No. S-224444
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., 1985 c. C-36, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CANADIAN DEHUA INTERNATIONAL MINES GROUP INC., WAPITI COKING COAL MINES CORP. AND CANADIAN BULLMOOSE MINES CO., LTD.

PETITIONERS

WEST MOBERLY BOOK OF AUTHORITIES
13 Jan. 2025

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Place: Vancouver
Time Estimate: 2 day
To be heard before: Justice Walker

INDEX

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Animal Welfare International Inc. v. W3 International Media Ltd.,* 2016 BCCA 372

Date: 20160916
Docket: CA42294; CA43142

Docket: CA42294

Between:

Animal Welfare International Inc.

Respondent
(Plaintiff)

And

W3 International Media Ltd.

Appellant
(Defendant/Plaintiff by Counterclaim)
(Defendant by Counterclaim)

And

**Animal Welfare International Inc.,
Natale Mark Perissinotto, Steven Perissinotto,
Global Dispatch Services Pty. Ltd.,
Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd.,
Ani Welf Int Pty. Ltd., and Pavillion International Ltd.**

Respondents
(Defendants by Counterclaim)

And

**Pet Supplies (U.S.A.) Inc. and
Pavillion International Ltd.**

Respondents
(Plaintiffs by Counterclaim)

- and -

Docket: CA43142

Between:

Animal Welfare International Inc.

Respondent
(Plaintiff)

And

W3 International Media Ltd.

Respondent
(Defendant/Plaintiff by Counterclaim)
(Defendant by Counterclaim)

And

Animal Welfare International Inc., Natale Mark Perissinotto, Steven Perissinotto, Global Dispatch Services Pty. Ltd., Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd., Ani Welf Int Pty. Ltd., and Pavillion International Ltd.

Respondents
(Defendants by Counterclaim)

And

Pet Supplies (U.S.A.) Inc. and Pavillion International Ltd.

Respondents
(Plaintiffs by Counterclaim)

And

Myfanwy Wong

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Garson
The Honourable Mr. Justice Savage

On appeal from: Orders of the Supreme Court of British Columbia, dated October 1, 2014 and September 3, 2015 (*Animal Welfare International Inc. v. W3 International Media Ltd.*, 2014 BCSC 1839 and 2015 BCSC 1580, Vancouver Docket S093691).

Counsel for the Appellant (CA42294), W3 International Media Ltd.: M. G. Armstrong, Q.C.

Counsel for the Appellant (CA43142), Myfanwy Wong: S. G. Cordell

Counsel for the Respondents Animal Welfare International Inc., Natale Mark Perissinotto, Steven Perissinotto, Global Dispatch Services Pty. Ltd., Pet Supplies (U.S.A.) Inc., VetShopAustralia Pty. Ltd., Ani Welf Int Pty. Ltd., and Pavillion International Ltd.:	R. A. Millar
Place and Date of Hearing:	Vancouver, British Columbia April 14 and 15, 2016
Place and Date of Judgment:	Vancouver, British Columbia September 16, 2016

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Garson
The Honourable Mr. Justice Savage

Summary:

Appeal from dismissal of a counterclaim alleging that Animal Welfare International Inc. ("AWI") dishonestly and in breach of contract secretly imposed a markup on goods supplied to W3 International Ltd. ("W3") for online retail sales in a joint venture. The contract provided for equal division of profits; W3 alleged that the markup resulted in a distortion of the profit sharing to 80/20 rather than 50/50, and damages of US$1.4 million were claimed. W3 argued that the trial judge erroneously interpreted "wholesale cost" to mean the cost AWI determined it to be, rather than the actual cost from suppliers, and the error led to the refusal of the counterclaim. W3 and its principal, Myfanwy Wong, appeal from an award of special costs against W3, to which Myfanwy Wong was made jointly and severally liable. The costs are estimated at $650,000. Held: the appeal on the counterclaim is dismissed. The trial judge rejected the expert evidence presented by W3 in proof of the markup for cogent reasons and her view of the evidence must be given deference. The issue of contract interpretation did not affect the result. The award of special costs against W3 was not reasonable and an order of ordinary costs was substituted. It follows that the joint and several liability of Myfanwy Wong must fall. In addition, the award of costs against a non-party was contrary to principle and precedent.

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This appeal addresses two problems: the interpretation and performance of a contract and the award of special costs against W3 International Media Ltd. ("W3") and its principal, Myfanwy Wong.

[2] In a profit sharing agreement, Animal Welfare International Inc. ("AWI") was to be reimbursed for the wholesale cost of goods and for their packaging and shipping before splitting the profit equally with W3 on the retail sale of veterinary supplies. W3's counterclaim alleged that AWI put a secret markup on the cost of goods and shipping which wrongly distorted the profit distribution from the agreed 50/50 split to 80/20 in AWI's favour. The trial judge dismissed the counterclaim on an interpretation of the reimbursement clause that "wholesale cost" in the agreement meant what AWI represented it to be. The trial judge rejected W3's expert evidence offered in proof of the alleged overcharge affecting W3's share by approximately US $1.4 million.

[3] The trial judge found that W3's principal, Myfanwy Wong, engaged in reprehensible pre-litigation and litigation misconduct and made her jointly and severally liable for a special costs award against W3. Those costs are estimated to be in the neighbourhood of $650,000.

[4] W3's central argument on the liability appeal (CA42294) is that the trial judge's interpretation amounted to a commercial absurdity. AWI responds that it is defensible on the evidence of the surrounding circumstances. Ms. Wong contends in the costs appeal (CA43142) that the costs award against her personally is contrary to legal principle and based on a misapprehension of the evidence. AWI's position is that the award conforms to the law and is justified by the evidence.

[5] In the reasons that follow, I would dismiss the appeal on the counterclaim, but I would set aside the order of special costs against W3 and Myfanwy Wong.

Background

[6] In 2005, AWI and W3 began a joint venture for the sale and distribution of animal health products in North America. AWI had the products and W3, the capacity to market and sell the products online. They were to divide the profits from retail sales equally after deducting certain expenses from gross revenue.

[7] AWI was incorporated in the British Virgin Islands for this venture and formed part of a family of companies based in Australia under the control of the brothers Natale Mark Perissinotto, a veterinarian, and Steven Perissinotto, a solicitor, which included Global Dispatch Services Pty. Ltd. and VetShopAustralia Pty. Ltd. This group did business in Australia under the name of VetShop.

[8] W3 was a Vancouver company with proprietary software designed for online shopping. Its principal was Myfanwy Wong. W3's role in the venture was to operate a website to be known as CanadaVet.com ("CanadaVet"), on the retail end, by advertising the products, taking orders, receiving payments and distributing the funds. Orders were passed on to VetShop which shipped the product from its warehouse in Australia to the customer in North America. The website went live in August 2005 pursuant to this arrangement and a more formalized written agreement entered into on 12 September 2006.

[9] A useful description of the mechanics of this enterprise can be found in an expert report prepared by Lorna Goertz, CGA, of Wolrige Mahon dated 23 November 2012 (the Goertz report):

> 5.04 Pursuant to the Agreement, VetShop was responsible for identification of the best products to sell, product procurement, warehousing, packaging, postage, shipping, order management, customer service, veterinary advice, marketing and promotions support and funding of the agreed start up costs. The Agreement stated that products were to be procured on the best terms/prices and cost was to be reimbursed at VetShop's cost without mark-up.
>
> 5.05 W3 was responsible for supplying W3's proprietary software, the initial design work and customization of the application for CanadaVet, ongoing design work, customization and updates for CanadaVet, creating a client base using its marketing expertise, provision of servers, managing the domain name, email addresses and mailboxes,

> setup and maintenance of e-commerce merchant credit card accounts and provision of online processing and maintenance of a US dollar bank account for depositing CanadaVet funds.
>
> 5.06 VetShop supplied and shipped products for various online animal health product websites, including VetShopAustralia.com.au, VetShopOnline.com, CanadaVet.com and CanadaVetDirect.com during the period from August 2005 through April 2009….
>
> 5.07 Customers purchasing pet products from CanadaVet either visited its website or called its call centre and selected products to purchase. The sales were made in US dollars. The customer's information and transaction details were captured on the servers maintained by W3, which automatically generated an order form. That order form was downloaded by VetShop in Australia. VetShop filled the order from the inventory in its warehouse and arranged for it to be shipped to the customer. VetShop was entitled to be reimbursed at wholesale cost for the products and at cost for shipping and packaging costs. For the most part, products, shipping and packaging were purchased using Australian dollars.

[10] A crucial fact in this process is that VetShop determined and reported the wholesale price and shipping costs to W3 through the CanadaVet database from time to time, and reimbursement was calculated on the basis of those figures:

> 5.08 VetShop advised W3 of the costs of the products for which it was to be reimbursed by entering or causing W3 to enter cost amounts into the CanadaVet database and stated that the cost information in that database was maintained in US dollars. VetShop periodically advised W3 of the shipping and packaging costs per order. W3 calculated the amount to be paid to VetShop based on the volume of filled orders for the period. For the period October 2008 through April 2009, W3 calculated the shipping and packaging cost reimbursement at US$ 4.70 per shipment rather than at the US$ 6.25 per shipment rate provided by VetShop. Amounts owing to VetShop for products, shipping and packaging were remitted to VetShop from the US$ account containing the proceeds of the sales.
>
> * * *
>
> 7.01 VetShop advised W3 of the costs of the products for which it was to be reimbursed by entering or causing W3 to enter cost amounts in US dollars into the CanadaVet database. VetShop had access to the database for this purpose and was able to update the cost information whenever it chose to do this. During the period of the Agreement, August 2005 through April 2009, the total product costs were $US 11,335,650, based on the prices that VetShop provided for the database.

[11] The Goertz report found that there was a significant markup in both wholesale and shipping costs. It was Mark Perissinotto who calculated the price list. The explanation at trial of his approach to the calculation will be examined after the relevant parts of the written agreement are set out.

[12] Under clause 1 of the agreement, which describes the respective responsibilities of the parties, those relating to product procurement, and packaging and shipping are:

> 1.1 Responsibilities of VetShop
>
> VetShop will be responsible for the following (at its own cost except as provided):
>
> …
>
> (b) Procurement of product - best terms/prices, number of sources/purchasing interstate to ensure continuity of supply, packaging materials (cost of product is an Expense as set out below and is to be reimbursed at wholesale cost).
>
> …
>
> (d) Packaging of orders - downloading of orders, appropriate packaging, comply with relevant postal & customs requirements, inserting of promotional materials, appropriately trained staff (Cost of packaging and postage/shipping of orders is an Expense as set out below).
>
> (e) Posting/Shipping of goods - arrange dispatching of orders, most appropriate/cost effective methods (Cost of packaging and postage/shipping of orders is an Expense as set out below).
>
> [Emphasis added.]

Profits are determined according to the following:

> 2.1 How Profit is Shared
>
> Profits of CanadaVet will be shared 50% to W3 and 50% to VetShop for the term of this agreement as set out below.
>
> 2.2 How Profit is Calculated
>
> For the purpose of the profit share:
>
> (a) “Profits” will be calculated by deducting from the “Revenue” received from the sale of products on CanadaVet the “Expenses” of CanadaVet.
>
> (b) “Revenue” is the actual amount received from customers from the sale of products through the CanadaVet website (and, if a call centre is established, through the call centre to CanadaVet customers). Revenue includes any amounts received on account of postage and handling and insurance.

(c) "Expenses" are:

1. …
2. The wholesale cost of the products;
3. The cost of postage/shipping, packaging and insurance of orders;

… [various other operating costs incurred by both sides are listed]

Expenses does not include the costs associated with the items listed in clause 1.1 or 1.2 above except to the extent the parties have expressly agreed that such costs will be reimbursed and treated as Expenses….

2.3 Incurring Expenses

No party can incur an Expense without the prior approval of both parties.

Where a party incurs an approved Expense, it will be reimbursed before Profit is calculated.

[Emphasis added.]

[13] Steven Perissinotto agreed in cross-examination there was to be no markup on the wholesale cost:

Q Mr. Perissinotto, is it correct that the profit sharing arrangement between AWI and W3 calls for product to be purchased from wholesalers and then shipped to the AWI's customers without any mark-up, a complete flow-through without mark-up?
A I believe that's a correct characterization of the agreement, My Lady.

[14] How then did AWI arrive at the wholesale price list sent to the CanadaVet database? This is Mark Perissinotto's explanation excerpted from his testimony in chief:

Q And did you develop a cost of goods list for VSO.com?
A Yes, I did.
Q Can you describe to the Court as fully as you can what was involved in that process and what was created?
A I would determine a cost of goods price in U.S. dollars to upload into the back end [the administration side of the website] so that I could then determine the appropriate retail price, and then I knew what the margin was, the difference between the retail price and the U.S. dollar price. But because we were obtaining our product from Australia and because we were buying product from a number of different suppliers, rather than constantly change and up[date] that, I would first develop a price list and determine an appropriate Australian dollar price, taking into a number of different factors -- taking into account that the different suppliers were supplying to us at different prices and different amounts of product. So I'd develop an Australian dollar price and convert that to a U.S. dollar price. Because when we placed that price into the system and I wasn't prepared to be constantly, you know, changing or up[dat]ing that price, I would factor in a conversion

> rate that I felt would be robust enough to go forward to take into account variances in exchange rates that are constantly changing. And from that U.S. dollar price, I'd determine a retail price with a fixed mark up, and I would end up with two columns.

In cross-examination, he said:

> Q And you didn't write down at the time what formula you adopted for arriving at this price list, did you.
> A There was no formula, My Lady, except how I explained why -- my method of doing the calculation.
> Q But you didn't document that in any way, did you.
> A No, there's no documentation of any formula or methodology.
> Q Did you create some sort of a document or methodology or formula at the time you did the price list?
> A The methodology was a methodology that I'd used previously. It was -- the exercise that I did in my mind, I took into account the same factors in coming up with this price list, but, My Lady, there was no fixed formula that I used.
> Q Did -- did you have a piece of paper in front of you when you were doing it, or a computer screen so you could do the calculations; to record the calculations you did.
> A Yes, I -- I -- I had my invoices laid out on my -- on my desk with my pad of paper and my computer screen in front of me with the price list. I'd go down and I'd write a price factored in to account the different factors, and then I put that into a spreadsheet and did the other calculations from that.
> Q So the spreadsheet would show the calculations you had done and how you arrived at the prices in the end.
> A Most of the calculations on a per item -- sorry -- a per item by per item basis was from the -- having a look at the different invoices and price lists and making assessment of where I thought I could get that product from, and then I'd write that figure down. So -- so the calculation of that on an individual basis was done in my head.

[15] What emerges from his evidence is that he purported to apply a kind of averaging among different suppliers, for different amounts at different times, and hedged against price increases and currency fluctuations. W3 argues that a genuine averaging process could not have produced differentials, on average, of 21% over the costs represented by supplier invoices.

[16] By late 2008, the relationship had become complicated with other ventures VetShop started in Canada, some service problems developed on W3's end, and W3 delayed payments to AWI. W3 misapplied CanadaVet funds to pay for amounts owed by VetShop for W3's work on other VetShop ventures; they were repaid but it

nevertheless influenced the judge's decision on special costs. On 30 April 2009, AWI issued notice of termination of the agreement. It filed a claim in May 2009 and after trial obtained judgment for the following items (in US dollars):

Accounting to April 2009	$251,809.79
Wrongful retention of customer list	$20,000.00
Lost Profits	$236,666.00
Breach of Copyright	$20,000.00

[17] The trial judge found that W3 was owed $8,048.38 for amounts owing on invoices.

[18] Special costs were awarded against both W3 and Myfanwy Wong. The trial judge found that W3 did not present a proper evidentiary foundation to advance allegations of fraud and conspiracy against the principals of AWI; the real claim was one of breach of contract. The claims of dishonesty prolonged the trial.

[19] The trial judge found that AWI was entitled to costs jointly and severally against W3 and Myfanwy Wong personally. The judge's reasons for assessing personal liability include her diverting funds in breach of trust, her role in W3 as the mind and will of the company, and carrying the burden of the fraud and conspiracy allegations through her testimony, which was rejected.

Issues

[20] The issues to be decided are:

1. Did the trial judge err regarding the interpretation of the agreement?
2. Were the representations of wholesale and shipping costs false or in breach of contract?
3. If the answer to question 2 is "yes", what are the damages that flow therefrom?
4. Were the awards of special costs unreasonable?

Discussion

Contract Interpretation

[21] At trial, W3 argued that the agreement limited AWI's reimbursement for actual costs of acquisition and shipping. The trial judge took that position as requiring justification of each expense on an item-by-item basis and rejected it as unrealistic and incompatible with the way VetShop conducted its business. Instead, the trial judge chose to adopt the version of events advocated by AWI, namely, the agreement meant that the wholesale and shipping costs were those represented by AWI on its price list.

[22] The key passage from the trial judgment is as follows:

> [383] AWI submits that the contract must be construed as a whole. AWI notes that, pursuant to clause 1.3(c), product range and pricing are shared decisions of the parties and that, pursuant to clause 2.3, where a party incurs an approved expense, it will be reimbursed before profit is calculated. AWI submits that pursuant to its responsibilities as set out in clause 1.1, Mark prepared a cost of goods list that was supplied to W3 for review and approval pursuant to clause 1.3. W3 signified its approval by uploading the list into the database, where it served as the wholesale cost of goods for which AWI was entitled to be reimbursed as an expense pursuant to clause 2.3.
>
> [384] AWI submits that therefore the meaning of "the wholesale cost of goods" was the price charged to the project by AWI as the cost of goods. AWI submits that this meaning is consistent with the definition of wholesale cost provided by *Black's Law Dictionary*.
>
> [385] I have concluded that the proper construction of the Profit Sharing Agreement is as submitted by AWI. In my view, that is the construction that is consistent with the language of the agreement read as a whole. It is also consistent with the surrounding circumstances.
>
> [386] W3 submits that it would never have agreed to such an open-ended system. However, I agree with the submission of AWI that W3's focus from the outset was on the markup between the wholesale cost of goods and the retail price. In addition, Ms. Wong made no reference to what she asserts is the true construction in any of the documents addressing contractual terms.
>
> [Emphasis added.]

[23] W3 alleges the following error in its factum:

> A. The trial judge erred in interpreting the Profit Sharing Agreement ("PSA"), in a commercially unreasonable manner wholly inconsistent with its unambiguous wording and the parties' objective intentions. This interpretation was the basis for dismissal of the PSA-based counterclaims

> and the conclusions that W3 had breached the PSA by underpaying AWI and AWI validly terminated the PSA.

[24] As the trial judge's reasons indicate, W3 objected to the open-endedness of the interpretation of wholesale cost. It was said to enable AWI to charge whatever it chose regardless of the actual cost of the goods. For the trial judge to find that was the common intention of the parties was, argues W3, commercially unreasonable.

[25] I do not accept that the counterclaim failed because of the interpretation the trial judge placed on "wholesale cost". W3's position on appeal accepted that AWI could estimate the cost of goods (rather than attempt a precise costing according to specific invoices) and that so long as the estimation reasonably corresponded to the product and shipping costs actually incurred, AWI was entitled to reimbursement on the basis of the estimation within the meaning of the contract. Both parties asserted that there was to be no markup. AWI could arrive at its product and shipping costs by a process of averaging, hedging and currency conversion but the figure must bear a reasonable relationship to the actual costs and they cannot amount to a markup. The trial judge accepted AWI's version of the contract on costs of goods as a "reasonable equivalent": see para. 9(d) of AWI's notice of claim.

[26] The problem for W3 in the counterclaim is not in the interpretation of the contract – it did not contemplate a markup – but whether AWI honestly and fairly represented its wholesale and shipping costs. W3 bore the burden of proof that AWI dishonestly, or in breach of the agreement, applied a markup and it failed to discharge the burden.

[27] I find it unnecessary to deal with the many arguments advanced by W3 on contract interpretation as it did not lead to the dismissal of the counterclaim.

False Misrepresentation and Breach of Contract

[28] Turning to the question of fraud and breach, the alleged error is framed by W3 in its factum in this way:

> B. The trial judge erred in imposing incorrect burdens and standards of proof on W3 and, in particular, failing to find that product acquisition and

> shipping costs represented to W3 were consistently and substantially overstated, and that the excess amounts paid to VetShop from CVet revenues, in purported reimbursement of expense under the PSA, were contrary to any entitlement of VetShop in contract, tort, and equity.

[29] W3 assembled a body of expert evidence from Hay & Watson, Chartered Accountants (CanadaVet's accountant), and from Wolrige Mahon, Chartered Accountants (the Goertz report), to estimate the markup on the costs of the products, packaging and shipping supplied by AWI.

[30] Hay & Watson analysed samples selected by W3 to determine whether a markup pattern could be discerned. It did not purport to look at the entire history of the transactions between the parties. That was the task of the Goertz report, which examined material for the period August 2005 through April 2009.

[31] Each of the reports compared supplier invoices provided by AWI with the cost of goods as presented on the CandaVet database. They also examined the shipping charges: Hay & Watson, selectively; Goertz, comprehensively. Both experts found that product and shipping costs were overstated significantly.

[32] The trial judge discussed the reports at length and gave a detailed explanation for her rejection of them. The trial judge found the Hay & Watson report unreliable because of its selective nature:

> [334] Hay & Watson conducted its analysis based upon a selection of products. The report does not identify which invoices were selected, who selected them or on what basis. Ms. Benbaruj [the author] states that the analysis is not scientific or statistical because the documentation is neither complete nor random.

[33] The trial judge questioned the use of the database emanating from W3, rather than the price list issued by AWI, as the source of the comparison between actual cost represented by supplier invoices and the cost of goods claimed by AWI for reimbursement.

[34] This was found to be a fatal defect in the Goertz report not only because of the risk of tampering by W3, but because of the way in which W3 extracted

information from the database for analysis by the expert. This is how the trial judge saw it [Ms. Huang did the extraction for W3]:

> [339] Further, neither Ms. Huang nor anyone else provided testimony or evidence that the Sales Reports included all relevant data required to be analyzed to determine the total sales and total cost of goods. Indeed, the Sales Reports produced do not correlate with the backend pharmacy administrator reports for CVT relied upon by the parties and Hay & Watson. For example, the Wolrige Mahon Expert Report shows a total cost of goods sold of $12,450,927.00, while the Sales Reports data shows a total cost of goods of $11,355,650.00, a discrepancy of 9.6%.
>
> [340] AWI submits that Ms. Wong's exercise in running reports, adding figures back into calculations, and estimating cut-off dates without a solid basis for doing so, which she described in her testimony, is a "self-serving attempt at information manipulation", and that it is hardly surprising that Ms. Wong, after adding back certain figures which she determined appropriate, came to figures which were in her view "close enough". AWI also notes that there are serious concerns regarding the chain of custody of these documents and whether they have been altered. The most concerning example of which is the metadata for these files, which states that they were last modified in September 2012, while earlier iterations of the files have a last modified date of October 2010. It appears, on its face, that these files have undergone some modification, the nature of which is impossible to determine.
>
> [341] Further, neither Ms. Benbaruj nor Ms. Goertz reviewed any part of the CVT database firsthand, electing instead to accept extracts provided by Ms. Wong.
>
> [342] As noted earlier, I admitted the Database Discs over objection. That is not to say however, that there is not a cloud of doubt with respect to the database. Responsibility for that cloud rests squarely at the feet of W3. The data in the database is susceptible to change and manipulation. After the termination, W3 retained the database. Despite the rules of court and orders of the court, W3 did not provide what is asserted to be a complete copy of the database to AWI until the eve of trial.

