could be considered alternatives. Given the way the claim was advanced, the additional preliminary issues raised by the defendants, and the mixed results on the various issues, this is not a matter where the “nature of the dispute” lends itself to a straightforward determination of who won and who lost. Instead, the proper approach to costs requires identification of the various “matters in dispute”, and then an assessment of the weight or importance of each of those matters and how each party fared in relation to them.

The matters in dispute

[15] In their written argument on costs, the defendants focused on the orders explicitly sought in the notice of application for summary trial, comparing them to the

orders granted by the Court. This is too narrow an approach. It does not sufficiently capture the various legal issues the Court was required to decide, including several important preliminary issues raised by the defendants themselves. In my view, the “matters in dispute” on the summary trial are similar, but not identical, to those articulated in the plaintiff’s written argument on costs (see paras. 8–27 and Schedule B). Bearing in mind the “issues” set out at paras. 13–14 of the *Reasons*, I would frame the “matters in dispute” on the summary trial as follows:

- a) the Court’s jurisdiction over the dispute in light of the *Civil Resolution Tribunal Act*, S.B.C. 2012, c. 25 [CRTA];
- b) suitability for summary trial;
- c) if the plaintiff’s claims under the *Condominium Act*, R.S.B.C. 1996, c. 64 (repealed), were either statute- or time-barred;
- d) alleged deficiencies with the first AGM held by the defendants in December 2019, including:
 - i. failure to prepare or provide statutorily required records; and
 - ii. whether any failures were compensable;
- e) alleged failures by the defendants during the interim budget period to:
 - i. properly estimate operating expenses;
 - ii. pay their share of the operating expenses; and
 - iii. pay their required contribution to the contingency reserve fund;
- f) alleged failure to properly establish the contingency reserve fund at first instance;
- g) alleged failure to properly insure the strata corporation;
- h) punitive damages; and

- i) restitution for unjust enrichment.

[16] As is apparent from the above list, and from the *Reasons* themselves, there were a significant number of matters in issue, some of which occupied more court time than others. I agree with the plaintiff that not all of the issues were of the same importance to the parties. These two factors complicate the necessary analysis.

[17] Before turning to the importance and outcome of the identified issues, I must briefly address three submissions respecting the “matters in dispute”. First, I reject the defendants’ submission that the issue of statutorily required records was not a “matter in dispute”. I acknowledge that before the summary trial, the defendants offered to pay for the cost of producing “building plans” required to receive a building permit (see *Reasons* at paras. 95 and 178; defendants’ written argument on costs at para. 6). That position remained unchanged at summary trial. However, the plaintiff’s request in relation to statutorily required records went beyond building plans; it encompassed all documents the defendants were required to provide under s. 20(2)(a) of the *SPA*. As the defendants did not offer to pay for the cost of all required documentation, this issue required resolution by the Court and therefore is properly a “matter in dispute” or a least a sub-issue to one.

[18] Second, I reject the plaintiff’s submission that the admissibility of Affidavit #2 of A. Slusarczyk should be considered a “matter in dispute”. I do not consider routine evidentiary rulings during the course of a proceeding to constitute a “matter in dispute” for purposes of costs considerations, nor was I referred to any jurisprudence in support of such a position.

[19] Third, both sides included the requests for “special costs” and “costs” on their listings of the matters in dispute. I am unable to agree. None of the cases I was referred to treated requests for costs (special or otherwise) as a “matter in dispute”. In any event, as noted above, both sides sought special costs against each other, and I rejected both positions, holding special costs were not warranted at all. To the extent special costs could be considered a matter in dispute, it is clear neither side was successful. Further, as the issue of general costs is the subject of these

additional reasons, it cannot be factored into the initial assessment of “substantial success”.

The importance of the issues and how the parties fared

[20] Turning then to the importance of the matters in dispute and how the parties fared in relation to them, the defendants did not address the relative importance or weight of the various issues in their written argument on costs. I agree with the plaintiff’s categorization of the issues into three levels of importance: significant weight, moderate weight and limited weight. I agree with some, but not all, of the plaintiff’s assignment of weight to the specific issues.