[35] The trial judge gave little weight to the expert evidence because of concerns over the integrity of the source data. She rejected W3's principal theory of liability:

> [352] With respect to the issue of the alleged "secret profit" related to goods, I am not able to conclude from the analysis that there was a difference between the actual wholesale cost of goods and the cost charged to the project.
>
> [353] W3 has not persuaded me that there was a "secret profit" at all, let alone of the magnitude alleged. In that regard, I note that reference was made in the evidence to instances in which the CVT cost price was in fact less than the "wholesale" invoice price. Mark's explanation was that this reflected the practice of purchasing from a number of sources and developing

> a notional price. It is certainly not consistent with the systematic marking up of cost alleged by W3.

[36] On the question of shipping costs, the trial judge found that both reports proceeded on incorrect assumptions regarding the average weight and size of packages, discounts, and reshipment costs of lost or damaged goods, all of which made the analyses unreliable.

[37] W3 argues that the trial judge arrived at her conclusions having misapprehended the evidence. None of the instances cited, which I regard as minor in significance, could affect the trial judge's broad conclusions about the defective proof of the overcharge. W3 says that AWI had access to the database and could have identified any inaccuracy, omission or manipulation, but it left the matter at the level of suspicion and the trial judge wrongly decided the case on that basis. To that submission, I repeat that the onus was on W3 to prove falsehood and default. I add that it is for the trial judge to find the facts on the weight that she assigns to the evidence. It is not for this Court to reweigh the evidence. W3 argues that even if there were flaws in the reports, the opinions revealed a consistent pattern of charges well above actual wholesale and shipping costs, and W3's case was made out.

[38] It was W3's choice to use its database rather than AWI's price list for analysis and they thereby ran the risk that its source material would be discredited. W3's primary witness was not believed. While it could be said that the expert reports raise a question about reimbursement for the cost of goods expenses, in the end the evidence had to satisfy the trial judge and it did not. Unless we were to retry the case, which we are not permitted to do, the result must stand.

Costs

[39] The trial judge found W3 engaged in reprehensible conduct deserving of special costs: pre-litigation, by a breach of trust in diverting CanadaVet funds; and, within the litigation, by its pursuit of allegations of fraud and dishonest behaviour, which failed. The trial judge made Myfanwy Wong jointly and severally liable because she found that the fraud was based on her testimony, which was not

accepted, and, as the principal of W3, she was in a position to know the fraud claim was groundless and thus was the perpetrator of W3's reprehensible conduct.

[40] With respect, the trial judge was, in my view, clearly wrong in the award of special costs against W3:

1. the breach of trust was given exaggerated importance; and
2. the fraud allegations were not without some foundation.

[41] In my judgment, the trial judge was wrong in assessing special costs against Myfanwy Wong personally because:

1. her conduct did not rise to the level requiring the court's rebuke; and
2. the principal allegation of fraud, that AWI's expenses were overstated, depended not on her testimony but on the analysis of experts.

[42] The breach of trust came about in this way. VetShop created a new venture in Canada known as CanadaVetDirect ("CVD") and involved Ms. Wong in some of its operations although she held no ownership interest in CVD. At one point, Steven Perissinotto contacted Ms. Wong and said that his credit card was "maxed out" and asked her if she could help with CVD's advertising expenses. She diverted some CanadaVet funds, approximately $149,000, for this purpose. As this was at the time the relationship was starting to break down, the diversion of funds was questioned, along with a general concern about W3's bookkeeping. W3 engaged Hay & Watson to perform a reconciliation. This generated a report in the nature of an accounting between the parties and which in particular pointed out the improper transfer of funds. Ms. Wong acknowledged that it was wrong for her to divert the funds and she borrowed US$65,000 from her parents to pay VetShop for its share.

[43] While the impugned transaction is correctly understood as a breach of trust, it carries none of the moral opprobrium often associated with the phrase:

1. the diversion was to assist another VetShop entity;
2. it was in response to an entreaty from one of the VetShop principals;

3. there was no stealth or self-dealing – it was an error of judgment;

4. Ms. Wong admitted the error and made substantial restitution.

This does not amount to the kind of dishonest conduct requiring the condemnation of the court.

[44] The fraud claim had two aspects. The first was an allegation that AWI misrepresented its intentions in negotiating the agreement, that is, it would charge actual costs for reimbursement when it actually intended to apply a markup. The second aspect, and for me the real issue of substance in the case, is that AWI, through VetShop, misrepresented the expenses through the life of the agreement. The first aspect went to the surrounding circumstances at the time the agreement was formed and, on this score, the trial judge accepted the Perissinottos' testimony where it differed from Ms. Wong's testimony. So W3 lost the claim that AWI had to justify each expense on an item-by-item basis. But even if it had won the point, the question remained whether AWI actually overstated its expenses. If it did not, then whether the contract stipulated actual item-by-item expenses or a rough but fair estimation did not matter; W3 could demonstrate no measureable loss either way.

[45] The case turned on the claim of overstatement. Here, W3's case was on the expert evidence and did not depend on Ms. Wong's testimony.

[46] Special costs are an appropriate rebuke to allegations of fraud that are baseless, motivated by spite, vindictiveness, or other forms of ill-will. This is not such a case. At a certain point in Hay & Watson's work on the reconciliation, they requested invoice backup from VetShop, and met with resistance. This, and W3's concern about foreign exchange conversions by AWI, led to a suspicion on W3's part that AWI's claimed expenses may not be right. As the dispute deepened, W3 asked Hay & Watson to analyse samples of the transactions to determine whether there was any markup in the cost of goods and shipping. Hay & Watson reported there was. Only then did W3 advance the fraud claim – it engaged Wolrige Mahon to perform a comprehensive analysis. The Goertz report confirmed the Hay & Watson opinion that there was indeed a pattern of markup.

[47] The implications of fraud from the reports are plain: it was common ground there was to be no markup, but the magnitude of the overstatements and the consistency of the pattern go well beyond carelessness; it had to be deliberate and involve the Perissinottos and their corporate family, doing business under the VetShop name.

[48] The trial judge said that W3 prolonged the litigation by persisting in the fraud claim when the case was really one of breach of contract. I disagree. Had the expert evidence been accepted, the overstatements would have vastly exceeded even the flexible interpretation the trial judge gave to the contract, and the evidence would have established that AWI was dishonest in its performance of the contract.

[49] In *Cimolai v. Hall*, 2007 BCCA 225 at para. 68, the Court relied on the decision of Mr. Justice Joyce in *Hung v. Gardiner*, 2003 BCSC 285:

> [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations (see *Native Citizens Fisheries et al. v. James Walkus*, (July 10, 2002) 2002 BCSC 1030).

[50] I refer also to *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where Mr. Justice Walker canvassed the law on this point:

> [16] Unproven allegations of fraud and dishonesty can amount to reprehensible conduct, particularly where they are made against a professional: *Bronson v. Hewitt*, 2011 BCSC 102 at para. 118; *Startup v. Blake*, 2001 BCSC 8 at para. 112. Where the reputation of a professional is "falsely assailed, the court's reproof should be felt": *Bronson* at para. 118; *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2009 BCSC 1049; *SeaQuest (1993) Adventurecraft Inc. v. Gray Line of Victoria Ltd.*, 2008 BCSC 1219.
>
> [17] Allegations of fraud or conspiracy must be based on something more than belief and speculation: *McLean* [*McLean v. Gonzalez-Calvo*, 2007 BCSC 648] at para. 24; *Pocuca v. Gutiu*, 2007 BCSC 490; *Kouwenhoven Estate v. Kouwenhoven*, 2001 BCSC 1402.

> [18] At the same time, an unproven fraud claim does not always result in an order for special costs because special costs should not be used to "chill" parties in proper circumstances from pursuing perceived wrongful conduct. Special costs are awarded when "examination of all circumstances show the allegations of fraud were unwarranted and completely unfounded": *Chaplin v. Sun Life Assurance Company of Canada*, 2004 BCSC 116 at paras. 25-28 and *Young v. Young* (1990), 50 B.C.L.R. (2d) 1 at paras. 63-64 (C.A.).
>
> [19] In *Chaplin*, Mr. Justice R. Holmes relied on *Ip v. I.C.B.C.* (1994), 89 B.C.L.R. (2d) 251 (S.C.) and, at para. 26, wrote that a "litigant making [claims of dishonesty, immorality, or fraud] must do so only after careful consideration and on the basis of the existence of a *prima facie* case. Special costs are available as chastisement against those who ignore the pre-requisite foundation to serious allegations of fraud and dishonesty."
>
> [Emphasis added.]

[51] The expert reports supported an arguable but, in the end, not a winning case of fraud. The reports were prepared by qualified professionals on a substantial body of commercial records. They were not found to be trumped up or bogus opinions, neither were they found to be instruments of malice or mere speculation. The trial judge was entitled to act on her misgivings about the reports and found them unpersuasive after a full trial, but that is a different matter from the question whether they formed a reasonable basis for a claim.

[52] In the result, I would substitute an order of ordinary costs against W3.

Special Costs – Myfanwy Wong

[53] I would set aside the special costs order against Myfanwy Wong for the same reasons given for quashing the special costs order against W3. The order against her was based on the proposition that as the directing mind of W3 and its chief witness at trial, she was responsible for W3's reprehensible behaviour in committing the breach of trust and pressing the fraud claim. Since I have found that neither element attracts the sanction of the court in relation to W3, it follows that the order against her must fail.

[54] The order also reaches well past the authorities which govern punishing non-parties with special costs.

[55] In *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, Hall J.A., for the Court, relied at para. 24 on comments in the case of *Kerr & Richard Sports Inc. v. Fulton* (1992), 10 C.P.C. (3d) 382 (Alta. Q.B.), quoting from the judgment of Veit J. (as she then was) at 386:

> The court has a broad discretion in imposing costs. A court could, in exceptional circumstances, order costs against a person who is not a litigant. Of such orders, some are made against lawyers; that is an exercise of the court's jurisdiction over officers of the court. Some such orders are made against the real litigants, even though such persons are not named parties; courts of equity recognized a court's jurisdiction over those persons who put up "men of straw". The jurisdiction, as broad as it is, does not extend to making orders for costs against principals of incorporated companies if the principals have not done something equivalent to fraud. … In my view, the result is that orders for costs may not be made against the principals of corporations if the only evidence is that those principals directed the operations of the corporation. Our system recognizes the legitimacy of corporations as legal entities; one legitimate purpose of such vehicles is to shield its principals from personal liability.

[56] The record does not support that, as the principal of W3, Ms. Wong did anything more than direct its actions. The trial judge did not find that she practised a fraud upon the court or even that she lied in her evidence; the trial judge was content to leave it in her reasons for judgment on the substantive issues that she found the Perissinottos more credible.

[57] *Anchorage* was considered in *Perez v. Galambos*, 2008 BCCA 382, which succinctly sets out the applicable test:

> [17] The court does have jurisdiction to order costs against a non-party: *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230 (C.A.). However, an award of costs against a non-party is unusual and exceptional, and should only be made in "special circumstances": *Anchorage Management Services Ltd. v. 465404 B.C. Inc.*, 1999 BCCA 771, 72 B.C.L.R. (3d) 389, at para. 21.
>
> [18] "Special circumstances" have been held to include situations where the non-party has engaged in fraudulent conduct, an abuse of process, or gross misconduct in the commencement and/or conduct of the litigation, or when the non-party is the "real litigant": *Anchorage*.

[58] In my judgment, the trial judge wrongly exercised her discretion in awarding any costs against Myfanwy Wong. The *Perez* test was not met in this case. There were no special circumstances that warranted a costs order against a non-party.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Savage"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Renuka Properties Inc.,* 2015 BCSC 2058

Date: 20151006
Docket: H150429
Registry: Vancouver

Between:

Bank of Montreal

Petitioner

And

Renuka Properties Inc., Whitehall Properties Ltd., Empress Management (2012) Ltd., The Chemist Holdings Ltd., Abbott (Renuka) Pharmacy Ltd., Costless Pharmacy Ltd., The Chemist #8 Pharmacy Ltd., Whalley Pharmacy Ltd., The Chemist #9 Pharmacy Ltd., 0998707 B.C. Ltd., 0926003 B.C. Ltd., Kamsan Holdings Ltd., Renuka Holdings Inc., Nikhil Kantilal Buhecha, Kamal Sandhu also known as Kamaldeep Kaur Sandhu, Sardis Pharmacy Ltd., Raven Pharmacy Ltd., Fusion Pharmacy Ltd., William Ard, 1210 Cameron Management Ltd., Saeid Shahram, Nakisa Holdings Ltd., Element Financial Corporation and Kohl & Frisch Limited

Respondents

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	K.A. Robertson S. Nelligan
Counsel for the Bidder Mehdi Mirzaei:	M. Sennott R.R. Veerapen
Place and Date of Hearing:	Vancouver, B.C. September 29 and October 2, 2015
Place and Date of Judgment:	New Westminster, B.C. October 6, 2015

[1] **THE COURT:** I am about to give oral reasons in this matter. As with all oral reasons, should a transcript be ordered I reserve the right to edit it and to include such things as case citations and full excerpts of some of the sources to which I will refer, but of course without changing the actual decision or any of the underlying reasoning.

I. Background

[2] This is an application by a bank for approval of a receivership sale of the assets of three of the respondent companies to a purchaser, Royal Med Pharmacy Ltd. At the initial hearing of the application other prospective purchasers came forward and urged the Court to allow them to submit bids at that time.

[3] By way of general background, the present proceedings involve both the foreclosures of two mortgages and the enforcement of security pursuant to general security agreements granted by 13 of the corporate respondents. The companies operated a number of pharmacies in the Greater Vancouver area.

[4] According to the receiver's report to the Court dated September 17, 2015, in June 2015 Pharmacare, the provincial prescription drug subsidy program, revoked the Pharmacare licences of certain of the companies which caused them to be unable to pay their obligations as they became due. At that point the petitioner Bank of Montreal, as secured lender, was owed about $10.3 million.

[5] On August 25, 2015, this Court granted an order appointing the Bowra Group Inc. as receiver of all the assets, undertakings and properties of The Chemist Holdings Ltd., Abbott (Renuka) Pharmacy Ltd. and The Chemist #9 Pharmacy Ltd. The order appears to reflect standard powers granted to the receiver and more particularly included the following powers:

> 2. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

> (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
>
> …
>
> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the other business, or cease to perform any contracts of the Debtor;
>
> (d) to engage consultants, appraisers, agents experts, auditors, accountants, managers, counsel and such otherpersons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including, without limitation, those conferred by this Order;
>
> …
>
> (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
>
> (i) without the approval of this Court in respect of any transaction not exceeding $10,000.00, provided that the aggregate consideration for all such transactions does not exceed $30,000.00; and
>
> (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,
>
> and in each such case notice under Section 59(10) of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359 shall not be required;
>
> (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.
>
> …

[6] Summarizing the order briefly for today's purposes, the order granted the receiver the power to take possession of property, to preserve the property, to manage the businesses, to continue the businesses, to market any or all of the

property, to sell any of the property -- with Court approval if over $10,000 -- and to apply for vesting orders.

[7] Following the making of the receivership order the receiver took possession of seven pharmacies. Although all employees were terminated it appears some were rehired because, as the Court was told, some pharmacies were required to maintain certain minimum operating hours due to regulatory requirements of the College of Pharmacists. Other locations, it appears, were closed entirely.

[8] Commencing August 25, 2015, the receiver marketed the sale of the assets. Those activities are set out in the receiver's report at paras. 14 to 20:

> SALES PROCESS
>
> 14. The Receiver prepared a Request for Offer to Purchase information package ("ROP") for the assets of the Pharmacies and commenced a sales process on August 25, 2015. A copy of the ROP is attached as Appendix B.
>
> 15. The ROP prepared by the Receiver provided prospective purchasers of the Pharmacies the following:
>
> - the nature of the business;
> - location of the pharmacies;
> - assets available for sale, including inventory, furniture and fixtures, goodwill and leasehold interests;
> - the form of purchase and sale agreement for the assets proposed by the Receiver; and
> - the deadline for the submission of offers, set at September 11, 2015.
>
> 16. The Receiver marketed the assets for sale for a three week period as the realizable value and goodwill of the Pharmacies decreased daily as confirmed by the owner of the Companies and prospective purchasers in the pharmacy industry.
>
> 17. The Receiver's sales process of the assets of the Pharmacies and results were as follows:
>
> - Advertised the ROP on the Receiver's website;
> - Advertised in the business section of the Vancouver Sun on August 26, 2015;
> - Advertised the ROP in the Insolvency Insider publication;
> - Discussions and correspondence with prospective purchasers who had been in discussions to purchase certain pharmacies from the owner prior to the Receivership;

- Discussions and correspondence with twenty-one potential purchasers;
- Eighteen parties signed Confidentiality Agreements and received the ROP;
- Seven parties entered into negotiations and conducted due diligence; and
- Four parties attended the locations and toured the pharmacies.
- Assisted potential purchasers as they conducted due diligence by answering enquiries, holding conference calls, attending meetings and facilitating tours.
- Four offers were presented to the Receiver by September 11, 2015. A summary of the offers is as follows:

Offeror	Offer ($000's)	Offer For
Royal Med Pharmacy Ltd.	1,025	All 7 locations
Offer# 2	850	All 7 locations
Offer# 3	802	Excludes Abbott (Renuka)
Offer# 4	322	Excludes Abbott (Renuka)

- All offers were subject to having the premise leasehold interests assigned.

18. The Receiver accepted the offer from Royal Med Pharmacy Ltd. ("Royal Med") which is a company controlled by the former Pharmacy Manager of the Companies. Their offer, which was dated August 28, 2015 and accepted by the Receiver on September 14, 2015, includes:

- $1.025 million for the seven pharmacies marketed by the Receiver;
- The assignment of all premise leases to Royal Med;
- Royal Med provided pharmacists to the Receiver during the sales process to assist with the proper control and possession of narcotic and prescription drugs, to transfer patient files and prescriptions to operating third party pharmacies, and to attend all site tours as required by the BC College of Pharmacists, and
- If Royal Med is the unsuccessful bidder, the Receiver will have to reimburse Royal Med for costs of approximately $8,000.

19. A copy of the Royal Med offer is attached as Appendix C.

> 20. The Receiver has had conversations with all landlords who have agreed to assign their respective leases to Royal Med after Court approval. A form of assignment agreement has been provided to them.

[9] It is the offer of Royal Med Pharmacy Ltd. that the bank seeks to have approved by the Court.

[10] At the hearing of the petitioner's application on September, 29, 2015, several other interested parties appeared and expressed the wish to address the Court. Counsel for Royal Med objected to the Court hearing from these persons on the basis that they lacked standing. However, counsel did not develop that argument. Nor did he offer any authorities for that proposition.

[11] The objection seems counter to the well-established insolvency practice of this Court and indeed counter to various authorities in other jurisdictions where other or later offerors have made representations to the Court. Royal Med's objection on the basis of standing was therefore dismissed.

[12] The Court heard from three parties interested in the sale:

(a) *Mr. Pavondeep S. Dhillon, who spoke on behalf of Mr. Pal Sahota*

[13] In addition to being an interested party Mr. Sahota is evidently also a subsequent charge-holder on one of the mortgaged properties. Mr. Dhillon indicated the process was too hasty and they had insufficient time to gather the necessary information to make a bid. He said Mr. Sahota was in the process of making a bid but was led by the receiver to believe that there would be a later opportunity to bring an offer to court. Mr. Dhillon also said the marketing of the assets was insufficient insofar as the sale was never advertised through the pharmacy association.

[14] After a dialogue with the bank's counsel and a review by her of the emails said to have left Mr. Sahota with the impression of a later bidding opportunity it emerged that the emails from the receiver having to do with the application for court approval were all dated after the bidding deadline had passed.

(b) *Mr. Vince Sara*

[15] Mr. Sara also asserted the process was too hasty. He said that licensing and business issues were not easy to sort out and there was not enough time to address these and other issues related to the sale. Mr. Sara noted that tours of the premises were conducted by the person who has turned out to be the winning bidder. This person was the former general manager of the debtor companies whom the receiver had retained to assist with the sale. Mr. Sara said that this person's inside knowledge of the operations gave him an unfair advantage over outside bidders, particularly in view of the short timeframe available to gather information relevant to the sale.

(c) *Mr. Serge Biln*

[16] Unlike the other two parties, Mr. Biln was a bidder. He explained that prior to his involvement in the pharmacy industry as an owner he had been a commercial banker at the vice-president level. He had submitted what he described as a "lowball offer" with the expectation that he would be able to submit a further offer at the court approval stage. He questioned the short time set for the sale process and said while the receiver may know business generally he does not know the pharmacy industry in particular, and the timeframe was too short given the complexities.

[17] He too said the current high bidder had an unfair advantage in that he was the previous general manager for the operation.

[18] Mr. Biln said the interest of the Court should be in maximizing the proceeds from the sale, and his submission was to the effect that the present process had not done that.

[19] The authorities indicate that later offers may be considered for the limited purpose of assessing whether the receiver's sale process has been sufficient to realize the value of the assets being sold. Here the receiver had refused to receive any offers submitted after the deadline, based on the rationale or goal of maintaining

the integrity of the sale process. While I do not question that otherwise laudable goal the refusal to even receive late offers left the Court without any information about what the amount of other bids might be.

[20] For that reason, at the hearing on September 29 I directed that any persons interested in submitting further bids should submit to the Court a form of bid, although not an actual bid, so as to test these waters. Two notional bids were received at the court hearing, accompanied by associated bank drafts for deposits. These were as follows: (1) a bid in the amount of $1,285,001; and (2) a bid in the amount of $1,499,000.

[21] The existing highest bid, that of Royal Med, is in the amount of $1,025,000, although counsel for the bank pointed out that Royal Med is by agreement paying rent and other costs in the interim, making the effective value of that bid $1,097,000 as of October 1, 2015.

[22] I turn to the submissions of counsel. Counsel for Royal Med emphasized that this receiver is very experienced. Because the receiver, in his judgment, felt goodwill was declining this meant the sale process could not be an extended one. Counsel said in these types of situations there are always purchasers who are not ready. The adequacy of the sale process must be evaluated at the time the process concluded, not today, and it is incorrect to compare an offer made today, made with the luxury of more time, with an offer made within the deadline, a time when there may be a comparative disadvantage in information available and consequently a greater risk discount.

[23] Counsel for Royal Med said that confidence in receivers' sales generally would be eroded if potential bidders can open up the process at the Court approval stage.

[24] Counsel for the bank reiterated the receiver's professional judgment that these were depreciating assets that called for a relatively short sale process. Despite the abbreviated timeframe, significant interest was generated and significant

bids were received. As was noted by Royal Med's counsel, counsel for the bank also observed that with the additional time available to the late-coming bidders, those parties are faced with less risk and so it was not fair to directly compare the Royal Med bid with potential later bids.

[25] This matter was set for judgment to be given on October 2, 2015. However, on that day counsel for Royal Med submitted two affidavits, one of which was from the principal of Royal Med, Mr. Mehdi Mirzaei, and the other from the owner of the subject pharmacies, Mr. Nikhil Buhecha. Mr. Buhecha said in his affidavit that when Pharmacare withdrew billing privileges from these pharmacies Mr. Buhecha contacted over 50 parties to see if they were interested in buying.

[26] Mr. Mirzaei confirmed that he was the former general manager for the pharmacy group whose assets are being sold. He said each of Mr. Sahota, Mr. Sara and Mr. Biln expressed interest in purchasing all or some of the pharmacies as early as June 2015. The cancellation of the Pharmacare billing privileges had been posted on the Pharmacare website and this in itself generated significant interest from potential purchasers.

[27] In the case of Mr. Sahota, Mr. Mirzaei said: (1) Mr. Sahota discussed with him the possibility of joining together to make a joint bid; (2) Mr. Sahota was aware of the receiver's bid deadline; and (3) Mr. Sahota met with Mr. Mirzaei prior to the bid deadline to review the financial statements for the subject pharmacies.

[28] In Mr. Sara's case, Mr. Mirzaei was introduced to Mr. Sara as a potential buyer in late July 2015, and he too proposed a partnership with Mr. Mirzaei. Mr. Mirzaei told Mr. Sara if no partnership could be agreed upon between the two of them then Mr. Mirzaei would likely bid on his own.

[29] As for Mr. Biln, prior to the receivership Mr. Biln expressed to Mr. Mirzaei an interest in purchasing one or two of the pharmacies and he made an offer on them, but there was no further contact after the receiver was appointed.

[30] That concludes my review of the proceedings thus far.

II. Discussion

[31] I begin with a summary of the legal principles that guide the Court in applications of this type. There are a number of general principles:

1. when considering the efforts of a receiver in obtaining offers for the purchase of property the Court must consider the following factors:

    (a) whether the receiver has made sufficient efforts to get the best price and has not acted improvidently;

    (b) the interests of all parties;

    (c) the efficacy and integrity of the process by which offers were obtained; and

    (d) whether there was unfairness in the sale process.

    Royal Bank of Canada v. Soundair Corp., [1991] 46 O.A.C. 321, 7 C.B.R. (3d) 1 at para. 16 [*Soundair*].

2. In considering whether the receiver has acted providently the Court should examine the conduct of the receiver in light of the information in the possession of the receiver when it agreed to accept the offer. The Court should be very cautious before deciding the receiver's conduct was improvident based on information that has come to light after the receiver made his or her decision: *Soundair*, at para 21.

3. there should be deference given to the receiver's judgment and his or her decision ought not to be set aside merely because a later and higher bid is made. This deference is appropriate because it allows for certainty and finality with receivership sales: *Cameron v. Bank of Nova Scotia* (1981) 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 313 (S.C.) at para. 36. I would add, however, that our Court of Appeal has suggested this deference is more of a factor where the difference in price is not significant and the later bid is, for example,

less well secured than the recommended one:. See *British Columbia v. Baron Enterprises Ltd.*, 2000 BCCA 317 at para. 40.

4. late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.

5. the primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

[32] That concludes my review of the general principles.

[33] I deal first with the sale process adopted by the receiver in this case. First of all, when measured at the time the sale process was established there seems nothing unreasonable in the receiver's conclusion that an abbreviated sale process was necessary given his judgment that goodwill was diminishing. However, this in itself does not end the examination of the matter.

[34] Although it was my initial impression that the receiver's efforts in generating market interest were not as extensive as they might have been, the affidavit of Mr. Buhecha persuades me that the general availability for sale of these pharmacies was well-publicized even before the receiver was appointed. More perhaps could have been done to specifically publicize the receiver's sale to this niche market, or if in fact those efforts were done, more should have been done to particularize them in

the receiver's report. I am, however, satisfied that the market was at least generally aware of the sale of these pharmacies.

[35] Two of the interested parties who addressed the Court spoke of their understanding that they would have a further opportunity to submit bids at the time of the court hearing to approve sale. I am satisfied that if these potential bidders had this understanding it was not as a result of anything the receiver said to them before the bidding deadline passed. There was nothing about the sale process or in any pre-deadline communication from the receiver that left them with that impression or would have caused them to regard the bid deadline as anything but final. I will, however, return to the sale process later.

[36] As to the interests of the parties it is of course in the interests of the secured creditor, any subsequent creditors, any guarantors of debt and ultimately the shareholders of the debtor companies to maximize the proceeds of sale. As to the position of those parties I was told by the bank's counsel that although the situation is complicated insofar as these assets form but one part of this insolvency file it appears the indebtedness to the bank may well be fully repaid once all assets have been realized. There is at least one subsequent charge-holder, but I was given no details about that debt or prospects for its repayment. Of guarantors and shareholders I heard nothing.

[37] The next party whose interests I consider is the high bidder, Royal Med. Royal Med has abided by the rules and submitted a bid within the deadline. By agreement with the receiver Royal Med has paid rent and other significant expenses in the interim, though the receiver will reimburse Royal Med for all those expenses should the assets ultimately be sold to another party.

[38] The disparity between the current high bid and the amount one of the interested parties is apparently willing to pay is of great concern. The difference is $474,000, or 46 percent higher using the face amount of the high bid, or $402,000 or 37 percent higher if the value of the high bid is to include the extra costs that have been borne by Royal Med.

[39] This is a substantial difference, and it tends to show that the sale process has failed to garner full market value for the assets. It is difficult to discern an identifiable aspect of the sale process that would account for this disparity, but two of the prospective bidders identified both the short sale period and the perceived unfairness of the high bidder having assisted the receiver with the sale and, as general manager for the debtor companies, having an advantage over outside bidders.

[40] These matters invoke three of the *Soundair* factors: sufficient sale efforts, efficacy and integrity of the sale process and possible unfairness. I do not conclude that it was improper for the receiver to have used the services of the former general manager in this way, nor that this party should have been denied the opportunity to bid, but nonetheless he had an advantage the others did not have and they may have been unable to make up that disadvantage in the short time available.

[41] Much was made in the submissions before me about maintaining the integrity of the receiver's sale process. I agree with those sentiments, but the rule is not absolute. In *Baron Enterprises* the Court of Appeal said that deference to the receiver's sale process has its limits:

> …The passage referred to by the chambers judge in this case was clearly *obiter* but was intended to emphasize that a receiver's decision to enter into an agreement for sale subject to court approval should not be set aside "simply because a later and a higher bid is made". I do not disagree with that point of view provided it is applied within reasonable limits. Where the later offer is higher, the court may refuse to entertain it and to approve the sale recommended by the receiver or other person given conduct of sale. But in practice, that is done only where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one. I will add that the view of Macdonald J.A. depended in large part upon the element of deference which has traditionally been shown to a court appointed receiver who usually is a professional person whose skill and experience in these matters must be established by evidence as a condition of his appointment. …

[42] In my view, according deference to the receiver's decision to accept and recommend approval of Royal Med's bid, in circumstances where another bidder appears to be willing to pay 37 percent more, would be to place excessive weight

and too high a premium on the deference factor. The authorities make it clear that the interest of the creditors is still the primary factor. For those reasons I decline to approve the sale of the assets to Royal Med.

[43] In *Baron Enterprises* at para. 41 the Court of Appeal noted that where there is uncertainty whether the late bid or bids should prevail the usual course is to order sealed bids. I conclude that this is the appropriate course here. This course of action will also level the playing field and address any unfairness, whether real or merely perceived, of Royal Med having had advantages due to its inside familiarity, or of the later parties having had more time than Royal Med has had to ponder the risks and benefits of the sale.

[44] So I order that there be a sealed bid process with the following terms:

1. interested parties are to submit sealed bids to the receiver on or before 4:00 p.m. Thursday, October 8;

2. the bids shall be in the existing form prescribed by the receiver;

3. the other general terms and conditions under the receiver's sale process shall apply, except where I have changed them, including that the highest or any bid will not necessarily be accepted;

4. as with the earlier process, bids shall be accompanied by bank drafts for 20 percent of the bid amount;

5. there will be a reserve in the amount of $1,097,000, the value of the present highest bid. In other words, for a further bid to be considered it must exceed that sum;

6. any parties who have submitted bids already, including Royal Med, are at liberty to submit a further bid or bids;

7. the receiver is to publicize this further bidding process as best it can and in particular shall notify the 18 parties who signed confidentiality agreements and received the information package; and

8. a hearing for Court approval will take place at 9:15 a.m. on Friday, October 9. I am seized of that application.

[45] Those conclude my reasons. I look to counsel for any clarifications or comments, particularly to do with the bidding process that I have ordered.

[46] MS. NELLIGAN: My Lord, I just have one request. Because there are a number of parties that appeared in the various hearings, can we dispense with the signatures of all the parties that appeared other than the applicant's counsel?

[47] THE COURT: Yes.

[48] MS. NELLIGAN: Thank you.

[49] MS. VEERAPEN: My Lord, in these circumstances my client requests that we give -- be given slightly more time than this Thursday to submit bids. We are asking for a date no earlier than next Friday in order for our client to consider its position, including an appeal.

[50] THE COURT: Any submission from the petitioner?

[51] MS. NELLIGAN: Well, I think it knows its position as far as whether or not it wants this asset. I think the question is just whether it is willing to go any higher on its purchase price, and I do not agree that it is going to require that much more time to go with that.

[52] As far as whether or not they want to appeal I do not think it is within the realms of consideration of a sales process to provide for more time for that sort of a consideration.

[53] THE COURT: What has been emphasized in the submissions, including the submissions of Royal Med, is that the value of these assets is declining and that urgency is a primary consideration.

[54] I will vary the order that I had pronounced only to this extent: the bid deadline will remain 4:00 p.m. this Thursday. The application for court approval will be set for hearing at 4:00 p.m. on Friday, October 9 instead of 9:15 a.m. on the Friday.

[55] UNIDENTIFIED MALE SPEAKER: My Lord, which court would that be in? The Vancouver court, or?

[56] THE COURT: No. That is a very valid question. I have seized myself, which for those who are not lawyers means that I have required that the matter come back before me and not any other judge. It is to come back before me because I am familiar with it. I am going to be in New Westminster on Friday, so the application for approval will have to be heard here in New Westminster at 4 o'clock.

"Blok J."

Citation: ***British Columbia v. Baron Enterprises Ltd.***
2000 BCCA 317

Date: 20000515
Docket: CA026657
CA026668
CA026691
Registry: Kamloops

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

PETITIONER
(RESPONDENT)

AND:

**CITY OF KAMLOOPS,
BARON ENTERPRISES LTD.,
BRITISH COLUMBIA WILDERNESS TOURS INC.,**

RESPONDENTS
(APPELLANTS)

AND:

592123 B.C. LTD.

RESPONDENT
(RESPONDENT)

AND:

**A & A ESTATES LTD., A & A FOODS LTD.,
CANADIAN WESTERN BANK, GIOVANNI CAMPORESE,
AIC INTERNATIONAL RESOURCES CORPORATION
And 415669 B.C. LTD.**

RESPONDENTS

Before: The Honourable Mr. Justice Esson
The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders

Joseph A. Zak	Counsel for the Appellant, Baron Enterprises Ltd.
Russell R. Cundari	Counsel for the Appellant, British Columbia Wilderness Tours Inc.
Frank R. Scordo, Leonard S. Marchand	Counsel for the Appellant, City of Kamloops

Robert W. McDiarmid, Q.C., Elizabeth A. Harris	Counsel for the Respondent, Province of British Columbia
Rodney A. Chorneyko	Counsel for the Respondent, 592123 B.C. Ltd.
Place and Date of Hearing:	Kamloops, British Columbia March 14 and 15, 2000
Place and Date of Judgment:	Vancouver, British Columbia May 15, 2000

Written Reasons by:
The Honourable Mr. Justice Esson

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Esson:

[1] These proceedings relate to a unique piece of real estate located within the municipal boundaries of the City of Kamloops. The Tranquille Lands, which cover some 188 hectares much of which is subject to the Agricultural Land Reserve, were for many decades owned and used by the Province for public purposes, originally as a tuberculosis sanatorium and later as a mental health facility. Sometime in the 1980s the institution was closed and the buildings have not been used since then. In 1991 the Province sold the lands to A & A Estates Ltd. ("A & A") for $8,000,000.00, taking back a first mortgage of $7,700,000.00 which ultimately went into default. This foreclosure action ensued.

[2] These three appeals arise out of judicial sale proceedings in that action. The appellants are:

City of Kamloops -	“the City”
British Columbia Wilderness Tours Inc. -	“B.C. Wilderness”
Baron Enterprises Ltd. -	“Baron”

The principal respondent is 592123 B.C. Ltd., to which I will refer as "592". Her Majesty the Queen in right of the Province of British Columbia, to whom I will refer as the "Province", has not appealed, but supports the position of the

City and B.C. Wilderness. Another entity which played a significant part in the events was British Columbia Assets and Lands Corporation which acted on behalf of the Province in dealing with the land. I will refer to it as BCAL.

[3] The three appeals are brought from an order of a chambers judge setting aside a master's order approving a sale of the lands to B.C. Wilderness, which was the highest bidder in a sealed bid process ordered by the master. The order under appeal not only set aside the sale to the highest bidder of $1,150,000.00 but approved a sale to 592 for $492,160.00. The City and B.C. Wilderness seek restoration of the master's order and are supported in that by the Province. Baron, one of the unsuccessful bidders, seeks both to have the order approving the sale to 592 set aside and to have the matter remitted to the chambers judge to fix new conditions of sale. 592, of course, seeks to uphold the order under appeal.

[4] To explain the basis for my conclusion that the unique order of the chambers judge cannot stand, regard must be had to the history of the proceedings. This action was begun in 1995. A & A delivered a defence and counterclaim seeking rescission on the ground of misrepresentations by the Province with respect to the value of the land and a promise by it to remove the land from the ALR. Those issues were resolved by

settlement in July 1998 and, on July 27, an order *nisi* was granted by consent providing for a one day redemption period and granting the Province exclusive conduct of sale. From that point, neither A & A nor any of the many other parties who were originally joined as respondents in the action have taken any part in it. However, at the time of order *nisi*, the City was joined as a respondent.

[5] The City's interest in the land arises from the fact that, after the land was sold by the Province to A & A, about $1,000,000.00 in unpaid municipal taxes accumulated. The City took ownership of three of the five parcels which comprised the Tranquille Lands through a tax sale on December 31, 1998. Generally, unpaid municipal taxes rank in priority to secured creditors but, under s.396 of the ***Municipal Act***, they rank second to the Province’s mortgage and to the mortgage debt which now stands at about $11,000,000.00.

[6] The City’s continuing interest arose from the assurances of the Province as expressed in this letter dated August 10, 1998 from the solicitors for the Province to the solicitors for the City:

> In response to your letter dated August 6, 1998, and as previously discussed, the Province presently intends to have the Tranquille property sold through a court-approved sale and vesting order, as a result of which the City of Kamloops would be paid from the

> sale proceeds for all outstanding taxes. If the Province's intentions change, I will let you know immediately; but I cannot imagine why there would be any change.
>
> [emphasis added]

The only other written reference to the matter was in a letter dated December 24, 1998 from BCAL to the City. It reads as follows:

> R.H. Diehl
> Development Services Department
> City of Kamloops
> 7 Victoria St W
> Kamloops BC V2C 1A2
>
> Dear Mr. Diehl:
>
> Re: Tranquille Property, Kamloops
>
> I am now authorized to confirm that, in consideration of the City of Kamloops retaining title to the Tranquille property following its acquisition through the tax sale process, the Province will, up to April 30, 1999,
>
> 1) continue to manage the property (e.g., pay for security, dam operation, and BC Hydro) and
> 2) pay the outstanding taxes (less penalties and interest) from any sale proceeds.
>
> As discussed, we should work to reach agreement on our mutual interests if the Tranquille property does not sell during this period.
>
> Yours truly,
> [signed]
> Peter Walters
> Regional Manager, Land Sales
> Southern Interior Region
>
> [emphasis added]

[7] Mr. Diehl swore that he later received "verbal assurances that the terms and conditions of the letter of December 24, 1998 are being extended". Mr. Walters denies having given such assurances. However that may be, it is undisputed that at no time did the Province, in the words of the letter from its lawyer, let the City know of any change in the Province's intentions.

[8] I return to the history of the proceedings.

[9] The Province elected not to take order absolute under that order but rather sought to find a purchaser subject to Court approval. The first application for approval was made on August 27, 1998 when the Province filed an application for approval of a sale for the price of $5.2 million. The prospective purchaser did not make the required deposit and the proposal collapsed.

[10] There then ensued lengthy efforts to market the property through a real estate agent at a listing price of $3 million. One of the factors which created concern for prospective purchasers was the existence of environmental hazards caused by the presence of underground storage tanks, asbestos, PCBs, and perhaps other dangerous substances. The "remediation cost" arising from those problems was estimated as being in the order of $1 million. The existing buildings, some a

century or more old, all built for special purposes and all in decrepit condition, were also a deterrent. The cost of demolition was estimated to be in the order of $1.2 million. The Province made it known to prospective purchasers that it would require them to accept a list of conditions, including responsibility for carrying out remediation at the purchaser's expense within five years. The existence of the conditions of sale was, as one would expect, widely known in the Kamloops area to persons interested in the property.

[11] The listing continued until August 31, 1999, without producing any firm offers. Some months prior to August 31, the principals of 592, a Mr. Rink and his sister, Ms. Jameson-Rink, became interested in the property and carried out an extensive study of it. They had a number of discussions with Mr. Walters and in early September 1999 advised him that 592 was prepared to make a firm offer of $492,160.00 and expressed willingness to agree to some of the conditions which the Province had previously insisted upon. The conditions accepted by 592 were substantially less onerous than those previously stipulated for, e.g., ten years rather than five for remediation. Mr. Walters recommended acceptance to his superiors and received authority to proceed. The lawyers for the Province and 592 settled the terms of a formal agreement

which was executed on September 14 subject to court approval. I note here that the Rinks say that their total costs to that point, including legal fees, approached $100,000.00.

[12] About the time the contract was finalized, there took place a discussion between Mr. Walters and Mr. Rink which assumed great significance in the view which the chambers judge took of the matter. Mr. Rink swore that, in the course of a meeting with Mr. Walters, he expressed concern that 592's offer should not be made known to others because it might then become a "benchmark" for offers from others. He swore that Mr. Walters told him and his sister that there were no other interested purchasers in sight. It does not appear that any of the lawyers were present at that meeting or were made aware of the assurances given by Mr. Walters.

[13] Mr. Walters, in an affidavit sworn after the chambers judge had given her decision and was hearing an application from 592 for special costs, gave this version:

> 16. Mr. Rink then raised the matter of confidentiality and his concern that his offer might become the basis for other competing bids. I told him, in error, that I expected that the terms of his offer would remain confidential until the morning of the hearing. I am not a lawyer, and did not seek legal advice before responding to Mr. Rink's concerns in that regard. Also, Mr. Rink had his own lawyer advising him.

[14] To that point, the City had been told nothing regarding the negotiations between 592 and the Province, and had no intimation that the Province had changed its mind regarding its promises to protect the City's recovery of taxes. The City received formal notice of the Province's intention to proceed without regard to its position when, on the morning of September 21, 1999, its solicitor was served with notice of the application for approval of the sale to 592 for $492,160.00 which had been filed on September 17 and was returnable on September 27. There may have been an informal indication by Mr. Walters to Mr. Diehl of the City some days before September 21 that an agreement had been entered into and that no provision was being made for recovery of the City's taxes.

[15] Predictably, the material filed in court rendered Mr. Walters' misguided assurances futile. The matter of the Tranquille lands was the first order of business at the regular meeting of City Council on September 21. There was a long discussion with the media present. The tone was one of dismay and confusion. The tax recovery had been included in the budget and so, if there was to be no recovery, taxes would have to be raised accordingly. The discussion revolved largely around "what can we do now?" At least one councillor

favoured consideration by the City of making its own offer for the land. There was recognition that other interested purchasers might be found and there was agreement that pressure had to be put on the Province to review its position. In the result, Council accepted the recommendation of its solicitor that he be instructed to seek an adjournment of the application to allow time for the City to "consider its options". A resolution was duly passed which instructed the solicitor accordingly and which also resolved that an "explanation" should be sought from the Province.

[16] In accordance with the resolution of Council, the City filed a motion supported by affidavits seeking an adjournment of the application for approval of the sale. 592 filed extensive material opposing an adjournment, the general tenor of which appears from this paragraph in the affidavit of Mr. Rink:

> 17) Our ability to purchase the Tranquille Lands has been jeopardized by the unexpected publicity pursuant to the public disclosure and discussion of our offer by the solicitor for the City of Kamloops with the Kamloops city council with media present. At least one other offer has now been received by the Petitioner.

[17] On September 27, Master Powers heard extensive submissions from counsel for the City and for 592 and less

extensive submissions from counsel for the Province who did not consent to an adjournment but who acknowledged the reality that it probably could not be successfully resisted. Counsel for the City sought an adjournment of four weeks to allow it to consider its options which were said to be to put in its own bid, to seek out other offerors and to lobby the Government to revive its agreement to protect the City in respect of taxes. Counsel for the City stressed the obvious fact that the 592 offer was surprisingly low in comparison to any amounts which had previously been considered. In the end, the master ordered the application to be adjourned for three weeks. At the same time, he ordered a sealed bid process and directed a hearing one week from that day in order to settle the form of the offers. He directed that a uniform form of bid must be used.

[18] That further hearing was held on October 4. On that day, the master ordered that the bids be in the same form in which 592's offer had been made, a form which had been the subject of extensive consideration. He indicated that, because the Province would necessarily have an ongoing relationship with the successful bidder on environmental remediation of the property, it should be at liberty to make submissions in favour of an offer other than the highest one. The matter was

then adjourned to October 18 with the closing date for bids being fixed as October 13.