[21] In my view, there were three issues of significant weight: a) the Court’s jurisdiction under the *CRTA*; b) the alleged failure to properly establish the contingency reserve fund at first instance; and c) the alleged deficiencies in relation to the first AGM (with sub-issues). Each was a matter that occupied a significant amount of court time and, in each case, the stakes were high. In terms of outcomes:

- a) The plaintiff was successful in persuading the Court that it should decide the claims rather than referring them to the Civil Resolution Tribunal. Failure on that issue would have led to the dismissal of the plaintiff’s claims before the Court.
- b) The plaintiff was not successful in proving that, despite having contributed more than the statutory minimum amount required to establish an initial contingency reserve fund, the defendants were nonetheless obliged to contribute additional funds to the contingency reserve, both to properly reflect the age and condition of the building at the time of the first conveyance of a strata lot and to fulfill multiple representations they were alleged to have made. This was a significant pillar of the plaintiff’s case; it involved novel legal arguments and a large claim for monetary compensation. The defendants successfully opposed it.

- c) With respect to the alleged deficiencies in the first AGM, in my view, there was divided success.
 - i. The plaintiff's primary position was that there were such significant deficiencies in advance of and at the actual December 2019 meeting that it could not constitute the first AGM, with the result that the defendants should be subject to a sizeable statutory penalty and other attendant consequences. I rejected the plaintiff's primary position in favour of the defendants' argument that any admitted or identified deficiencies did not nullify the meeting in its entirety. Accordingly, I found no basis to impose a statutory penalty in relation to the AGM.
 - ii. However, I did find significant deficiencies, including (but not limited to) the defendants' failures to meet statutory obligations to provide the records and documents necessary for the strata corporation to exercise its governance function. The defendants admitted some deficiencies but sought to downplay the practical impacts on the strata corporation. To address the defendants' failings, I granted both a declaration and an order that together require the defendants to reimburse the plaintiff for the value of the professional assistance the strata corporation obtained to put its affairs in order and for any costs incurred to acquire all documentation the defendants ought to have provided under the SPA. As noted, the defendants previously offered to reimburse the costs for building plans, but not other documentation.

[22] Given the above, I do not consider either side to have achieved substantial success with respect to the three issues of most significant weight. Instead, success on those issues was divided fairly evenly between the two sides.

[23] I consider there to be four matters in dispute that were of moderate weight, one of which had three sub-issues: a) suitability for summary trial; b) whether the plaintiff's *Condominium Act* claims were statute- or time-barred; c) alleged failures by the defendants during the interim budget period (with three sub-issues); and

d) punitive damages. I do not agree with the plaintiff's submission that the issue of punitive damages was of limited importance. While the monetary amount of a particular claim does not necessarily align with its importance, there is no dispute the plaintiff's claim for punitive damages was by far its largest monetary claim. Further, the plaintiff sought punitive damages based on what it characterized as the defendants' "complete dereliction" of their duties to the strata corporation. The plaintiff expressly sought to denounce what it saw as deliberate and egregious behaviour by the defendants, and to deter other owner developers from similar conduct by sending a strong message that statutory and fiduciary requirements cannot be ignored (*Reasons* at paras. 169–171). Those are not allegations of limited importance. In terms of outcomes on these four matters:

- a) The plaintiff succeeded in establishing that its claims were suitable for summary trial, despite continued strong opposition from the defendants. A decision otherwise would have delayed the adjudication of the plaintiff's claims to a future point in time and likely also increased the costs of that adjudication by way of a full trial.
- b) The defendants successfully opposed the plaintiff's attempts to advance various claims in relation to the contingency reserve fund based on obligations alleged to arise under the *Condominium Act*. I accepted the defendants' position that the coming into force of the *SPA* on July 1, 2000 extinguished any rights or obligations that may have previously arisen under the *Condominium Act*. This not only shortened the timeframe for the defendants' potential exposure to liability, it obviated the need to address the parties' limitations arguments.
- c) There were three sub-issues associated with the alleged failures in the period of the interim budget. The plaintiff successfully proved that the defendants underestimated the operating expenses by a minimal amount (which the defendants were found liable to pay), however the plaintiff did not succeed in proving that the difference between the estimated

operating expenses and the accrued expenses was sufficient to attract an additional statutory penalty (as the plaintiff had alleged). The plaintiff was successful in proving the defendants failed to pay both their share of the operating expenses and their required contribution to the contingency reserve fund during the period of the interim budget (the second and third sub-issues). However, I rejected the plaintiff's submission on the time period for which the defendants were required to pay a share of the operating expenses, which significantly decreased the amount I found the defendants liable to pay. Although the plaintiff did not obtain the amounts sought in relation to the alleged failures during the period of the interim budget, viewed holistically, I consider the plaintiff to have achieved substantial success on this matter in dispute.

- d) Lastly, the defendants successfully opposed the plaintiff's claim for punitive damages. I accepted the defendants' submission that their failings could not properly be characterized as "oppressive" or "high-handed", and therefore did not meet the requisite threshold for such an extraordinary remedy.