[19] Before the bidding closed, the City's efforts to secure a new commitment from the Province were successful. It is a reasonable inference from the evidence that that resulted from intensive lobbying and public pressure put on the Province which found itself in an embarrassing position. The record yields no clear explanation for the Province having treated the City as it did. It may have been a matter of the passage of time, combined with a growing realization that the value of the lands was nothing like it had earlier appeared to be, which caused a drying up of the willingness of the Province to be generous towards the City. Or it may have been simple forgetfulness and ineptitude on the part of BCAL. In the costs proceeding which followed the decision of the chambers judge, the president of the Corporation, who formerly had been Deputy Minister to the Minister of Environment when that office was occupied by the Member for Kamloops, dolefully recounted that she recalled thinking, while on the receiving end of an angry phone call from the Member, that:

> ... BCAL may have been too aggressive in taking the position it did; and that in any event the position was not politically sustainable. I knew there would have to be a negotiated settlement between the Province and the City.

[20] The agreement entered into in October 1999 was somewhat less generous than the earlier arrangement in that it limited the City's recovery on the offers presented to $850,000.00. Specifically, it provided that the City is to receive one-half of the sale proceeds to $600,000.00, all of the next $569,000.00, and nothing thereafter.

[21] Seven sealed bids were put in on October 13. As previously mentioned, the highest was from B.C. Wilderness for $1,150,000.00, the second was from 592 for $1,100,001.00, and the third was from Baron. That bid departed from the form directed by the master on October 4. It was an offer of $850,000.00 plus “an intention to facilitate” the transfer of certain parts of the lands for public use.

[22] On October 18, the matter came before the master. Counsel for 592 submitted that its sealed bid should be accepted. There was no suggestion that its initial offer of $492,160.00 should be approved. The Province took the position, supported by an affidavit of Mr. Walters, that the bid of B.C. Wilderness should be accepted. It indicated that all of the proposed purchasers were acceptable to it in that there was no reason for concern as to their ability to complete the purchase or comply with their obligations with respect to remediation and environmental concerns.

[23] The master gave extensive reasons for approving the highest bid including references to earlier authorities which have held that in some circumstances a lower bid may be approved. He concluded as follows:

> [24] As I have already said, I appreciate the efforts that have been made by all of the parties that put in offers. I appreciate the hard work and the sacrifices and expense that may have been incurred by the principals of 592123 B.C. Ltd., and I appreciate they will be disappointed by my decision. From their point of view, they may see the decision as unfair, but I must not look at it simply from their point of view. I have to consider whether the process in arriving at the most acceptable offer was fair, and I am satisfied that it was, and then consider if there are any other matters which should outweigh the difference in price. I am satisfied that the difference of $50,000.00 is significant, that the equities that are argued in favour of 592123 B.C. Ltd. are no different than the arguments that any other offeror might make -- in other words, 'I have spent time and effort, and it is not for the court to decide that an offer should be accepted simply because somebody has spent more time and effort or money than somebody else in presenting their offer.' As I say, the obligation is to make sure the process is fair, and then if the price is significantly different, which I find it is, to accept the best price.

[24] 592 then appealed as provided for in Rule 53(6) of the ***Supreme Court Rules***:

> 53(6) A person affected by an order or decision of a master, registrar or special referee may appeal the order or the decision to the court.

[25] The notice of appeal stated the grounds of appeal as being that the master erred in approving the sale to B.C. Wilderness for $1,150,000.00 and in "... not approving a sale of the subject property to 592123 B.C. Ltd. for $1,100,001.00".

[26] The appeal of 592 was heard on November 22 and 25, 1999, along with an appeal by Baron which asserted, as a ground of appeal, that the master had failed to "properly review and consider" Baron's offer to purchase. The learned chambers judge reserved decision and delivered written reasons on December 8, 1999. The reasons are very lengthy but the gist of them is to be found in these passages:

> [81] The failure of both the Province and the City to advise the Court they had been in negotiations for the purchase of Tranquille for several months before the Province's application of September 27, 1999, misled the Court as to the real purpose of the City's adjournment request. That purpose was to secure their agreement for the payment of the City's outstanding taxes. It was not to make an offer for the purchase of Tranquille.
>
> [82] It is interesting that almost immediately after the application was served on the City on September 21, 1999, the City received letters on behalf of parties who were interested in making an offer. Similarly, after the sealed bid process was ordered by the Court on September 27, 1999, the City wrote the interested parties advising them on how to proceed. Both actions appear to have the City assuming the role of the receiver in a court-approved sale process.

[83] 592123 Ltd. was the innocent victim in this process. The treatment received by 592123 Ltd. was manifestly unfair. The Province had invited it to make a proposal for the purchase of Tranquille. In response to that invitation, 592123 Ltd. invested $100,000 in due diligence efforts and five weeks of negotiating beneficial terms for its proposal. It was never informed of any upset price of $850,000 or of the Province's hand-shake agreement with the City regarding payment of the City's outstanding taxes.

[84] Instead, 592123 Ltd. was assured by the Province that it would present and support 592123 Ltd.'s offer to the court. The Province assured 592123 Ltd. that upon its offer being disclosed, the Province would not consent to any adjournment of its application thereby allowing its offer to become a bench mark for other offers. This assurance was made subject only to a better offer being presented at the time of the application for sale to 592123 Ltd. This is a risk any participant in a court-approved sale process assumes when it makes an offer requiring court approval. 592123 Ltd. was entitled to rely on the *bona fides* of these representations by an agent of the Province. After the application was served on September 21, 1999, when it became apparent that the Province could obtain a higher recovery on its investment, its assurances to 592123 Ltd. were abandoned.

[85] If the efficacy of the process has no boundaries, if the actions of governments are not transparent, if the interests of a *bona fide* offeror can be ignored or subverted in favour of the internal interests of governments, then the integrity of the court-approved sale process will be rendered meaningless. In the words of MacDonald J.A. in ***Cameron***, *supra,* such a process would "literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement."

CONCLUSION

> [86] With respect, in these circumstances, I exercise my discretion to set aside the order of October 18, 1999, and order that the sale of Tranquille be made to 592123 Ltd. on the terms and conditions contained in the Province's application that was before the court on September 27, 1999. In so doing, I have concluded that absent competing offers on the date for hearing of the Province's application, the court should not have granted the City's adjournment request. I have also concluded that the material misrepresentation to the court regarding the City's intention to make an offer on the property, when it had no intention of so doing, affected the integrity of the court-approved sale process. For both of these reasons, I have decided that the order of October 18, 1999 must be set aside and 592123 Ltd.'s initial offer as recommended to the court by the Province be approved.

[27] In my respectful view, the conclusions stated in the last paragraph of that passage and the findings, premises or assumptions in the preceding paragraphs are insupportable. I do not propose to consider each of them separately. The fundamental error in the decision flows from the two implicit assumptions on which it appears to be based.

[28] The first is that the assurances given by Mr. Walters to the Rinks on September 14 were legally binding upon the Province and upon the master so that, in the absence of a superior offer from a bidder with deposit in hand, the master had no choice but to refuse an adjournment and approve the sale to 592.

[29] The second is that the City, by applying for an adjournment when it had no real interest in the land except through a mere "handshake" agreement with the Province, abused the process of the court.

[30] The matter of the rather daft assurances given by Mr. Walters is regrettable. Obviously, they were based on a lack of understanding on his part of the position of the court when asked to approve a sale. He should not have encouraged 592's principals to think that their offer could be kept confidential and that a sale to them for $492,160.00 would be approved unless someone came up with a better offer on the hearing. In a matter so complex and full of uncertainties as the sale of the Tranquille lands, that was an absurd proposition. If the matter could be kept "confidential" until the commencement of the hearing in chambers, there could be no possibility of the 592 offer being bettered on that day.

[31] In the course of the hearing in this court, counsel for the Province was asked why his client had pursued the course of a court approved sale rather than the option which was open to it under the judgment of taking an order absolute, obtaining title to the property, and disposing of it as it wished. Mr. McDiarmid’s response was that his client thought it right, particularly in respect of a property which has

stirred great public interest, to pursue an "open and transparent course."

[32] That was a proper approach but the assurances were quite inconsistent with it. On the other hand, they could not confer any rights on 592 and, indeed, it does not appear that the Province breached any promise which it gave to 592. It did what it could to keep the matter confidential and stood by its assurance that it would not consent to or seek an adjournment of the application for approval unless a superior bid was put in. On September 27, the Province did not seek or consent to an adjournment. Had its counsel actively supported 592 on that day in face of the fact, well known by then, that there were several others interested in bidding, she would not have been taken seriously.

[33] The position taken by the Province, apart from Mr. Walters' gratuitous assurances, was in accord with its contractual obligations as set out in the Offer to Purchase Agreement between 592 and the Province which provided, in part:

> 2.3 The Province's obligations under this Agreement are limited to the following:
>
> (a) on acceptance of the Purchaser's offer, to file in Court evidence in support of the motion [for an order approving the sale of the Land to the Purchaser on

> the terms and conditions set out in this Agreement]...and to make submissions to the Court in regard to that motion...
>
> 2.4 For greater certainty, nothing in this Agreement precludes the Province before or after accepting this offer from accepting an offer of purchase and sale from, or making submissions to the Court in favour of an order approving the sale of the Land to someone other than the Purchaser.

[34] Even had the Province been obliged as a matter of law to attempt to stand by Mr. Walters' assurances, it is a virtual certainty that any such effort on its part would not have affected the result.

[35] That is because, in my view, no judge or master experienced in these matters, having heard the City's submissions, would have declined its application for an adjournment. There was nothing improper or misleading in the position taken by the City. It had the right, and indeed the obligation, to do whatever it could to protect its position in the face of the revelations that something had gone sadly wrong with the Province's conduct of its responsibility to seek the best price and its obligation, in light of its earlier assurances to the City, to keep the latter informed of developments. Two conclusions emerged inescapably from the submissions and evidence presented on September 27. The first

was that the Province had agreed to a suspiciously low price and had somehow lost sight of its earlier assurances to the City and its moral obligation, arising from those assurances, to keep the City informed of developments.

[36] In finding that the City acted improperly in seeking an adjournment of the application, the chambers judge gave great weight to the fact that counsel for the City mentioned as one of its options that it wished time to consider whether to put in its own bid. The chambers judge appears to have accepted the submission of 592 that there was an element of fraud in the City's conduct in that regard because it had no genuine intention of taking such a step. I find no substance in that point of view. It is, of course, true that the City never formed a corporate intention to bid for the land. But it is clear that some councillors and perhaps some staff persons thought it to be a course that the City should consider. It is obvious that the more practical options for the City were the two which came to pass shortly after September 27 when the City succeeded in flushing out other bidders of substance and, most important to it, in restoring its understanding with the Province.

[37] With all respect, I detect no element of wrongdoing on the part of the City. That being so, the master's decision to

adjourn was the only one which, acting judicially, he could properly make. Furthermore, his concurrent decision to order sealed bids was entirely reasonable.

[38] Interestingly, the latter conclusion finds clear support in the decision of the Nova Scotia Court of Appeal in ***Cameron v. Bank of Nova Scotia*** (1981), 45 N.S.R. (2d) 303. The chambers judge, in para. 85 of her reasons (quoted *supra* para. 26), quoted what I would respectfully regard as the somewhat overheated rhetoric of Macdonald J.A., speaking for himself in separate concurring reasons. The more significant aspect of the case is that, in a factual situation closely similar to that in the case at bar, the Court of Appeal upheld the decision of the chambers judge to order sealed bids. A receiver, who was authorized to enter into contracts to sell, solicited offers. Three interested parties were told that if they wished to acquire the property they should make their final offer on a given day. In the result, a Mr. Cameron and a Mr. Treby, both of whom had previously submitted lower offers, increased their offers to $300,000.00 but with the minor difference that Mr. Cameron made a cash offer while Mr. Treby retained some conditions as to financing. The receiver sought court approval of the sale to Mr. Cameron. Mr. Treby opposed on the ground that he had been led to believe that if

the offers were equal, there would be an opportunity to make further offers.

[39] The chambers judge found that Mr. Treby had been unintentionally misled and therefore refused to approve the sale to Cameron. He directed that the three bidders be given the chance to make further bids by way of sealed tender. Mr. Treby then offered $331,000.00, a second bidder offered $326,000.00, and Mr. Cameron made no new offer but appealed on the ground that the original agreement was final and should have been approved by the chambers judge. The concluding paragraph of the reasons of Hart J.A. for the majority at p.313 have clear application to this case:

> [31] From the very beginning the appellant knew that his contract was subject to the approval of the court and must have known that this meant such approval could be refused. When it was denied he was given a further opportunity to submit bids in fair competition with the other bidders and he failed to do so. He cannot now be heard to say that the order granted by Burchell, J., on February 20, 1981 was unfair to him.

For the same reasons, 592 cannot now be heard to say that the order granted by Master Powers on September 27, 1999 was unfair to it.

[40] Macdonald J.A. concurred in that decision. The passage referred to by the chambers judge in this case was clearly

obiter but was intended to emphasize that a receiver's decision to enter into an agreement for sale subject to court approval should not be set aside "simply because a later and a higher bid is made". I do not disagree with that point of view provided it is applied within reasonable limits. Where the later offer is higher, the court may refuse to entertain it and to approve the sale recommended by the receiver or other person given conduct of sale. But in practice, that is done only where the improvement on the price is not significant and, in most cases, where it also appears that the late bid is less firmly secured than the recommended one. I will add that the view of Macdonald J.A. depended in large part upon the element of deference which has traditionally been shown to a court appointed receiver who usually is a professional person whose skill and experience in these matters must be established by evidence as a condition of his appointment. No similar grounds existed for showing deference to the Province's agent in this case.

[41] Where there is uncertainty whether the late bid should prevail, the usual course is to order sealed bids. An example is to be found in the decision of Bouck J. in ***Royal Bank v. Derco Industries Ltd.*** (1988), 24 B.C.L.R. (2d) 202 (S.C.). In that case, the receiver sought approval of a sale at

$660,000.00. Another party then put in an offer of $690,000.00 but with "... a number of subjects". The subjects were removed before the hearing. The reasons of Bouck J., which include a very helpful survey of earlier cases, conclude with this paragraph, at 205:

> Looking at all the evidence, I am unable to say this is a situation where I should accept either bid. They are too close for me to be certain that fairness dictates the higher or the lower offer should succeed. Therefore, I order there be a process of presenting sealed bids in open court by both parties. The highest or any bid will not necessarily be accepted.

[42] The point that ordering sealed bids is commonly resorted to where a difficulty appears on a motion to approve a sale is also supported by the decision of Huddart J., as she then was, in ***Sun Life Savings & Mortgage Corp. v. Sampson*** (1991), 59 B.C.L.R. (2d) 355 (S.C.). That decision, like the one under appeal, was rendered on an appeal from the decision of a master. The facts and the decision are summarized thus in the headnote:

> In foreclosure proceedings, the mortgagee applied to a master for an order approving a sale of the mortgaged residential property to the purchaser for $985,000.00. Another prospective purchaser unexpectedly arrived in the courtroom asking to submit a sealed bid. The master opened the bid, which was for $1.02 million. He then adjourned the application, directing the interested parties to submit sealed bids if they wished. The original purchaser objected, saying that because there was no

> flaw in the sale process the court was obliged to affirm the sale. The master disagreed that such a flaw was a precondition to the court's refusal to affirm. At the resumed hearing, the new bidder offered $987,500 and the original purchaser offered $1.03 million. The higher bid was approved and the purchaser appealed, seeking to have the master's order set aside and its original bid approved.
>
> Held - Appeal dismissed.
>
> The usual practice as it applies to the sale of residential properties in foreclosure proceedings is to order sealed bids if a higher offer appears before an order approving a sale is made or entered. In doing so the court's primary concern is to protect the creditors' interests, but another important consideration is to protect the integrity of the sale process. Here, the mortgagee had led no evidence at the initial hearing as to why the offer it had accepted should be approved. What the purchaser was now seeking to do was to introduce evidence which it said should have caused the mortgagee to object to the reception of the second offer and to support the first offer throughout the hearing. That was inappropriate here. Seen from the perspective of the original hearing, the ordering of sealed bids was proper in the circumstances.

[43] The reasons of Huddart J. include a thorough canvass of the authorities on this point. Leave to appeal from that decision was refused: 62 B.C.L.R. (2d) 399 (C.A.). In refusing leave to appeal, Macdonald J.A. referred to the decision of A.B. Macfarlane J.A. in ***Westcoast Savings Credit Union v. Wachal*** (1988), 32 B.C.L.R. (2d) 390 (C.A.), and in particular this passage, at 393-94:

> The court here was acting pursuant to the discretionary power found in R. 50(5)(g) under which the court *may* order a sale of the mortgaged

> property. An appellate court will not presume to substitute its own discretion for the discretion already exercised by the judge or otherwise to interfere with such an order unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that on other grounds it appears that the decision may result in an injustice: see *Taylor v. Vancouver Gen. Hosp.*, 62 B.C.R. 42, [1945] 3 W.W.R. 510, [1945] 4 D.L.R. 737 (C.A.).
>
> A shorter statement of the same rule is that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong.
>
> I think it extremely unlikely that a panel of this court would interfere with the discretion of the chambers judge in this case. This is particularly so in view of the comment of Mr. Justice Taggart in *F.B.D.B. v. Mission Creek Farm Inc. et al.* Although it is important that judicial auctions be discouraged, I think that the trial judges in this province understand that proposition and take it into careful consideration when deciding what to do in cases like the present one.

[44] At the time Macfarlane J.A. spoke, the present system by which masters deal with virtually all applications for approval of sale in foreclosure proceedings had not come into effect. In 1991, when Macdonald J.A. refused leave to appeal in ***Sun Life***, the system had been in effect for a very short time. It has now been in effect for almost a decade. In 1988, Macfarlane J.A. expressed the view that trial judges understood the proposition that judicial auctions should be discouraged. Since then, the masters, a relatively small and

cohesive group, have heard the great majority of applications to approve sales. They have gained a level of experience in these difficult matters which is higher than that of most judges. That being so, it is appropriate that judges hearing appeals from masters in these cases should start with the assumption that the masters understand the legal principles and factual considerations applicable to such applications.

[45] In saying that, I should not be taken as suggesting that the principles laid down in ***Abernim Corp. v. Granges Explor. Ltd.*** (1990), 45 B.C.L.R. (2d) 188 should be modified. I assume, without deciding, that this was not a purely interlocutory matter and that it was therefore open to the judge to substitute her own view for that of the master. But, in deciding whether to give effect to a different view, a judge should give due recognition to the reality that masters have certain advantages arising out of their great experience in matters of this kind.

[46] A further ground requiring the appeal against the order of the chambers judge to be allowed is that 592, by joining in the sealed bid process, effectively precluded itself from asserting that the initial contract should have been approved. That position, if it was to be taken at all, surely had to be taken by a prompt appeal seeking to prevent the sealed bid

process from going forward. But the position of counsel for 592 on October 4, when the master heard submissions as to the procedure was that "... in any event, that it be on a sealed bid process".

[47] The solicitude of the chambers judge for 592 was, in my respectful view, misplaced. The substance of the matter is that the Province, having tested the market for a considerable period at $3 million and having stipulated for very onerous conditions, thus established that there was no market at that level but apparently did nothing to create interest at a lower level. An experienced receiver likely would have considered a sealed bid process which would have offered adequate publicity and time for bidders to prepare. What the Province's negotiator did, without any publicity and without informing the City, was allow itself to be persuaded by 592 to agree to a sale at an improvidently low price and on less stringent conditions, and to keep the matter confidential. It was not wrong for 592 to take advantage of the unwary negotiator but its success in so doing cannot reasonably be the basis for awarding it the legal and moral high ground as against the City (in reality a creditor) and the high bidder, B.C. Wilderness. The integrity of the process cannot have been prejudiced by disappointing 592's hopes of getting the

property for about 45% of what, on the basis of its sealed bid, it thought the true value to be.

[48] To this point, I have concentrated on explaining why I consider the factual conclusions of the chambers judge to have been insupportable. I should also make it clear that even if there were facts to support the view that the City misled the judge on material facts, I doubt that the chambers judge would have had the power, after the sealed bid process was acted upon, to set aside the master's orders on the ground that the City abused the process of the court. When asked if he could provide any authority to support what was done here, counsel for 592 could point only to that line of cases holding that an ex parte order may be set aside on the ground that there was material non-disclosure. That is a special rule designed to prevent abuses by those who avail themselves of the right to apply without notice to other parties. I doubt that it can be extended to cases such as this where all interested parties were heard. However, I need not express a firm opinion on that.

[49] I turn then to 592's alternative position which is that, if the appeal by the City were to be allowed and the order approving the sale at $492,160.00 were to be set aside, this court should order that 592's bid of $1,100,001.00 should be

approved. That was the relief which 592 sought in the notice of motion which launched its appeal from the master's decision. The reasons of the master for refusing to give effect to that submission are set out in para. 24, (quoted *supra*, para. [23]). I see no error in the reasoning of the master.

[50] 592 also seeks to support this ground of appeal on a somewhat different basis which may not have been argued before the master, i.e. that it was its initiative in entering into a contract to purchase at $492,160.00 which led to the stirring up of interest which in turn led to the sealed bids and to a much higher price being realized. The fact however is that 592 sought to keep the existence of its agreement a secret in order to prevent anyone else becoming interested. What stirred up interest was the energetic intervention of the City which pursued an adjournment and actively solicited others to consider bidding. I can see no proper ground upon which 592's bid at $1,100,001.00 should take priority over the $1,150,000.00 bid of B.C. Wilderness. There have been cases in which the court has rejected a later and slightly better offer on the ground that it would be unfair to the "first in" bidder to accept the later offer. I will add that I know of no case in which that discretion has been applied after

ordering sealed bids but again it is unnecessary to decide whether that can be done.

[51] In this case, the master reserved to the Province the right to submit that a lower offer should be received on the ground that it would more adequately meet the environmental and other social concerns. Where a stipulation of that kind is made prior to bidding, it can provide a proper basis for a lower bid being approved but here the Province made no such submission.

[52] That leaves for consideration the appeal of Baron which put in a sealed bid for $850,000.00 cash plus what it describes as "the reversion to the public" of some 80 acres of the Tranquille site to be held as park and/or recreational lands. It contends that, when the value of those lands is taken into account, the value of its offer was $1,320,000.00. Baron supports the City in submitting that the sale to 592 should be set aside but does not contend that this court should order a sale to it on the basis of its non-conforming bid. It asks rather that the matter be referred back to the chambers judge to hear submissions in support of the respective tenders and to exercise her discretion in the selection of an appropriate bid or, alternatively, that the matter be referred back to the chambers judge with directions

to fix new terms for a sale by tender on more fully defined terms and conditions than those which governed the sale in October, 1999.

[53] It is Baron's position that the terms and conditions set by the master, which were those set out in the contract with 592 for which the Province sought approval, were vague and misleading and that Baron thus was led to put forward its composite offer, thinking that it was conforming. It does not appear that any other bidder was misled or confused by the conditions. I can see no proper basis for referring the matter back to recommence the process. I will note that the Province and the City, as well as the other parties appearing before us, all oppose Baron's appeal.

[54] Counsel for 592 made the point that Baron's bid was in reality simply one for $850,000.00 cash. There was no commitment in its bid to turn back part of the lands for park or other purposes. Baron relies on a document called a "resume" which accompanied the offer but was not incorporated in it, which includes the following statement:

> It is the intention of the Principals of [Baron Enterprises Ltd.] to facilitate a program wherein [a certain portion of the lands] be returned to the public to be held as a public park and recreation lands.

[55] As Mr. Chorneyko says in his factum:

> Obviously, "intentions" are not legally binding promises and the key words "facilitate", "program" and "public" are so vague and uncertain as to make this inducement nothing more than extra-contractual fluff or "spin".

[56] Without adopting the unkind tone of the last three words, I agree that the words are incapable of creating contractual obligations. I have considered the original ground of appeal by Baron to the effect that it was not given a fair opportunity by the master to make submissions as to why its bid should be accepted. It seems possible that there is some merit in that ground. However, Baron has now had a full opportunity to develop its case in this court and, having heard those very full submissions, I am of the view that had the master heard them, the result would have been no different. Furthermore, the interests of other parties must at this stage be considered.

[57] I would therefore dismiss Baron's appeal. I would allow the appeals of the City and of B.C. Wilderness and would

direct that the sale to B.C. Wilderness at $1,150,000.00 be approved. The matter is remitted to the Supreme Court of British Columbia to give any directions which may be necessary in order to carry that transaction into effect.

"THE HONOURABLE MR. JUSTICE ESSON"

I AGREE:

"THE HONOURABLE MADAM JUSTICE HUDDART"

I AGREE:

"THE HONOURABLE MADAM JUSTICE SAUNDERS"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Commonwealth Trust Company (In Liquidation) (Re),* 2012 BCCA 138

Date: 20120323
Docket: CA039076

IN THE MATTER OF COMMONWEALTH TRUST COMPANY (In Winding Up) (CTC) AND IN THE MATTER OF THE *WINDING UP AND RESTRUCTURING ACT*

Between:

Commonwealth Investors Syndicate Ltd. (CIS) and J.A. Coles

Appellants
(Respondents)

And

KPMG – Liquidator of CTC and Fasken Martineau DuMoulin

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Low
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, May 18, 2011
(*Commonwealth Trust Co. (In Liquidation) (Re),* 2011 BCSC 650, Vancouver Registry X1081.69)

Oral Reasons for Judgment

Appellant appearing on own behalf:	J.A. Coles
Counsel for the Respondent, KPMG – Liquidator of CTC:	William C. Kaplan, Q.C.
Counsel for the Respondent, Fasken Martineau DuMoulin	Albert M. Roos and Melissa Kruger
Place and Date of Hearing:	Vancouver, British Columbia March 20, 2012
Place and Date of Judgment:	Vancouver, British Columbia March 23, 2012

[1] **HINKSON J.A.**: The appellants appeal, with leave from Mr. Justice Tysoe granted July 20, 2011, from the order of a Supreme Court Judge, in Chambers, granting special costs to each of the respondents, to be paid jointly and severally by the appellants. The reasons for judgment which give rise to the order appealed from are indexed at 2011 BCSC 650.

Background

[2] The litigation that underlies the order under appeal began on December 29, 1969 when Commonwealth Trust Company ("CTC") filed a petition to be wound up pursuant to the *Winding Up Act*, R.SC. 1970, c. W-10 (now the *Winding-up and Restructuring Act,* R.S.C. 1985, c. W-11). Pursuant to the petition, on January 1, 1970, a Liquidator was appointed for CTC.

[3] By approximately 1990, with the exception of a claim by the Canada Deposit Insurance Corporation ("CDIC"), the claims of CTC's creditors had been resolved. On June 15, 1990, the respondents KPMG were appointed by Preston J. to replace the former Liquidator of CTC. Thereafter, at all material times until his retirement, Preston J. oversaw the liquidation of CTC.

[4] The appellant Commonwealth Investors Syndicate ("CIS") was and continues to be controlled by Mr. Coles, and owns 33% of the common shares and 74% of the preferred shares of CTC.

[5] On August 23, 1995, Preston J. dismissed CDIC's claim, and awarded CIS its costs for contesting CDIC's claim.

[6] On June 20, 1996, remuneration for the Liquidator up to 1995 was certified by a Registrar of the Supreme Court.

[7] On March 1, 2004, Preston J. ordered a stay of the liquidation of CTC, conditional upon specific terms and conditions which included the completion of the

taxation of the Liquidators' fees and the passing of the accounts of the estate of CTC.

[8] By October 19, 2006, the taxation of the Liquidator's fees and the passing of accounts had still not occurred, and Preston J. dismissed the Liquidators' application for a summary taxation of their fees and the passing of accounts.

[9] On August 16, 2007, CIS delivered to the respondents a List of Issues that it proposed to contest at the taxation and passing of accounts. Some 40 separate issues were identified, including some that obliged the respondents Fasken Martineau DuMoulin ("FMD") to withdraw as counsel for KPMG and to retain their own counsel.

[10] Registrar Sainty conducted a pre-hearing conference respecting the taxation and passing of accounts on September 15, 2004. On July 29, 2008 a further prehearing conference proceeded before Registrar Sainty. The affidavit of Todd Martin, a chartered accountant with and senior vice-president of KPMG was referred to at this hearing. In that affidavit, Mr. Martin deposed, in part, that:

> 78. The total fees of the Liquidator in the entire Liquidation as of March 31, 2008 are $469,921.14. Of that amount, $160,236.27 have already been taxed, and $309,684.87 is subject to taxation in this hearing. Faskens' fees in the entire Liquidation to date total $717,653.48 as of March, 2008, of which $232,376.72 have already been taxed, leaving $485,276.76 subject to taxation in this hearing.
>
> 79. In the circumstances, based on CIS' List of Issues, the Liquidator is concerned that [CTC's] remaining assets will be significantly depleted, possibly in their entirety, as a result of this taxation. To the extent possible, the Liquidator would therefore respectfully request that the hearing of this matter be expedited so as to reduce that risk.

[11] The taxation of the Liquidator's fees and the passing of accounts began on September 15, 2008 and continued, with various interruptions until April 3, 2009, occupying some or all of 26 days. On September 26, 2008, after the taxation and passing of accounts had commenced, counsel for KPMG wrote to counsel for the appellants, stating, in part, that:

> If you are successful in your plea to the Registrar that the entirety of the fees and disbursements of both Faskens and the Liquidator be disallowed, there will likely be sufficient funds in the estate to complete the administration of the estate. If you are not, it is now apparent that there is a serious risk that there will be insufficient funds in the estate to pay all of the foreseeable fees and expenses of the estate required to complete the administration of the estate.

[12] The Registrar's judgment was rendered on November 3, 2009 and is indexed at 2009 BCSC 1493.

[13] Following the Registrar's decision, the respondents sought orders for special costs against the appellants. The appellants took the position that the Registrar lacked jurisdiction to hear the matter of costs. As Preston J. had by then retired from the Supreme Court, the Chambers Judge heard submissions relating to the applications for special costs against the appellants on December 7-9, 2010 and January 24-26, 2011, rendering her reasons for judgment on May 18, 2011.

Issues on Appeal

[14] In their factum, the appellants contended that the Chambers Judge erred in principle by:

a. Ordering costs against the appellant Coles as the real litigant;
b. Finding that the appellant Coles had engaged in scandalous conduct;
c. Ordering costs against the appellant Coles as a shareholder of CIS;
d. Finding that the appellant Coles had a monetary interest in having the respondents' remuneration diminished; and
e. Finding that the appellant CIS had engaged in scandalous conduct.

[15] The principal additional grounds of appeal were:

f. That the appellants' success before the Registrar was not considered by the Chambers Judge;
g. That the Chambers Judge failed to take into account an offer to settle made by FMD;
h. That the respondents ought to have brought their taxation proceeding separately or that counsel for the respective

respondents need not have attended the entirety of the hearing before the Registrar; and

i. That had it been known that there was a serious risk that after the taxation and passing of accounts there would be insufficient funds in the estate to pay all of the foreseeable fees and expenses of the estate required to complete the administration of the estate, the appellants would have sought directions from Preston J., and the taxation and passing of accounts would never have proceeded and that even if CIS had not appeared at the taxation hearing required and ordered by the Court, the hearing would have taken over 5 days.

Standard of Review

[16] As Mr. Justice Low said in *Seminoff v. Seminoff*, 2007 BCCA 403:

> [2] ... This Court should not interfere with the trial judge's exercise of discretion on the issue of costs unless persuaded that the trial judge misdirected himself or herself on a matter of legal principle, or that the trial judge's decision is so clearly wrong as to amount to an injustice: see *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1377.
>
> ...
>
> [4] In the absence of an identified error in principle it is difficult for a litigant to obtain leave to appeal a costs order. The awarding of costs is a matter of discretion and the trial judge is in a much better position than this Court to appreciate the course of the proceedings and to ascribe responsibility for duration of the trial. The trial judge is also in a much better position to assess the length of time each issue occupied at trial. These matters and others go into the exercise of discretion.

Discussion

i) The Real Litigant

[17] In *Interclaim Holdings v. Down*, 2002 BCCA 632, this court approved of an award of costs against a company that stood behind a named litigant "in such a way that it should be taken to be a promoter of and to have a direct interest in" the litigation.

[18] At para. 35 of her reasons, the Chambers Judge set out the position of the appellants as follows:

> [35] The directors argue that the first issue is whether anyone is entitled to costs for the taxation before Registrar Sainty. They submit that the second issue, if the liquidator and its counsel are entitled to costs, is whether they are to be paid from the estate of the company in liquidation. The third issue, if the company in liquidation has insufficient funds, is whether the liquidator and its counsel are entitled to look to others to receive indemnity. The fourth issue, the directors submit, is whether a non-party can be liable to pay costs.

[19] It is clear from his affidavit #4 that prior to and throughout the hearing before the Registrar, Mr. Coles was aware of and approved the List of Issues produced by counsel for CIS.

[20] In an affidavit sworn for the proceedings before the Chambers Judge, Mr. Coles deposed that:

> Insofar as Mr. Shields [counsel for CIS before Registrar Sainty] on occasion stated in the course of the taxation that he represented the directors of CTC, or made submissions on their behalf, that was on the basis [sic] my instructions alone to him. There was never any resolution of the Board to retain Mr. Shields to act for them or represent them in the taxation proceeding. I was never given the authority by the other CTC directors to speak for them or represent them or to retain legal counsel on their behalf. My wish was that the Registrar and the Court be aware of the views of CTC which I, as a director of CTC felt should be expressed. I never consulted with the other directors on anything to do with the taxation or more specifically with any issues or submissions relating to the conduct of KPMG or Faskens.

[21] At paras. 72-73 of her reasons, the Chambers Judge found:

> [72] ... These are insolvency proceedings. A winding-up order was made against CTC because it was insolvent. There is, generally speaking, a larger community of interest in insolvency proceedings than there is in "ordinary" litigation. There is no claimant and no respondent. However, it is common in insolvency proceedings that those with an interest in a particular aspect of a proceeding are heard, whether or not they have entered an appearance. Creditors and others who have an interest may be heard on the determination of fees, without filing an appearance. Anyone having a bona fide interest is usually heard in court at insolvency hearings. Here, no one challenged the standing of CIS and the directors of CTC. They appeared and were heard...
>
> [73] I do not understand it to be the case that those who participate are insulated from an award of costs regardless of their conduct. In my view, an award of costs may be made against those who oppose the passing of accounts and the taxation of fees of the liquidator and its counsel. The remaining question is whether costs should be awarded.

[22] In my view, the Chambers Judge correctly found that those who choose to participate in insolvency proceedings are not, in principle, insulated from an award of costs.

[23] At para. 87 of her reasons, the Chambers Judge found:

> [87] Mr. Coles participated personally in the proceedings. In doing so, he exposed himself to an award of costs. Even if I found that Mr. Coles had not participated personally at the taxation, I am satisfied that he is the "real litigant" behind CIS and the "directors of CTC", and that costs could be awarded against him on that basis. Mr. Coles was heavily involved in these proceedings as a director of both CIS and CTC. He has functioned as the directing mind of these companies. He attended the hearings. He swore affidavits, and filled a notice of intention to act in person on his own behalf and on behalf of the other directors. As a shareholder, officer, and director of CIS, Mr. Coles had a monetary interest in seeing the liquidator's or Faskens' remuneration diminished in these proceedings. In all of these circumstances, I am satisfied that Mr. Coles was a promoter of the taxation proceedings and had a direct interest in them.

[24] The finding that Mr. Coles was the "real litigant" was a finding of fact by the Chambers Judge, and was supported by the evidence before her. I see no error in principle nor any misconception or misapprehension of evidence by the Chambers Judge that could warrant any intervention by this Court, and I would not accede to this ground of appeal.

ii) Reprehensible and Scandalous Conduct

[25] An award of special costs may be made when the Court seeks to disassociate itself from reprehensible conduct: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17.

[26] The findings of reprehensible and scandalous conduct against both appellants can be dealt with together. The Chambers Judge referred, without quoting, to the findings of Preston J. at paras. 14-22 of his decision in *Canada Deposit Insurance Corp. v. Commonwealth Trust Co. (In Liquidation)* (1997), 35 B.C.L.R. (3d) 48 (S.C.). His findings were:

14 Since my involvement in this liquidation commencing in 1990, CIS has repeatedly sought to broaden the scope of the liquidation to enable it to use the machinery of the winding-up Court to pursue broad allegations of conspiracy and negligence. It has tenaciously pursued uneconomic applications and appeals, the effect of which has been to frustrate the expeditious and inexpensive resolution of the issues within the winding-up. Its actions have greatly increased the cost of the winding-up, much of that cost will be borne by the estate. On the other hand, CIS was solely responsible for resisting the claim of CDIC.

15 In reasons for judgment in this winding-up reported at (1991), 4 C.B.R. (3d) 16 at p. 25, I said:

> Attempts to move that litigation [the interest contestation] forward have been frustrated by the expansive nature of the litigation required to resolve the issues raised by the statement of defence filed by CIS.

16 In reasons delivered November 27, 1991, [1991] B.C.J. No. 2513 (Q.L.) at p. 5, I observed:

> The purpose of my order was to achieve an orderly resolution of the issues remaining in the liquidation. It was my view then, and it is my view now, that most of the facts that underlie that issue are not controversial. The intent of my February order was to enlist the efforts of counsel in a process that would isolate those facts which were controversial and determine them through a summary process. That requires a certain measure of cooperation from the parties. CIS has frustrated that process by refusing to give its cooperation.

17 Later (at p. 5) in the same reasons I said:

> The conclusion of this winding-up has already been significantly delayed by the energetic efforts of CIS to expand the scope of every enquiry to allow it to canvass, through discovery procedures, the entire history of the winding-up.

18 Mr. Justice Toy observed in the course of his reasons for judgment in one of the many appeals taken by CIS: *Re Commonwealth Trust Co. (Liquidation)* (1992) 7 B.C.A.C. 161 at 166:

> In my view, the winding-up process has been, and continues to be frustrated by the tenacious stances taken by CIS.

19 Subsequently, in reasons for judgment reported at (1993), 106 D.L.R. (4th) 636; (1993), 23 C.B.R. (3d) 9 at 15, I commented:

> In many instances, the fundamental view taken by counsel for CIS of the manner in which the liquidation was properly to proceed has been at variance with the view which is embodied in the *Winding-up Act*.

20 The Court's control of litigation within a winding-up has long been recognized as essential to the achievement of the goal of a winding-up: the

economical and expeditious winding up of the affairs of the company in liquidation. In *Stewart v. LePage*, (1916), 53 S.C.R. 337, 29 D.L.R. 607, Mr. Justice Anglin observed at p. 349 [S.C.R.]:

> But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property found in the hands or possession of the company in liquidation, but also of all litigation in which it might be involved.

21 One of the means by which the Court exercises control over litigation in the course of a winding-up is through the exercise of the discretionary power to award costs.

22 Many of the applications brought by CIS did not advance the interests of the estate. Many of the others, while advancing the interests of the estate in some measure, did so at ruinous cost. The approach taken by CIS throughout the time that I have been involved as the winding-up judge has frustrated and delayed the winding-up.

[27] The Chambers Judge found at para. 83 of her reasons that:

> [83] In my view, this is a case which calls for the Court to award special costs to KPMG and its counsel. The conduct at the hearing was reprehensible. It is deserving of rebuke. CIS and the directors made allegations of serious professional misconduct against the liquidator and its counsel. Those included allegations of breach of trust, and of misleading the Court. CIS and the directors wasted many days in cross-examination of witnesses, raised trivial issues, pursued issues which pre-dated the taxation, mischaracterized evidence, and argued that the liquidator and its counsel were not entitled to fees. Taken collectively, this is reprehensible conduct. Registrar Sainty described the process as follows:
>
> > [536] CIS says that KPMG and Faskens approached a stay reluctantly and that, had they not pursued the course of seeking "self-serving" terms in the stay order the Estate would not now be insolvent and a decade would not have been lost. I have found, on the evidence before me, that there were no "self-serving" terms in the stay order. Nor has a decade been lost because of the actions of either KPMG or the Liquidator. Most of the delays in this liquidation came because of CIS's intransigence and desire to pursue a "scorched earth" approach to each and every action taken by KPMG or Faskens, both in the liquidation and in this taxation process. The fact that the Estate is now insolvent rests more likely at the feet of CIS and its counsel, rather than those of KPMG or Faskens.
>
> [Emphasis added by the Chambers Judge.]

[28] In my view, informed by the findings of Preston J. and Registrar Sainty, there was an ample basis for the conclusion of the Chambers Judge that CIS and Mr. Coles engaged in scandalous conduct with respect to the taxation and passing of accounts, and I am unable to accede to the submission that she erred in so concluding.

iii) Costs against Mr. Coles *Qua* Shareholder of CIS

[29] This ground of appeal relates to the comments of the Chambers Judge in the penultimate sentence at para. 87 of her reasons set out above.

[30] In my view, the reference to Mr. Coles as a shareholder was simply descriptive of one of his several roles in the corporate vehicles involved in the taxation and passing of accounts, but not a discrete basis upon which the award of special costs was made. I do not consider it necessary to deal any further with this ground of appeal, as it was not dispositive of the award of special costs.

iv) Mr. Coles Monetary Interest in a Reduction of the Remuneration of the Liquidator and its Counsel

[31] This ground of appeal also relates to the comments of the Chambers Judge in the penultimate sentence at para. 87 of her reasons set out above.

[32] There was no contest before us that the principle, if not the only beneficiary of any residue in the estate of CTC that would follow what was described by counsel for KPMG in his letter of September 26, 2008 as success on CIS' plea on the taxation and passing of accounts would be CIS. If CIS were successful, as they argued on the taxation and passing of accounts, in avoiding any payment to the Liquidator or its counsel, then there would have been a residue in the estate, available for distribution to the shareholders, officers, and directors of CIS, including Mr. Coles. I am unable to accede to the submission that the Chambers Judge erred in so concluding.

v) The Appellants' Success before the Registrar

[33] Clearly the appellants enjoyed some success before the Registrar. She reduced the fees claimed by both the Liquidator and FMD. The former were presented for the period of time since 1995 at roughly $298,000, and reduced to roughly $282,600. After accounting for taxes and interest on the reduction, the fees were approved at $275,670.

[34] The fees of FMD for the relevant period were presented at $356,656.10 and were reduced to $310,000, in part due to a concession in the amount of $3,600 by FMD during the taxation and passing of accounts, and as well to take into account what the Registrar determined to be unnecessary photocopying charges, some duplication of efforts due to the departure of one of the FMD lawyers and the return of the file to FMD, and some amount of duplication of effort through the use of more than one counsel for some of the required activities.

[35] The appellants assert that their success before the Registrar was much greater. The Chambers Judge heard and rejected the argument that the appellant's success was sufficient to warrant a disposition of the costs other than that which she chose. In my opinion, it was within her discretion to do so.

[36] The appellants have been unable to show any error in principle with respect to the exercise of her discretion concerning the factor of the appellants' success before the Registrar, and I would not accede to any interference with respect to her exercise of discretion on this factor.

vi) FMD's Offer to Settle

[37] On September 5, 2008, counsel for the appellants proposed a settlement to counsel for FMD. FMD presented a counter-offer to settle to counsel for the appellants dated September 11, 2008. The appellants' counsel took the position that the offer had to be approved by not only the appellants, but by the Liquidator as well. In the result there was no settlement.

[38] As the proceedings involving the two respondents were found by the Registrar to be inextricably intertwined, I am unable to find that the Chambers Judge erred in the exercise of her discretion in placing no importance upon FMD's settlement proposal to the appellants' counsel. I would not accede to this ground of appeal.

vii) Should the Respondents have Proceeded to Taxation Separately?

[39] As I have already said, the proceedings involving the two respondents were found by the Registrar to be inextricably intertwined. I am not persuaded that it was practical for either of the respondents to have proceeded to taxation separately, and would not accede to this ground of appeal.

viii) The State of Knowledge of Mr. Coles Prior to and During the Taxation and Passing of Accounts

[40] I see no merit in this ground of appeal, and would not accede to it. As set out above, CIS, Mr. Coles, and Mr. Shields were put on notice as early as July 29, 2008 when Registrar Sainty conducted her prehearing conference that CTC's remaining assets would be significantly depleted, possibly in their entirety, as a result of this taxation, and reminded of that potential result by the letter from KPMG's counsel dated September 26, 2008.

ix) The Need for Some Taxation of the Liquidator's Fees and the Passing of the Accounts of CTC

[41] With respect, however, I am not persuaded that the Chambers Judge correctly addressed the fact that the legislation and the order of Preston J. both obliged the Liquidator to tax its fees and pass the accounts of CTC. At paras. 74-75 of her reasons, the Chambers Judge stated:

> [74] I accept the submission of CIS that the liquidator and its counsel would, in any event, have had to pass their fees and accounts. I agree that it would not be appropriate for CIS or CTC to pay costs for something that the liquidator and its counsel would have had to do in any event.

> [75] However, the circumstances in this case are not ordinary. It would be common for the creditors or shareholders with an interest in the fees and accounts of the liquidator to review the accounts in advance, raise issues with the liquidator, narrow the issues, and arrive before the taxing officer with a common position on the accounts, or seeking resolution of a limited number of issues. The matter would be determined expeditiously, and probably with a hearing time of a single day or less. If no creditor or shareholder took an interest, and the liquidator had to take the registrar through more of the background, one might expect the hearing to take 2 days, even with a complex matter such as this, with accounts spanning 15 years.

[42] Notwithstanding these conclusions, the Chambers Judge offers no explanation as to why the Liquidator should recover all of its fees and disbursements. Although she acknowledges at paras. 89-90 that:

> [89] ... I, too, am only dealing with the taxation before Registrar Sainty and the findings that she made after hearing witnesses at the taxation.
>
> [90] ... The taxation before Registrar Sainty, in keeping with the history of this matter, was extreme, out of proportion, and out of keeping with the usual experience at taxation.

she does not address her finding that even if "no creditor or shareholder took an interest, and the liquidator had to take the registrar through more of the background, one might expect the hearing to take 2 days".