[24] As with the issues of significant importance, success on the issues of moderate weight was also divided. Neither side can be said to have achieved success of 75 percent or greater.

[25] That leaves two matters in dispute of more limited weight or importance: a) the alleged failure to obtain proper insurance for the strata corporation; and b) the claim for restitution for unjust enrichment. I agree with the plaintiff that the insurance issue, in particular, was one of more limited importance viewed in context with the other matters in dispute. It was advanced more as an attempt to proactively obtain indemnification against a possible future claim that may never materialize. With respect to the claim for restitution for unjust enrichment, I considered that claim to have been advanced "in the alternative", in the event the plaintiff was unsuccessful in obtaining other remedies for the alleged failings of the defendants. I accept that

claim was in the nature of a “different approach[...] to achieve the same result” (*Cohen v. Cohen*, (1995) 15 R.F.L. (4th) 84 at para. 4, 1995 CanLII 8940 (B.C.C.A.)), and thus is, at best, a matter of lesser importance. While the plaintiff did not succeed on either of the two remaining matters in dispute, in my view, they were largely ancillary to the other matters and their outcomes are not sufficient to tip the balance one way or the other.

[26] Taking a step back from the minutiae, I do not accept the defendants’ submissions that their positions on the merits were “completely vindicated” or that they were substantially successful because liability was only found where they had already admitted it. While the defendants did admit certain failings, those admissions were primarily, if not exclusively, in relation to the alleged deficiencies of the first AGM. That was only one aspect of the plaintiff’s claim. The defendants steadfastly maintained their compliance with all of their statutory obligations; I did not find that to be the case, and I made orders and declarations accordingly. As articulated at para. 193 of the *Reasons*, each side advanced positions I found to have some merit. This is confirmed by my above analysis.

[27] I also reject the defendants’ suggestion that they must be considered to have achieved substantial success because the Court awarded far less to the plaintiff than the amounts claimed. In *Loft v. Nat*, 2014 BCCA 108, the Court of Appeal confirmed that the appellant was still the successful party despite having obtained a damage award far lower than that claimed: “The fact that [a party] obtain[s] a judgment in an amount less than the amount sought is not, by itself, a proper reason for depriving [the party] of costs [citations omitted]” (at para. 47; see also *Stearman* at para. 61). In *Wallace*, Branch J. confirmed that substantial success is not determined by “comparing dollar amounts”; rather, it is determined by evaluating success on the issues of substance (at para. 16). I agree with the plaintiff that an arithmetic comparison of amounts claimed to amounts obtained is not the appropriate measure of substantial success.

[28] Instead, the matters in dispute are to be considered globally and in light of their weight or importance and the parties' relative success or failure. Assessed in broad terms, as the case law requires, I am unable to conclude that either side achieved substantial success, in the sense of success of approximately 75 percent or more on the issues of substance. This is not a case where there can be said to have been one or two primary issues in relation to which one side clearly won or lost. On the contrary, as the above analysis confirms, there were multiple issues of substance. Viewed holistically, but without descending into a "meticulous mathematical examination and assign[ing] a percentage to each matter" (*Fotheringham* at para. 45), I find success on the matters in dispute to have been fairly evenly divided between the two sides.

Issue 2: Appropriate scale of costs

[29] Given my conclusion that neither the plaintiff nor the defendants were "substantially successful" on a global consideration of the matters in dispute and in light of their relative importance, it is not necessary for me to decide the appropriate scale of costs to award, nor whether there are unusual circumstances that would justify an award of uplifted costs above any fixed scale chosen by the Court. I therefore decline to address those issues.

Conclusion and costs order

[30] Neither party was substantially successful on the summary trial. Instead, this was a case where success was divided. Further, given both the nature of the issues at play and how those issues were ultimately resolved, I do not find this to be an appropriate case in which to award a portion of costs to one side as the "more successful party" on issues of greater importance. Accordingly, I find the appropriate order is for each side to bear their own costs. This was my preliminary view and after careful consideration of the parties' further costs submissions and the applicable legal principles, it remains my view. I therefore order each side to bear their own costs, including costs associated with these further submissions.

[31] As a result of this conclusion, there is no need to revisit my earlier conclusion regarding the May 8, 2024 order of Associate Judge Scarth that costs of the application before her would be payable as costs in the cause. The present decision means each side also remains responsible for its own costs of that application.

[32] I thank counsel for their concise and helpful submissions with respect to these further matters.

“K. Wolfe J.”