[43] In my opinion, the Chambers Judge erred by failing to account for the time and expense that would have been required of the Liquidator and its counsel to prepare for and attend that portion of the taxation and passing of accounts necessitated by its statutory obligations and the Court order. The circumstances cannot be compared to a claim for civil relief. In such cases, litigation is at the instance of one or more of the parties involved, and controlled by those parties.

[44] If special costs are awarded in civil proceedings they are generally awarded for the entire proceeding. The general rule is not absolute. As Ross J. observed in *Coulter v. Ball*, 2003 BCSC 1186, 17 B.C.L.R. (4th) 41 at para. 13:

> [13] The general rule is that where special costs are awarded, they will be for the entire proceeding, see *Sammartino v. Hiebert*, [1997] B.C.J. No. 2036 (S.C.). However, there is discretion to award special costs for only a particular period of time related to the impugned conduct. The factors which

> will be relevant in relation to this exercise of discretion included whether the impugned conduct was an isolated occurrence and its significance in terms of the conduct of the litigation, see *Muncaster v. Nunnenmacher* (1996), 76 B.C.A.C. 211 at paragraph 17 per Finch J.A., speaking for the court:
>
> > When one looks at the overall course of this litigation and at the reasons of the learned trial judge in their entirety, two things seem apparent with respect to the false document. The first is that the learned trial judge viewed its creation as a matter which called for a sanction in costs. The second is that the document did not play a major part in the disposition of the law suit. It seems to me that in awarding special costs for the short period he did the learned trial judge was attempting to balance those somewhat conflicting factors. The order limiting special costs to a brief period of the law suit is an unusual one. Indeed, counsel were unable to find any case where a similar order had been made. However, the learned trial judge had the unique advantage of having heard all of the evidence and having seen all of the witnesses, and the advantage of being able to assess the relative importance of the false document in the full context of this long, complex and obviously difficult lawsuit.

[45] In my view, where the need to attend before the Registrar is absolute, as it is in this case, due to the operation of the legislation and the order of Preston J., it would be an error in principle to require the appellants to pay for the preparation for and attendance at that portion of the proceedings before the Registrar that would have been required regardless of the position taken by the appellants.

[46] While it would have been necessary for the Liquidator to attend a taxation and passing of accounts, the same cannot be said of FMD. Their attendance before the Registrar was only due to their need for separate counsel as a result of CIS' List of Issues.

[47] The Chambers Judge found that the hearing before the Registrar could be expected to take two days. I would therefore allow the appeal to the limited extent of reducing the award of special costs to the Liquidator by allowing it special costs for 24/26ths of the special costs ordered by the Chambers Judge, but making no reduction in the award of special costs to FMD.

[48] In the result, I would also order that the liquidator and the appellants bear their own costs of the appeal, but that the appellants pay to the respondents FMD their costs at Scale 1 of the *Court of Appeal Rules*, B.C. Reg. 297/2001. I would not alter the award of costs for the proceedings before the Chambers Judge.

[49] **SAUNDERS J.A.**: I agree.

[50] **LOW J.A.**: I agree.

[51] **SAUNDERS J.A.**: The appeal of the order of costs in favour of Fasken Martineau DuMoulin is dismissed. The appeal of the order of costs in favour of KPMG is allowed to the extent of substituting an order that KPMG is entitled to special costs from the appellants of 24/26ths and KPMG will bear its own costs of the appeal. The appellants will bear their own costs of the appeal. Fasken Martineau DuMoulin is entitled to costs of the appeal at Scale 1.

"The Honourable Mr. Justice Hinkson"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gichuru v. Smith,*
2014 BCCA 414

Date: 20141029
Docket: CA040987

Between:

Mokua Gichuru

Appellant
(Plaintiff)

And

Howard Smith and Howard Smith Personal Law Corporation
both doing business as "Howard Smith & Company"

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Goepel

On appeal from: Orders of the Supreme Court of British Columbia, dated May 22, 2013 (*Gichuru v. Smith,* 2013 BCSC 895, New Westminster Registry S123626) and dated September 10, 2013 (*Gichuru v. Smith*, 2013 BCSC 1818, New Westminster Registry S123626).

The Appellant appeared in person

Counsel for the Respondents:	R.S. Anderson, Q.C. & J.K. Yamashita
Place and Date of Hearing:	Vancouver, British Columbia September 16, 2014
Written submissions from Appellant:	September 29 and October 20, 2014
Written submissions from Respondents:	October 2, 2014
Place and Date of Judgment:	Vancouver, British Columbia October 29, 2014

Written Reasons by:
The Honourable Mr. Justice Harris and
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Stromberg-Stein

Summary:

Mr. Gichuru commenced an action against his former employer for unjust dismissal and breach of fiduciary duty. Mr. Gichuru worked as an articled student for Mr. Smith's law firm. The trial judge found just cause. She dismissed the breach of fiduciary duty claim. She summarily ordered lump-sum special costs against Mr. Gichuru.

Held: *Appeal dismissed with respect to the employment issues. The judge's findings were supported by the evidence and her analysis of credibility. The findings were made in respect of factual issues that were properly before her and there was no unfairness in the trial or arising from the respondents' argument on appeal.*

The special costs order is set aside on the ground that there was no evidence before the court permitting a summary assessment. The Court comments on, and rejects, the practice of assessment of special costs in the absence of evidence of legal fees incurred and rejects the so-called "rough and ready" method of assessing special costs.

Reasons for Judgment of the Honourable Mr. Justice Harris and the Honourable Mr. Justice Goepel:

Introduction

[1] This appeal arises out of the dismissal of Mr. Gichuru's claim for unjust dismissal as an articled student employed by Howard Smith Personal Law Corporation. The trial judge concluded that the employer had established just cause to terminate Mr. Gichuru's employment. She also rejected Mr. Gichuru's allegation that Mr. Smith, his effective principal, owed him fiduciary obligations.

[2] The trial judge went on to summarily order lump sum special costs against Mr. Gichuru to rebuke him for recklessly pursuing allegations impugning Mr. Smith's conduct and to avoid an unnecessary but likely protracted hearing before the registrar.

[3] For the reasons that follow, we would not accede to the appeal as it relates to the employment issues and the award of special costs. We would, however, set aside the assessment of special costs and, unless the parties can otherwise agree as to the amount, refer the assessment of costs to the registrar.

Background

[4] The reasons for judgment are lengthy and contain a detailed analysis of the evidence as well as comprehensive findings of fact. We propose to set out only sufficient background to set the issues on appeal in an appropriate context.

[5] One of the issues at trial was whether the employment contract was entered into by Mr. Smith personally or by his professional corporation. The judge concluded the contract was between Mr. Gichuru and the corporation, and not Mr. Smith personally. Although, Mr. Gichuru alleges on appeal that this conclusion is in error, as a practical matter, nothing turns on who the employer was. The respondents have given assurances both at trial and in this Court that if there is liability, the judgment will be paid regardless of who is liable. Accordingly, we have concluded that it is not necessary to address this issue. Throughout these reasons we will, for convenience, refer interchangeably to Mr. Smith or Howard Smith & Company without intending to detract from the judge's conclusion about the parties to the contract.

[6] In early 2002, Mr. Gichuru, who had graduated from law school the previous year, was looking for articles. He sent a letter to Howard Smith & Company inquiring about articles in late January 2002. He was offered and accepted an articling position with the firm. He began working at Howard Smith & Company in early February 2002 as a legal assistant because the Law Society had not yet approved his articles.

[7] In early March 2002, when his articles were approved, he began to work at the law firm as an articled student. Effectively, although not officially, Mr. Smith acted as his principal. Mr. Gichuru worked under Mr. Smith's direction and supervision.

[8] The trial judge characterized the employment relationship at para. 164. She said:

> [164] Mr. Gichuru was hired to work at HS&C as an articled student. He was not hired in some other capacity, although Mr. Smith agreed that Mr. Gichuru could begin work in February 2002, even though Mr. Gichuru's application for admission to the articling program had not yet been approved. Both sides refer to the Articles Agreement and the employment agreement as

> separate agreements, and they are. However, Mr. Gichuru's obligations as an articled student overlap his obligations as an employee. Whatever work he was doing as an articled student, he was also doing as an employee of the firm. For example, as an articled student, Mr. Gichuru was obligated "to observe strictly all confidences of the principal or of others in the principal's firm." He owed the same obligation in his capacity as an employee in HS&C. This is a necessary aspect of accepting a position in a law firm. As an articled student, Mr. Gichuru was obligated to accept assignments, direction and supervision from Mr. Smith. When Mr. Smith decided that he wanted Mr. Gichuru to do work for other lawyers in the office, Mr. Gichuru was obliged to accept and do those assignments, in addition to whatever he was doing specifically for Mr. Smith. Mr. Gichuru's obligations as an employee were the same.

[9] The trial judge made certain critical findings of fact that underlay her conclusion that Mr. Gichuru was in breach of his employment contract:

> [166] I find that Mr. Gichuru was insubordinate. He did not accept that Mr. Smith had the right to determine how HS&C and the business of the firm were to be conducted. When Mr. Smith told Mr. Gichuru what he expected in terms of Mr. Gichuru's availability to do the work Mr. Gichuru was hired to do, Mr. Gichuru rejected it as unreasonable and unfeasible and expected Mr. Smith to justify what he was asking Mr. Gichuru to do before Mr. Gichuru would do as instructed. But it was not for Mr. Smith to justify work terms to Mr. Gichuru.
>
> [167] I find that Mr. Gichuru was in fact given work assignments by Mr. Murphy, that the assignments were appropriate assignments for an articled student at HS&C but that, instead of completing the assignments, he argued with Mr. Murphy and expected Mr. Murphy to justify the work before Mr. Gichuru would take it on. I reject Mr. Gichuru's evidence that he did not receive work from Mr. Murphy and that it is "absolutely false" that he refused to do work for Mr. Murphy. I also find that Mr. Gichuru was given work by Ms. Barkwell-Blake and that he did not do what he had been asked by her to do.
>
> [168] I find that these issues were brought to Mr. Gichuru's attention at Mr. Gichuru's meeting with Mr. Smith on April 18, 2002. At that meeting, Mr. Smith again raised his own difficulties concerning Mr. Gichuru's availability and told Mr. Gichuru what Mr. Smith expected. When Mr. Smith stated his concerns and expectations for Mr. Gichuru, Mr. Gichuru's response (by, on his own evidence, indicating that he was only five minutes away and could not see what the problem was) was to deny there was a problem and require his boss to justify why things had to be the way Mr. Smith wanted, as opposed to the way that Mr. Gichuru wanted.
>
> [169] I conclude that Mr. Gichuru is probably mistaken about the further discussions about "lunch" he relates he had with Mr. Smith at the end of the week of April 22, 2002. He did not put this evidence to Mr. Smith during Mr. Smith's cross-examination, and I think it more likely that these were among the matters canvassed during the meeting on April 18, 2002. There

> was nothing in Mr. Smith's evidence to suggest that, after the Abbotsford courthouse incident he had a change of heart concerning Mr. Gichuru.
>
> [170] I find that, by the end of the meeting on April 18: Mr. Gichuru had been informed by Mr. Smith about what Mr. Smith expected; he had been warned by Mr. Smith that his conduct was unacceptable; and he recognized that his continued employment at HS&C was in jeopardy unless he changed. Based on Mr. Gichuru's own evidence, the April 18 meeting was a "big deal," and concerned him to the extent that he took the step of documenting what had happened. I also accept Ms. Enair's evidence that Mr. Gichuru contacted the Law Society around this time and spoke to her. However, as his "no-names" discussion with Ms. Enair confirms, Mr. Gichuru was not prepared to change. His view remained that what Mr. Smith required was unreasonable and unacceptable to him.
>
> [171] Although I conclude that Mr. Gichuru is most probably mistaken about the date, and that this discussion probably also occurred at the April 18 meeting, based on Mr. Gichuru's evidence regarding a further discussion about "lunch" with Mr. Smith while they were in Abbotsford, Mr. Gichuru in essence communicated to Mr. Smith that Mr. Smith's way of running his firm was unacceptable to Mr. Gichuru and he was not staying. Mr. Gichuru said he felt relieved.
>
> [172] I have also concluded that an incident probably occurred at the Abbotsford courthouse where Mr. Gichuru spoke disrespectfully in a loud voice to Mr. Smith. The event itself is not something a person in Mr. Smith's position is likely to forget, even though some details have faded from memory after ten years. Ms. Barkwell-Blake's evidence on cross-examination supports Mr. Smith's evidence that an incident occurred. I conclude that Mr. Gichuru is mistaken in his recollection of events at the Abbotsford courthouse on April 22 and 23, 2002.
>
> [173] Despite having been warned at the April 18 meeting that his conduct was unacceptable, apart from April 19 (when he stayed at the office, "feeling miserable"), I find that Mr. Gichuru did not alter his behaviour. Mr. Gichuru does not dispute this. When Mr. Smith again attempted to reach Mr. Gichuru over lunchtime, he could not. Although it was a very serious step, I find that, at that point, Mr. Smith was justified in terminating Mr. Gichuru's employment. In my view, Mr. Gichuru had demonstrated quite clearly by his conduct that he found the working conditions Mr. Smith set for him to be unacceptable and that he would not accept them. I conclude that Mr. Gichuru's behaviour was such that the employment relationship could no longer viably subsist.

[10] In light of her conclusion on just cause, the trial judge did not proceed to analyze issues connected to notice, damages or consequential damages.

[11] The trial judge did, however, reject Mr. Gichuru's allegation that Mr. Smith owed him a fiduciary duty arising out of Mr. Smith's status as his effective principal. The nub of her reasoning follows:

[180] *Ad hoc* fiduciary relationships must be established on a case-by-case basis. Vulnerability alone is insufficient to support a claim that a fiduciary duty is owed. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake. For an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship (as described by Wilson J. (dissenting) in *Frame v. Smith*, [1987] 2 S.C.R. 99): (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. See *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at paras. 28, 31, 33 and 36.

[181] The relationship between an articled student and his or her principal is not a *per se* fiduciary relationship. Mr. Gichuru acknowledges that, to succeed on this aspect of his claim, he must make out the elements of an *ad hoc* fiduciary relationship.

[182] Neither side has been able to locate any cases where a principal has been found to be in a fiduciary relationship with the principal's articled student in relation to the student's articles. I do not find that at all surprising. This is because a lawyer's primary duty is to the lawyer's clients, to whom, and without any doubt, the lawyer owes fiduciary obligations. The idea that, by taking on an articled student, a lawyer gives an undertaking (either express or implied) to act in the articled student's best interests, is incompatible with the lawyer's existing fiduciary obligations to the lawyer's clients. To paraphrase McLachlin C.J. at para. 44 in *Alberta v. Elder Advocates*, imposing such a burden on a lawyer is inherently at odds with the lawyer's duty to act in the best interests of the lawyer's clients. [Emphasis in original.]

[183] I find that Mr. Smith did not in fact give Mr. Gichuru any undertaking to act in Mr. Gichuru's best interests, nor could he. The clients' interests came first. This is sufficient to dispose of Mr. Gichuru's breach of fiduciary duty claim, because, on the facts, Mr. Gichuru is unable to establish an essential element of the relationship; it does not exist. Moreover, Mr. Smith did not in fact control whether or not Mr. Gichuru completed articles and was called to the bar. Mr. Gichuru himself had the ability to terminate the relationship and reassign his articles to any other lawyer qualified to act as a principal. Mr. Gichuru was never "vulnerable," in the sense required to establish an *ad hoc* fiduciary relationship, to Mr. Smith's control.

[184] Of course, a lawyer acting as principal to an articled student has important responsibilities to the student, and also has important responsibilities to the Law Society. But the principal's responsibilities and obligations to the student are not fiduciary obligations, nor is the lawyer in a fiduciary relationship with the student.

On Appeal

[12] Mr. Gichuru accepts that the trial judge relied on the correct legal test to determine when an employer has just cause to dismiss an employee. Reduced to its essentials, just cause exists where the employee's conduct, in breach of the employment contract, is such that the employment relationship can no longer viably exist: see *McKinley v. BC Tel*, 2001 SCC 38 at para. 29. The employer bears the burden of proving just cause. Moreover, Mr. Gichuru concedes that the facts found by the trial judge support the finding of just cause. His contention on appeal is that the trial judge erred in her findings of fact. In substance, he argues that the trial judge made palpable and overriding errors in reaching her findings of fact.

[13] As we understand it, Mr. Gichuru's argument about palpable and overriding error focuses on two principal contentions. First, he argues that the trial judge's conclusion that just cause existed depended critically on her finding that he was not available at lunchtime on April 26 and 29, 2002, when Mr. Smith said he had tried to contact him. He argues that there was no evidence that he was not available at those times and, accordingly, the judge's findings were made in the absence of any evidence. Second, he attacks the trial judge's finding that he was in breach of his employment contract before April 18, 2002, when he had lunch with Mr. Smith to discuss issues and concerns about his employment at the firm. These findings and the findings about the events at the Abbotsford courthouse on April 22, 2002, set out above, he contends, were based on palpable and overriding errors in the trial judge's assessment of credibility.

[14] We are, with respect, unable to discern any merit in these submissions. The trial judge recognized the importance of credibility to the facts she was required to find in deciding the case. She noted at para. 132 that "the degree and frequency of the conflicts between Mr. Gichuru's evidence, on the one hand, and the evidence of other witnesses who worked at HS&C, on the other, is striking". She gave examples of conflicts in the evidence relating to a number of important issues in the trial. She explained how she intended to assess credibility, relying on seminal authority in this

province: see paras. 129 and 130. The trial judge considered the arguments the parties advanced to justify their views of what credibility conclusions the judge should reach. She analyzed credibility issues both from a general perspective and, importantly, in relation to specific factual questions, such as: whether Mr. Gichuru was asked to do work that he did not do, or do adequately; what occurred at the lunch meeting on April 18, 2002; and whether he was subsequently available by telephone to Mr. Smith in late April 2002.

[15] The trial judge did not find Mr. Gichuru's evidence on a catalogue of important matters to be reliable unless it was independently supported. She preferred the evidence of other witnesses to Mr. Gichuru's where the evidence conflicted. She gave detailed reasons explaining her credibility findings and how they related to her findings of fact. In undertaking that analysis, it is evident that the trial judge properly applied the burden of proof. We see no merit in Mr. Gichuru's criticism of the trial judge's assessment of credibility. The analysis was undertaken carefully with painstaking attention to detail and to a consideration of the submissions on credibility advanced by both parties, but particularly by Mr. Gichuru. Mr. Gichuru has not demonstrated any error in principle in the way in which the trial judge assessed credibility. To the contrary, his argument on appeal does not rise above an attempt to reargue his case and suggest that the trial judge, in reaching her conclusions on credibility, should have weighed matters differently.

[16] In our view, a review of the evidence at trial demonstrates that there was ample evidence supporting each of the findings of fact made by the trial judge. By way of example, Mr. Gichuru contested the trial judge's finding that Mr. Murphy had asked him to do work that he did not do. But that was exactly what Mr. Murphy said had occurred. In short, Mr. Murphy had attempted unsuccessfully to enlist Mr. Gichuru's assistance on a number of personal injury files, but found the experience so frustrating that he gave up and did the work himself. The trial judge was entitled to find the facts as she did, having seen the witnesses and assessed their evidence against the probabilities and the relevant circumstances.

[17] Similarly, we are satisfied that the trial judge's finding that Mr. Gichuru was unavailable to Mr. Smith when he attempted to call him on April 26 and 29, contrary to instructions he had received, is supported by the evidence. Mr. Gichuru testified that he was always available to be contacted at lunchtime by telephone and that if he did not answer his cell phone, it would have been because he was in court or driving to court. He testified that he never missed a call. Specifically, he disputed that he might have missed calls when he went home for lunch and was listening to music. He said he was no more likely to miss a call in his apartment than in the office.

[18] On cross-examination, it was suggested to Mr. Gichuru that he had missed a call from Mr. Smith on April 30 at lunchtime (this suggestion was consistent with some evidence Mr. Smith had previously given at a Human Rights Tribunal hearing). Mr. Gichuru explained that he had attended court in Maple Ridge at 1:30 p.m. that day and that he would have left for Maple Ridge at about 12:30 p.m. He would have turned his phone off while he was driving. He was also asked whether he had missed calls from Mr. Smith in the morning and evening of April 29. This evidence needs to be set in context. Mr. Gichuru was being cross-examined on cell phone records. It is apparent from a review of the transcript that the initial premise of the cross-examination was that the cell phone records disclosed calls made to Mr. Gichuru's phone. As the evidence developed, it became clearer that the calls reflected Mr. Gichuru phoning to retrieve voicemail messages that had been left earlier. Accepting that, the cell phone records disclosed Mr. Gichuru phoning his voicemail first thing on the morning of April 29, which was a Monday, and then phoning his voicemail again in the evening of April 29 to pick up a message left earlier in the day. Mr. Gichuru testified that, on those occasions, a caller who had gone to voicemail had not left a message.

[19] Mr. Smith was clear that he had attempted unsuccessfully to reach Mr. Gichuru at lunchtime on April 26 and April 29, 2002. He explained how he had been able to identify those particular days and why he had been mistaken in his evidence before the Human Rights Tribunal in identifying April 30 as the date when

he attempted to contact Mr. Gichuru. Mr. Smith explained the sequence of events that had triggered him dictating his termination letter on April 26, but then holding it over the weekend. He had refreshed his memory from notes of a call that he had made to the Law Society on April 26 advising that he would be terminating Mr. Gichuru. He also referred to some records that he had located during trial that showed Mr. Gichuru's expenses for attending court in late April. Those records did not disclose any claim for expenses on April 26 or April 29, although they did do so for April 30 when Mr. Gichuru attended court in Maple Ridge.

[20] Mr. Smith testified that at lunchtime on April 26 he had called Mr. Gichuru's cell phone and not received an answer. The call went to voicemail, but he did not leave a message. He then checked with his office to determine if Mr. Gichuru's whereabouts were known and was advised that he had left the office. That was the last straw and Mr. Smith dictated a termination letter over the phone, but decided to leave it over the weekend. At lunchtime on April 29, he called again, principally to check whether Mr. Gichuru would answer the phone. He did not. Once again the call went to voicemail but Mr. Smith did not leave a message. Mr. Smith's evidence that the call went to voicemail but he did not leave messages on April 26 (a Friday) and April 29 is consistent with Mr. Gichuru's cell phone records disclosing Mr. Gichuru's call to pick up messages on the morning and evening of April 29.

[21] Mr. Gichuru cross-examined Mr. Smith on his evidence that he had called at lunchtime on both April 26 and April 29. Mr. Smith confirmed his evidence.

[22] Mr. Gichuru gave rebuttal evidence arising from the records of his expenses that had been disclosed after he had given evidence in his case. He did not give any evidence in rebuttal explaining whether he was available to receive calls at lunchtime on April 26 and 29, 2002.

[23] In our view, it is clear that there was evidence before the trial judge from which she could draw the conclusion not only that Mr. Smith had attempted to reach Mr. Gichuru by cell phone at lunchtime on those days but also that Mr. Gichuru had not been available to take the calls as he should have been. It is, respectfully, a

complete misapprehension of the state of the evidence to suggest, as Mr. Gichuru does, that there was no evidence before the court to support a finding of fact that he was not available, or failed, to take calls from Mr. Smith at the time he was required to receive them. Mr. Gichuru has not demonstrated any palpable or overriding error in the findings of fact made by the trial judge.

[24] It is, of course, trite law that this Court owes deference to findings of fact made by a trial judge if they are supported by the evidence. Assessing credibility and finding facts based on that assessment are peculiarly the province of the trial judge. In this case, Mr. Gichuru's argument fails to demonstrate any legal error made by the trial judge in the assessment of the evidence and credibility. On this aspect of the appeal, Mr. Gichuru simply attempts to reargue his case at trial. He invites us to reweigh the evidence – something we should not do. We would not accede to Mr. Gichuru's contention that the trial judge committed palpable and overriding errors in reaching her findings of fact.

[25] Mr. Gichuru goes further than suggesting that the trial judge made findings of fact in the absence of evidence that established just cause. He submits that it was improper for the judge to make those findings because he did not have proper notice by way of the pleadings or other notice that he was alleged not to have been available on those particular days.

[26] Mr. Gichuru contends that he understood that the allegation he faced was that he had not been available to receive a call at lunchtime on April 30, 2002. He based that understanding on evidence that Mr. Smith had given earlier at a Human Rights Tribunal hearing explaining what had precipitated his decision to terminate Mr. Gichuru's employment. Further, there was no specific pleading that he had not been available on April 26 and 29, 2002, and at the beginning of his evidence, he had requested that any alleged facts relied on to justify termination be put to him in his evidence so that he would have an opportunity to respond to them. He argues that it was not suggested to him in his cross-examination that he had been

unavailable on those dates. Accordingly, the judge erred in making findings of fact about those dates, since the issue was not properly joined between the parties.

[27] We do not find Mr. Gichuru's argument persuasive.

[28] In his Notice of Civil Claim, Mr. Gichuru alleged that he had been wrongfully dismissed on April 30, 2002. In the Response to Civil Claim, amongst other alleged breaches of the contract of employment, the defendants alleged that Mr. Gichuru had breached express terms of the contract of employment, including his obligation to "obey the reasonable and lawful directions" of Mr. Smith. They pleaded:

> … Often, the only time in a work day available for the Defendant Smith and the Plaintiff to communicate was over the lunch hour because of the Defendant Smith's busy court schedule, and for this reason, the Plaintiff was specifically requested to be capable of telephone contact over that time. Notwithstanding repeated requests and admonitions that the Plaintiff make himself available over the lunch hour, the Plaintiff refused to be available over this time period and accordingly compromised his use to the Defendant Smith because of strategic communication breakdown caused by his absence …

[29] The defendants go on to plead that Mr. Gichuru was warned of this breach of his employment contract and that if the breach was not remedied, he would be dismissed. They then pleaded:

> On a third occasion, the Plaintiff again neglected to answer his mobile phone, at a time that he was required on a pressing matter. On account of failed efforts by the Defendant Smith and support staff to contact the Plaintiff on this day, and due to the Plaintiff['s] failure to accede to the Defendant Smith's repeated warnings, a notice of dismissal was forwarded to the Plaintiff on account of his breach of the employment contract.

[30] There is no issue that the "third occasion" referred to in the pleading is an alleged event occurring after the lunch meeting on April 18, 2002. It is, accordingly, clear that the defendants were relying as justification of just cause on Mr. Gichuru's failure to be available by telephone on a day between April 18 and April 30, 2002, when the termination letter was provided to the appellant.

[31] The pleadings, therefore, raise the factual issue of whether Mr. Gichuru had been unavailable by phone immediately prior to his dismissal and it was, as a pleadings matter, entirely proper for the trial judge to make findings of fact in relation

to it. It may have been open to Mr. Gichuru to request particulars of the specific date or dates on which it was alleged that he had not been available by telephone. It does not appear that was done. Regardless, the pleading as it stands is sufficient to raise properly the issue for the purposes of trial.

[32] In our view, Mr. Gichuru places inappropriate weight on the fact that Mr. Smith had testified earlier at a Human Rights Tribunal hearing that what had precipitated his decision to terminate Mr. Gichuru's employment was his inability to reach Mr. Gichuru by phone on April 30, 2002. That evidence was given in a hearing dealing with different issues and it is difficult to see that the date on which Mr. Smith had attempted to contact Mr. Gichuru was relevant to the issues in that hearing. In any event, Mr. Gichuru was not entitled to rely on that evidence of the specific date as if it were a pleading, or particulars of pleadings, that formally defined the issues between the parties for the purposes of trial. The specific date was not, in that sense, a formal allegation of material fact. The gravamen of the formal allegation is that after being warned that he had to be available to Mr. Smith at certain times, within very short order, he disobeyed the instructions he had received. The specific time he was unavailable is less significant, although, of course, as a matter of trial fairness, Mr. Gichuru was entitled to know when it was said he was unavailable and to have the opportunity to address that issue in his evidence. In our view, he did receive that opportunity.

[33] At trial, as has already been alluded to, Mr. Smith explained not only that he was mistaken in saying that he had tried to call Mr. Gichuru on April 30, but he also explained how he had reconstructed the timeline using documents that he had not consulted before giving evidence at the Human Rights Tribunal. Unfortunately, some of those documents had been located during the course of the trial, after Mr. Gichuru had testified.

[34] We have already canvassed the scope of Mr. Gichuru's evidence, both in direct and on cross-examination. There was clearly some confusion as the evidence unfolded about what the cell phone records disclosed about calls made to his phone.

As discussed, it appears the evidence eventually established that Mr. Gichuru had called for messages in the morning and evening of April 29, and it was suggested in cross-examination that Mr. Gichuru had been unavailable on April 29, although it was not put to him that he had failed to answer a call from Mr. Smith at lunchtime.

[35] Mr. Gichuru, it will be recalled, gave evidence that he did not miss calls and that if he had been phoned, he would have answered the call, unless he was in court or driving. He was cross-examined generally about his availability to take calls and whether he might have missed some, but he was not confronted with the specific allegation that he had been unavailable to receive cell phone calls on April 26 or lunchtime April 29, 2002.

[36] As already noted, when Mr. Smith gave his evidence, he pinpointed those dates as the dates he had attempted to contact Mr. Gichuru and explained how it was that he was now able to identify those as the specific dates. Mr. Gichuru was, by then, well aware of when it was said he had not been available to Mr. Smith. Mr. Gichuru cross-examined Mr. Smith on this evidence but did not receive answers that assisted his case.

[37] Mr. Gichuru then had the opportunity to give rebuttal evidence. Indeed, he did give rebuttal evidence related to the document that showed the expenses he claimed for driving to court at the end of April. This was one document that Mr. Smith had relied on to refresh his memory of the dates on which he attempted to call Mr. Gichuru but it was not the only one. Mr. Smith also refreshed his memory by referring to a Law Society document that recorded his April 26 call to the Law Society in which he explained that he would likely be terminating Mr. Gichuru's employment and the reasons why. This document is clear evidence that corroborates Mr. Smith's evidence that he failed to reach Mr. Gichuru on April 26. More importantly, for current purposes, the document was available before trial and should have alerted Mr. Gichuru to the fact that there was evidence that he had been called on that date. Nonetheless, Mr. Gichuru did not give, or attempt to give,

any evidence in rebuttal to explain why he would not have been able to receive telephone calls at lunchtime on April 26 or 29, if Mr. Smith had tried to reach him.

[38] In all of these circumstances, we do not think there was anything improper or unfair in the trial judge accepting that Mr. Smith had tried unsuccessfully to contact Mr. Gichuru on those dates and that Mr. Gichuru had been unavailable to receive those calls, without a reasonable excuse. By the time Mr. Smith had given his evidence about these calls and been cross-examined on them by Mr. Gichuru, Mr. Gichuru must have recognized what amounts to a very minor shift in the case. That shift amounted to little more than that Mr. Smith had tried to contact Mr. Gichuru on two days after the April 18, 2002, lunch meeting and that one of those days was April 29 rather than April 30, 2002.

[39] What happened here is the kind of situation that arises regularly in trials. A witness corrects mistaken evidence during trial. The opposing party has the opportunity to address the issue but, as in this case, does not do so. In our opinion, it is not open to him now to say that the trial was unfair or that the trial judge had no proper basis on which to make findings of fact about April 26 and April 29, 2002.

[40] We turn now to two further arguments advanced by Mr. Gichuru concerning the finding of just cause. First, Mr. Gichuru, in his factum at least, misinterprets the relationship between the trial judge's findings of fact and her conclusion that his employer had just cause to terminate his employment. Mr. Gichuru argues that the finding of just cause was based on his unavailability on April 26 and 29, 2002.

[41] The trial judge's statement that Mr. Smith had just cause to terminate Mr. Gichuru's employment at that point has to be read in a wider context. The trial judge had found that Mr. Gichuru was in breach of his employment contract before the lunch meeting on April 18, 2002. At that lunch meeting, Mr. Gichuru was warned that unless his conduct changed, his employment was in jeopardy. The trial judge concluded that the events after that April 18 meeting were, in effect, culminating events demonstrating that Mr. Gichuru would not alter his behaviour and that, as a result, just cause existed to terminate his employment.

[42] Second, Mr. Gichuru alleges one specific legal error in the trial judge's contractual analysis. He contends that the law does not permit an employer to rely on reasons for termination that were not provided to an employee at the time of termination, unless the employer learned of the relevant facts subsequent to the termination.

[43] In our view, it is unnecessary to comment on whether this view of the law has any merit. This is so because the alleged legal principle does not arise on the facts of this case. Mr. Gichuru relies on the wording of the letter that he received on April 30, 2002, terminating his employment. In relation to the reasons for termination, that letter simply said:

> … I should also add, to be fair to you, that your attitude is not pleasing and the idea of what would constitute your work hours is also not pleasing.
>
> … I will report to the Law Society. I do not intend to report that there is anything unsatisfactory [about] your work ability. …
>
> I am sorry that this happened, but cannot be convinced that your continued Articles in my law firm will be a benefit to us. …

[44] The reality is, as the trial judge found, that Mr. Gichuru was well-informed, before he was terminated, of the concerns his employer had about his performance and attitude. He could have been in no doubt about why his articles were terminated and the defendants did not rely on reasons to justify cause not known to Mr. Gichuru. More specifically, Mr. Smith had spoken to Mr. Gichuru about his availability as early as March 2002. The lunch meeting on April 18, 2002, canvassed the critical problems. Mr. Gichuru called the Law Society on April 18 and discussed the reasons why his employment was at risk. The trial judge found that a serious incident had occurred on April 22 at the Abbotsford courthouse and that Mr. Gichuru knew that Mr. Smith took a very serious view of what had occurred then.

[45] We turn finally to the suggestion that the trial judge erred in finding that Mr. Smith, as effective principal, did not owe fiduciary duties to his articled student, Mr. Gichuru. The trial judge assessed the case against the well-known test for finding that an *ad hoc* fiduciary duty exists, which requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[46] The trial judge found that Mr. Smith did not give an undertaking to act in Mr. Gichuru's best interests, nor could he have, because to have done so would be incompatible and in conflict with Mr. Smith's fundamental fiduciary duties that he owed to his clients. Moreover, she also concluded that Mr. Gichuru was not in the requisite sense "vulnerable" to Mr. Smith's control. Mr. Gichuru contends these conclusions are in error. First, he says, the alleged duty is not incompatible or in necessary conflict with the acknowledged fiduciary duties owed to clients. The two duties can jointly co-exist without contradiction. Secondly, he argues that he was "vulnerable" and that vulnerability was not dissipated because he could seek articles elsewhere. By way of example, he drew our attention to the fact that a lawyer's client can terminate a retainer and seek other representation without that undermining the existence of a fiduciary duty. In the result, Mr. Gichuru asks for an order remitting the matter of the existence of a fiduciary duty and any alleged breaches back to trial.

[47] We note that the trial judge found as a fact that Mr. Smith had not given an undertaking to act in Mr. Gichuru's best interests. Certainly, Mr. Smith took on obligations to Mr. Gichuru both in his capacity as an employer (through his law corporation) and as Mr. Gichuru's effective articling principal. But taking on those obligations does not imply that in doing so he was undertaking to act in Mr. Gichuru's best interests in the sense necessary to create a fiduciary duty. The trial judge's analysis that Mr. Smith could not give such an undertaking without creating a necessary conflict with his primary fiduciary duties owed to clients may very well be entirely correct, but it is not necessary to decide the question for the purposes of deciding this appeal. The trial judge's finding as a fact that Mr. Smith gave no such undertaking in the circumstances of this case is sufficient to dispose of the claim. No basis has been demonstrated to undermine her finding of fact. Accordingly, we would not accede to this ground of appeal.

[48] We turn finally to two matters that have arisen since the hearing of the appeal. On September 29, 2014, Mr. Gichuru wrote to the Court Registry. In his letter, he raised a number of matters. First, he requested that the Division recuse itself on the ground that a reasonable apprehension of bias arose from the conduct of the hearing. Second, he asserted that the respondents had raised new arguments on the appeal relating to the April 26 and 29, 2002, calls. He said that those arguments caught him by surprise and that he did not have sufficient time in reply (which he timed at four minutes) to respond to them. He requested that the Division not consider those arguments or, alternatively, that he be given an opportunity at a further oral hearing to respond to them or, failing that, that he be permitted to provide written submissions. Finally, Mr. Gichuru argued that the suggestion advanced by the respondents that this Court award party and party costs on a summary basis, if we were not inclined to uphold the order awarding special costs, was also a new argument to which he ought to be permitted to respond in a brief written submission.

[49] Through the Registry, we informed Mr. Gichuru that the Division would not recuse itself and that we would not receive any further submissions except a brief written submission dealing with the costs issue.

[50] Turning to the issue of a reasonable apprehension of bias. The issue arose because each member of the Court strongly encouraged Mr. Gichuru to move off his argument that the trial judge erred in finding that his employment contract was with the law corporation and not Mr. Smith personally. Mr. Gichuru says he was prevented from making his argument and that a reasonable and informed observer, viewing the matter realistically and practically, would conclude that he did not receive a fair hearing by an impartial court.

[51] There is no merit in this submission. Mr. Gichuru was encouraged or directed to move on to other aspects of his appeal because the issue he was addressing was of no practical significance to the outcome of the appeal. The respondents had committed on the record to pay a judgment, if there was liability, regardless of which defendant was liable. Spending time on who was the party to the contract wasted

the time available to Mr. Gichuru to advance his argument that the trial judge had erred in her finding that his employment had been terminated for cause. A reasonable and informed observer would conclude that the Division was assisting Mr. Gichuru by directing him to focus on issues that might materially affect the practical outcome of the appeal to his benefit and not detriment.

[52] Turning to the new argument issue. Mr. Gichuru argued in his factum that the trial judge made findings of fact about the phone calls on April 26 and 29, 2002, in breach of principles of natural justice because the respondents had not put those alleged facts to him in cross-examination. The substantive issues on this matter have been canvassed above. He submits, however, that the respondents did not respond to this argument in their factum and that their response to it in oral submissions was a new argument of which he did not have notice.

[53] Mr. Gichuru is correct in saying that the respondents did not directly respond to the specific paragraphs in his factum raising this ground of appeal, but they did take the position in their factum that the issue of just cause was properly pleaded and was before the court. They also submitted that the finding of just cause rested on multiple and cumulative reasons and that the findings of fact made by the trial judge were supported by the evidence. The evidence in support of that argument, including the evidence bearing on the April 26 and 29 phone calls, was referenced in the respondents' factum. They also devoted pages of their factum to correcting factual statements made by Mr. Gichuru in his factum. Specifically, the factum references the cross-examination of Mr. Gichuru on Mr. Smith's attempts to call him after April 18, 2002, and Mr. Smith's attempt to call him on April 26 and 29. In substance, the factum does contest the factual basis of Mr. Gichuru's argument.

[54] In our view, in their oral submissions, the respondents elaborated properly on their factum and responded appropriately to Mr. Gichuru's oral submissions. In their oral submissions, the respondents did not raise new points of law, rely on any authorities not already before the Court, or take the Court in any material way to evidence not already referred to in the factum. It must be remembered that

Mr. Gichuru carried the burden of establishing that the record demonstrated facts capable of supporting his argument. The respondents' oral submissions highlighted for the Court how the evidence unfolded at trial. In substance, their submission consisted of explaining the record. In doing so, they relied almost exclusively on references to the record included in their factum. In our view, this was entirely proper. In considering the merits of Mr. Gichuru's argument, the Court was entitled to know, for example, that Mr. Gichuru had cross-examined Mr. Smith on those particular phone calls and had not availed himself of an opportunity to give evidence about them in reply. For the purposes of the appeal, Mr. Gichuru ought to have anticipated the relevance of these matters and been prepared to deal with them. An appellant does not acquire a right to submit further submissions in reply by not thinking about obvious objections to the argument he or she is advancing or by being unprepared to deal with matters in the record relevant to the ground of appeal being advanced.

[55] Mr. Gichuru complains also that he had, he contends, only four minutes in reply and that he was deprived of a fair opportunity to respond. The court record suggests that Mr. Gichuru spent nearly 10 minutes in reply. Mr. Gichuru received the entire morning to make his argument. He also had time for reply. Mr. Gichuru was given significantly more than half of the time available to the court for oral submissions. Mr. Anderson reluctantly acquiesced in that allocation of time, although he stated a preference for a more equal allocation, given that he anticipated, quite accurately, that he would need to spend time referring in detail to the evidence. Mr. Gichuru chose to use the time he was allocated in the way that he saw fit. In our view, Mr. Gichuru had ample time to deal with these issues either in his principal submissions or in reply to explain his position.

[56] In our view, there was nothing unfair in the hearing of the appeal. We see no basis on which we should have agreed to refuse to consider whether the trial judge breached a principle of natural justice in making certain findings or to receive additional oral or written submissions on the matter.

Costs

[57] Following delivery of the trial reasons, the parties made submissions on costs. The trial judge's reasons on costs are indexed at 2013 BCSC 1818.

[58] At the costs hearing Mr. Gichuru argued that each side should bear their own costs, or alternatively, that Mr. Smith recover only 25% of his assessed costs. He submitted Mr. Smith should be deprived of his costs because of misconduct on his part and his counsel's part.

[59] Mr. Smith sought special costs. Alternatively, and on the basis of an offer to settle, he sought an order that he recover costs assessed on a party and party basis on Scale B up to September 13, 2012 and double costs thereafter.

[60] The trial judge dealt first with Mr. Gichuru's application. She noted that pursuant to R. 14-1(9) of the *Supreme Court Civil Rules* (the "*Rules*") costs of a proceeding must be awarded to the successful party unless the court otherwise orders. The trial judge reviewed in detail Mr. Gichuru's various complaints about the conduct of Mr. Smith and his counsel, but ultimately concluded that Mr. Gichuru had not met the burden on him to displace the usual rule that costs follow the event. She dismissed Mr. Gichuru's application in regard to costs.

[61] She then turned to Mr. Smith's application. She dealt first with the offer to settle. She found that it had been made too close to trial. In the circumstances, she was not prepared to find that the offer was one that Mr. Gichuru ought reasonably to have accepted. On that basis, she was not prepared to exercise her discretion and make an order for double costs.

[62] In regard to special costs, she noted that such an award is intended to chastise a party for reprehensible, scandalous or outrageous conduct and that unproven allegations of fraud or dishonesty may attract an award of special costs since such allegations are serious and potentially very damaging to those accused of deception. She noted that Mr. Gichuru had made serious allegations of dishonesty against Mr. Smith. She found that he had not proven the allegations of dishonesty at

trial nor had he proven any breach of fiduciary duty. She noted that Mr. Smith had put Mr. Gichuru on notice in advance of the trial that the allegations of misconduct had no evidentiary foundation and that he would seek special costs.

[63] After a detailed review of the allegations, pleadings and evidence, the trial judge concluded that an award of special costs was justified. She summarized her views as follows:

> [76] Mr. Gichuru's attacks on Mr. Smith's professional integrity and honesty were persistent and maintained over a period of years. They were maintained after Mr. Smith warned Mr. Gichuru of the consequences, something Mr. Gichuru should have appreciated even without any warning. A lawyer relies on his reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt.
>
> [77] As I noted above, alleging (and failing to prove) fraud or dishonesty will not necessarily result in an award of special costs. Here, however, there is something more, namely: Mr. Gichuru's recklessness in making such allegations and in stubbornly refusing to abandon them, maintaining them over a period of years, and through to closing submissions at the trial. In my view, based on Mr. Gichuru's reckless allegations of fraud and dishonesty against Mr. Smith, an award of special costs is justified.

[64] The trial judge then turned to the issue of how costs were to be assessed. Mr. Smith sought to have costs, including disbursements, assessed summarily pursuant to R. 14-1(15). Mr. Gichuru opposed such an assessment. He said that regardless of whether special costs or party and party costs were ordered he was entitled to have costs and disbursements assessed by the registrar and to have the ability to challenge the amounts claimed.

[65] The trial judge held that it was appropriate to assess costs summarily. In reaching this decision she took into account that Mr. Gichuru had no current ability to pay a judgment in respect of costs, whatever the amount, and as such had nothing at stake in forcing Mr. Smith to incur the time and expense of a formal assessment. She saw no good reason why Mr. Smith should be subject to an assessment. She noted that judicial resources are scarce and need to be used efficiently and effectively. In her view making an order that required an assessment before the registrar was not compatible with the economical use of judicial resources.

[66] The trial judge then went on to assess costs. In regard to the approaches to the quantification of special costs she said:

> [86] There are three common approaches to the quantification of special costs: one is to award costs equal to the actual legal costs incurred by the party to whom costs are being awarded; a second is to fix costs at a percentage of actual legal costs, often on 80 or 90 percent of the actual legal costs; and a third is what is sometimes referred to as a "rough and ready" approach, based on $5,000 per half day plus taxes and disbursements. See *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912, at para. 32.

[67] She then noted that in this case Mr. Smith had asked to have costs determined on the basis of the rough and ready approach which on his calculations using a multiplier of $6,000 per half day would lead to a costs award of $108,000.

[68] Mr. Smith did not put before the trial judge any evidence of his actual legal fees. He did submit a draft party and party bill of costs which showed various tariff items that with taxes totalled $29,629.60. In addition the bill of costs showed disbursements of $16,490.63 leading to a total party and party bill of $46,120.23.

[69] The trial judge indicated that the draft bill provided some guidance in determining costs on a rough and ready approach. She considered the factors set out in R. 14-1(3)(b) and noted that given the importance of the litigation to Mr. Smith, the scandalous allegations that had been made against him and the successful outcome, he was entitled to a substantial costs award. She assessed costs inclusive of disbursements and taxes at $90,000. Her reasoning in that regard was:

> [90] I would not increase the per-half-day amount to $6,000, as requested by the defendants, although I appreciate that it has been done in other cases cited to me in argument. In *Bradshaw*, the court's assessment was based on $5,000 per half day, and the total amount of the award after a 51-day trial included disbursements and taxes. That basic approach commends itself to me.
>
> [91] Therefore, on the "rough and ready" approach, and under Rule 14-1(15), I fix the defendants' costs of this action, including disbursements and taxes, at $90,000. This is roughly double the amount presented in the draft bill of costs, which included disbursements and taxes. Although, since it includes disbursements and taxes, it represents somewhat less than $5,000 per half day, I have concluded that it represents appropriate compensation by way of special costs in this action.

Issues On Appeal

[70] Mr. Gichuru now challenges both the award of special costs and the summary assessment of those costs. While acknowledging that a judge's decision on costs will generally be insulated from appellate review, Mr. Gichuru notes that an appellate court may and should intervene where it finds the trial judge has misdirected himself or herself as to the applicable law or made a palpable error in the assessment of the facts: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

[71] Mr. Gichuru suggests that the trial judge erred by finding that he had made reckless allegations of fraud and dishonesty. He submits the trial judge ordered him to pay special costs of the entire proceeding even though there was already an order in place in relation to a payment of party and party costs for certain interlocutory applications that had been made in the course of the action.

[72] Mr. Gichuru further submits that this was not an appropriate case for special costs to be assessed summarily. He submits that parties who are impecunious should not be treated differently than more affluent parties. He notes that one of the trial judge's stated reasons for a summary assessment was the stubbornness he had shown in litigating the action including his appeal of Madam Justice Bruce's interlocutory orders. Mr. Gichuru points out that he in fact succeeded on several issues on that appeal: *Gichuru v. Smith*, 2010 BCCA 352.

[73] Mr. Gichuru challenges the validity of an assessment made in the absence of evidence of the actual legal fees incurred by Mr. Smith. Mr. Gichuru also challenges the use of a fixed fee "rough and ready" calculation to assist in determining special costs. He notes that this Court in *Bradshaw v. Stenner*, 2013 BCCA 61 at para. 16 [*Bradshaw Review*] had suggested that the suitability of a fix fee rough and ready calculation may require resolution in this Court.

[74] Mr. Smith asks this Court to uphold the special costs assessment. He submits that in the circumstances the award of special costs was justified and there are no grounds to interfere with the trial judge's exercise of her discretion.

[75] Mr. Smith cites several cases in the trial division that have made rough and ready summary assessments. He says the authority for such assessments is *Interclaim Holdings Limited v. Down*, 2002 BCCA 632.

[76] Mr. Smith submits that a bill of special costs is not a prerequisite to a summary assessment. In support he cites the trial decision in *Bradshaw v. Stenner*, 2012 BCSC 237 [*Bradshaw*]. Mr. Smith suggests that he should not be put through the time and costs of a registrar's hearing. At the hearing of this appeal his counsel advised that if the summary assessment was reversed, he would prefer this Court summarily assess costs on a party and party basis, as per the draft bill of costs, rather than go through the costs and expenses of a registrar's hearing.

Discussion

A. Award of Special Costs

[77] The award of costs, including the appropriate scale of costs, involves the discretion of the trial judge. This Court should not interfere with that discretion unless the trial judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:

> ... 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.

[79] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197 (C.A.). In this case, Mr. Gichuru's pleadings made serious allegations against Mr. Smith, including the following:

> 20. Smith provided false and misleading information to the Law Society with respect to the circumstances surrounding the termination of the plaintiff's articles.
>
> 21. Smith falsely informed the Law Society the plaintiff insisted on taking a 60 minute lunch away from the office and that the plaintiff never worked after 5:30 p.m.
>
> 22. Smith failed to inform the Law Society that he had promised to hire another person as an articled student to replace the plaintiff.
>
> 23. Smith falsely informed the Law Society that Beuhler had consented to the correspondence providing the alleged reasons for the termination of the plaintiff's employment.
>
> 24. In or about May 2003, as a result of the correspondence received from Smith, the Law Society refused to allow the plaintiff admission in the Law Society Admission Program.
>
> 25. In or about May to June 2003, as a further result of the correspondence received from Smith, the Law Society required the plaintiff to provide personal medical information and undergo an independent psychiatric evaluation.

[80] The trial judge found that Mr. Gichuru did not prove any of his allegations. A lawyer relies on his reputation for integrity. While not every accusation against a lawyer will lead to special costs, when a lawyer's reputation is falsely assailed, the court's reproof should be felt: *Patriquin v. Laurentian Trust of Canada Inc.*, 2002 BCCA 6 at paras. 27 and 29; *Bronson v. Hewitt*, 2011 BCSC 102 at para. 118; *Startup v. Blake*, 2001 BCSC 8 at para. 112.

[81] In the circumstances of this case it was open to the trial judge to make an award of special costs. Mr. Gichuru has not established that she misdirected herself as to the applicable law or made any error in her assessment of the facts. We would not accede to this ground of appeal.

B. Assessment of Special Costs

i. Overview

[82] This aspect of the appeal raises several issues of general importance which need be considered before turning to the assessment made in this case. The issues include: the power of a judge to assess costs and the source of that power, when a judge should assess costs, and, if a judge does decide to assess costs, how that assessment is to be carried out. The third issue raises several additional issues. These include: whether a judge's method of assessment can differ from that of a registrar, whether a judge can assess special costs absent evidence of the actual legal fees incurred, and whether a judge can use the rough and ready method to assess special costs.

[83] To address these issues it is first necessary to consider the purpose of special costs, the civil rules governing special costs and how these rules have evolved over time. We will next discuss the powers of a judge to assess costs and various factors that should be considered in determining whether such an assessment should be carried out summarily. We will then consider the ways that costs can be assessed and consider the validity of the rough and ready method of assessment. That discussion will also involve the question as to whether an account is a pre-condition to a special costs assessment. Finally we will turn to the assessment made in this case and whether it has to be reconsidered.

ii. The Rules – Present and Past

[84] Rule 14-1 of the *Supreme Court Civil Rules* sets out the present rules governing costs. The *Rules* recognize two categories of costs: party and party costs and special costs. A trial judge cannot impose cost sanctions that are not authorized by the *Rules*: *Kurtakis; A.E. v. D.W.J.*, 2009 BCSC 505 at paras. 48-50, aff'd 2011 BCCA 279 at paras. 12, 39.

[85] Party and party costs are assessed in accordance with Appendix B of the *Rules*. On an assessment of special costs a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding.

[86] For the purpose of this appeal the following provisions of the present *Rules* are of particular import:

> **Rule 14-1 - Costs**
>
> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> (c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;
>
> (d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> ...
>
> **Assessment of party and party costs**
>
> (2) On an assessment of party and party costs under Appendix B, a registrar must
>
> (a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and
>
> (b) consider Rule 1-3 and any case plan order.
>
> **Assessment of special costs**
>
> (3) On an assessment of special costs, a registrar must
>
> (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
>
> (b) consider all of the circumstances, including the following:

(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.

Assessment officer

(4) The officer before whom costs are assessed is a registrar.

Disbursements

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

...

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.
>
> ….
>
> **Form of bill in certain cases**
>
> (30) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.
>
> **Description of services**
>
> (31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.
>
> **Evidence of lawyer**
>
> (32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.
>
> …

[87] The foundation of the present cost rules can be traced back to the initial *Supreme Court Rules*, 1880 (the "1880 *Rules*"). While the language and terminology has evolved over time, the principles governing costs have remained fairly constant.

[88] The 1880 *Rules* set out that fees and costs as between party and party or solicitor and client should be allowed only according to the schedule in Appendix H (MR 385). Costs were to be determined by a taxing officer; in regard to costs to be paid by another party, no costs were to be allowed which appeared to the taxing officer "to have been incurred through over-caution, negligence, or mistake, or merely at the desire of a party" (MR 391).

[89] The distinction between "party and party" and "solicitor-client" costs recognized in the 1880 *Rules* continues to the present day. The *Supreme Court Civil Rules,* 1990 (the "1990 *Rules*") introduced the term special costs in place of solicitor-client costs.

[90] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 at 134-138. Special costs may also be ordered in circumstances where there has been no wrongdoing. Such orders may arise from the terms of a statute, (*Laye v. College of Psychologists of British Columbia* (1998), 114 B.C.A.C. 201; *Campbell River Woodworkers v. British Columbia (Minister of Transportation and Highways*), 2004 BCCA 27) or a contract (*Johal v. Virdi*, 2012 BCSC 450). Parties in estate litigation are often entitled to special costs (*Leung v. Chang*, 2014 BCSC 1243), as are those in committee proceedings (*Vieira (Re),* 2013 BCCA 420). A successful public interest litigant may be entitled to special costs: *Victoria (City) v. Adams*, 2009 BCCA 563.

[91] Special costs are usually intended to indemnify a successful litigant, fully or at least substantially: *Everywoman's Health Center Society (1988) v. Bridges* (1991), 54 B.C.L.R. (2d) 294 (C.A.) at 297; *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at para. 45 [*Lee*]. While special costs are usually awarded for the whole proceeding, it is open to a judge to make a partial award if of the view that it would be disproportionate to award special costs for the entire proceeding: *Muncaster v. Nunnenmacher* (1996), 76 B.C.A.C. 211; *Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1772; *A.S.P. v. N.N.J.*, 2013 BCSC 2377.

[92] The power of a judge to award costs directly first arose in the *Supreme Court Rules*, 1890, which allowed a judge to fix a lump sum in lieu of taxation in interlocutory applications (MR 765).

[93] A judge's powers to fix costs were expanded in the *Supreme Court Rules,* 1906. Marginal Rules 998 and 998a read respectively:

> 23. In interlocutory proceedings the court or judge may fix a lump sum of costs.
>
> 23(A) Where the cause or matter is tried at any other place other than: Victoria, Vancouver, New Westminster, Nanaimo, Nelson, Rossland, Greenwood, Grand Forks, Vernon or Kamloops, the court or judge may fix a lump sum for costs of the whole proceedings, and may on any case, wherever tried, fix such sum with the consent of all parties.

[94] A judge's ability to fix a lump sum in interlocutory proceedings was removed in the *Supreme Court Rules*, 1925. Judges continued to have the power, except in certain registries, to fix sums for the whole proceeding and to have that power in any case where the parties consented. Those *Rules* were changed in 1961. Pursuant to the 1961 *Supreme Court Rules*, a judge could fix lump sum costs of a whole proceeding only with consent.

[95] The judge's power to fix costs with consent continued through the 1977 (R. 57-6) and 1990 (R. 57-13) *Supreme Court Rules*. In January 1992, R. 57-13 was amended to give the court the additional power upon application by a party or by consent to fix a lump sum as the costs of a motion. In May 2002, R. 13.1 was adopted. Pursuant to R. 13.1, the court could award lump sums of an interlocutory application and either fix those costs, inclusive or exclusive of disbursements, or order that costs be in accordance with Schedule 3 of Appendix B and fix the scale of those costs pursuant to the terms of the Appendix.

[96] Rule 14-1(15) of the present *Rules* has expanded the role of the court. A judge who awards costs of a proceeding may now fix the amount of costs including the amount of disbursements.

[97] Prior to the adoption of the present *Rules* and other than for a period of years in specific registries, a judge did not have the power under the *Rules* to fix the amount of costs absent the consent of the parties. Even so, a judge could still fix costs pursuant to inherent jurisdiction: *Harrington (Guardian ad litem of) v. Royal Inland Hospital*, (1995) 69 B.C.A.C. 1; *Graham v. Moore*, 2003 BCCA 497; *Buchan v. Moss Management Inc.*, 2010 BCSC 121 at paras. 15-22 [*Buchan*], aff'd 2010 BCCA 393 at paras. 11-32 [*Buchan Appeal*]. While these cases recognized the court's jurisdiction to assess costs, they all cautioned that it was a jurisdiction to be exercised sparingly.

[98] The cases concerning the court's inherent jurisdiction to fix costs all pre-date the introduction of the present *Rules*. In *Lines v. Gordon*, 2009 BCCA 107, this Court summarized the scope of a court's inherent jurisdiction at paras. 23-25. While a

court has the inherent power to regulate its own procedure, it cannot adopt a practice or procedure inconsistent with the rules of court as set down by statute or adopted by ancient usage. Inherent jurisdiction is invoked where there is a gap in the statutory regime. This was the case under the previous *Rules*, as reviewed above. Under the present *Rules*, there is no longer a gap in regard to a judge's power to assess costs that requires invoking the court's inherent jurisdiction: see *Lines* at para. 26. The power to award costs now comes from and must be considered in the context of the *Rules.*

iii. When and How Should a Judge Assess Costs

[99] While R. 14-1(15) authorizes a judge to assess costs, the *Rules* are silent as to when and how a judge should exercise that authority. These questions are inter-related and should be dealt with together.

[100] At the outset, it is important to emphasize that in exercising the power to fix costs a judge cannot act arbitrarily or capriciously. He or she must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B)* (1989), 38 B.C.L.R. (2d) 307 (C.A.) at 310, Lambert J.A. articulated the limits on a judge's power to award costs:

> …Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Insurance Co.* (1981), 28 B.C.L.R. 230,[1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e. not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the Rules of Court. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[101] The principle governing cost assessments under the *Rules* is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant

to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the *Rules* and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[102] The *Rules* specifically set out two scales of costs: party and party and special costs. In an award of special costs, R. 14-1(3)(a) requires a registrar to allow only those fees that were proper or reasonably necessary to conduct the proceeding. Rule 14-1(3)(b) sets out a non-exhaustive list of factors for a registrar to consider in determining whether fees were proper and reasonably necessary. While a judge when fixing costs under R. 14-1(15) may not necessarily follow the same procedure as a registrar, the ultimate award of costs must be consistent with the award that a registrar would make in similar circumstances. Thus, in making a determination of special costs a judge must consider the non-exhaustive list of factors in R. 14-1(3)(b). The quantum of the award should not depend on the identity of the assessor.

[103] When a judge has assessed costs in place of a registrar it has often been done in a summary manner. The *Rules* do not mandate that a judge assess costs summarily. In many cases, the rules of natural justice would suggest that a summary proceeding is not appropriate: *Williston Navigation Inc. v. BCR Finav No. 3 et al.,* 2007 BCSC 190 at paras. 49-58 [*Williston*]. Absent consent, natural justice requires a certain level of procedural fairness. In the typical case, this means providing an opportunity for the party against whom costs are being awarded to test the reasonableness of the fees underlying the award, which reflects the basic costs principle that cost awards are meant to be an indemnity for fees incurred rather than to provide a windfall.

[104] As we explained above, the principle underlying R. 14-1 is that parties are only entitled to their objective reasonable legal costs as determined by the precise

scale of costs they were awarded. In order to determine if a legal fee is reasonably objective, it is often necessary to know the particulars of what the lawyer did to accrue it. As noted by Kirkpatrick J., as she then was, in *Canadian National Railway Co. v. A.B.C. Recycling*, 2005 BCSC 1559 at para. 28 [*A.B.C.*], it is difficult to conceive that a proper examination of a party's incurred legal costs can take place without disclosure of the other side's file and an examination of the other side's lawyers in respect of the file and the matters arising therefrom.

[105] The fact that a lawyer has billed a certain sum does not necessarily make the fee reasonable. This is of particular importance when the other party to the litigation is paying the bill. As noted by Seaton J.A. in *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.) at 88:

> …The party who made that arrangement, the successful party in the litigation, might have made a very poor bargain. The bill rendered pursuant to the agreement might be justifiable between the solicitor and his client but thoroughly unjustifiable to impose on another. The client might have demanded more work to be done than was appropriate in the circumstances, or more lawyers and more expensive lawyers to be retained than were appropriate in the circumstances. Of course, at the taxation, if the other litigant is paying the bill the client will be particularly pleased to see that the bill is as high as possible.

[106] Whether a judge should determine the quantum of costs as authorized under R. 14-1(15) is a matter of judicial discretion. It is a discretion that must be exercised in light of Rules 14-1(2) (for party and party costs) and 14-1(3) (for special costs). It is a discretion which should be exercised sparingly: see *Buchan Appeal* at para. 13. There is good reason for that approach. The court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar. The registrar's extensive knowledge and experience assessing legal bills is seldom matched by that of a trial judge.

[107] An exception to that general proposition can arise in cases when the judge is intimately familiar with the litigation, or the time and costs of a registrar's hearing cannot be justified. In this regard, the words of Southin J.A. in *Interclaim* are often cited:

> [27] As this division is also the division which heard the appeals mentioned in paragraph 13, we are substantially familiar with what happened below. I have in mind also that these litigants have taken unto themselves, from the pool of judicial resources available in this Province, more than can be said to be their fair share. They are not alone in doing such things but litigants must be encouraged to be economical of judicial time.
>
> ...
>
> [38] I accept the submission of Mr. Willms that this is a proper case for the exercise of the power to fix a sum to be paid in lieu of taxation. This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of the time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good. ...

[108] However, the fact the judge has heard the trial does not necessarily lead to the conclusion that the assessment be done summarily or that the best use of judicial resources is for the judge to embark on the assessment of costs. The time the judge spends on the assessment is time the judge does not have for other matters.

[109] A related concern is that the party who might have to pay the costs will prolong any assessment by requiring microscopic review of the services undertaken by counsel for the successful party: *Buchan* at para. 25. This concern must be weighed against the right of a party to challenge the reasonableness of the opposing party's proposed costs. This right derives from the rules of natural justice: see *Williston* at para. 53.

[110] It is true that a more detailed review may be tedious and expensive. That does not mean such a review is unfair to the successful litigant, particularly given that significant amounts may be in issue. While R. 1-3(1) sets out that the object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding. The amount

involved may be an important consideration in determining whether a summary procedure is appropriate.

iv. The Need for an Account

[111] As indicated above, the right of a party to challenge the reasonableness of the opposing party's proposed costs derives from the rules of natural justice. Where a court elects to make a summary assessment of costs, the party facing a costs order must have a meaningful opportunity to challenge the reasonableness of the fees allegedly incurred by the other party; this opportunity is denied where there is insufficient evidence as to the scope and nature of the actual legal fees: *Williston* at para. 53. Assessing special costs on a summary basis absent sufficient evidence of the objective reasonableness of those fees is an error of principle, contrary to both natural justice and to the *Rules*.

[112] Several cases, including the case before us, have proceeded with a summary assessment absent a bill of special costs. In *Bradshaw*, the Court held that the failure to produce a bill of special costs should not bar a judicial assessment. At the time of the assessment in *Bradshaw* the case was under appeal. The judge was concerned that the production of a bill would lead to a loss of solicitor-client privilege because the defendant would relentlessly insist upon detailed information about subjects discussed with counsel and advice and instructions given.

[113] This same situation existed in *A.B.C.* There Kirkpatrick J. recognized that the assessment of special costs would require a waiver of privilege. One of the main purposes of special costs is to indemnify the successful party for the actual legal costs they have incurred. Absent a bill or other evidence of the legal fees incurred there is no way of knowing the amount of those costs. While the disclosure of the legal account may result in a waiver of privilege, that is the price that a party may have to pay if it seeks to recover special costs.

[114] It is difficult to conceive how a proper examination of a party's reasonably incurred legal fees can be made without disclosure of the party's file: see *A.B.C.* at para. 28 and *Williston* at para. 53. A simple presentation of the client's bill to the trial

judge together with counsel's submission would not usually allow a party to challenge the reasonableness of the legal costs nor would it allow for an objective determination of the reasonableness of those costs. In *A.B.C.*, Kirkpatrick J. considered that the prejudicial effect of disclosure could be minimized or eliminated by deferring the assessment until both parties had exhausted or waived their rights of appeal.

[115] In *Buchan*, an objection was made that there was not a proper "bill of special costs before the court". In that case the successful party had filed the affidavit of a legal assistant exhibiting the law firm's statements of account. Bauman C.J.S.C., as he then was, agreed with the comments in Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2d ed. (Markham: LexisNexis, 2007) that a bill for special costs is presented in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Importantly, he did not suggest that an assessment should take place in the absence of any bill.

[116] The need for a bill of a lawyer to tax his account against a client has been long recognized. In the absence of a bill a registrar does not have jurisdiction to conduct a review of a solicitor's account: *Kelly v. McMillan and Harbottle & Co.*, 2003 BCSC 307.

[117] The *Rules* clearly indicate the need for an account. Since 1961 taxing officers have had the power to assess a solicitor-client bill in the form permitted for lump sum charges by the *Legal Profession Act* (MR 983a). Marginal Rule 983b required that every lump sum bill should contain a description of the nature of the services and of the matter involved as would in the opinion of the taxing officer afford any solicitor sufficient information to advise a client on the reasonableness of the charges made. Marginal Rule 983c allowed any party to a taxation of a lump sum bill to put into evidence the opinion of a solicitor as to the nature and importance of the services and the reasonableness of the charges.

[118] The provisions in the 1961 *Rules* have been carried forward and are found today in Rules 14-1(30), 14-1(31) and 14-1(32). Rule 14-1 (30) sets out that a bill for

special costs may be rendered on a lump sum basis. Rule 14-1(31) sets out that a party is entitled to a sufficient description of the nature of the services provided so that another lawyer can advise on the reasonableness of the charges. Absent a bill there is nothing to advise on. Rule 14-1 (32) allows a party to an assessment to put into evidence the opinion of a lawyer as to reasonableness of the charges made. Absent a bill there is nothing to opine on.

[119] A party seeking an assessment of special costs must tender evidence of the legal fees incurred and a sufficient description of the nature of the services and of the matter involved to afford any lawyer sufficient information to advise a client on the reasonableness of the charge made. This will usually be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. Those cases, such as *Bradshaw*, that have held that a court can assess special costs absent evidence of actual legal costs were wrongly decided and should not be followed.

[120] Where a party is claiming its legal accounts are privileged, it can elect to waive privilege, wait until all appeals are exhausted before having its costs assessed or choose to abandon its claim to special costs.

v. How Should a Judge Quantify Special Costs

[121] In this case, the trial judge stated that there were three common approaches to the quantification of special costs. The first was to award costs equalling the actual legal costs incurred by the party to whom costs were being awarded. The second was to fix costs at a percentage of actual legal costs. The third was to use the rough and ready approach based on $5,000 per half day plus taxes and disbursements. A similar incantation can be found in several recent cases: *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914; *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912 [*Clare's Cove*]; *Hundal v. Border Carrier Ltd.*, 2012 BCSC 2196; *Nomani v. Tan*, 2014 BCSC 78; *Leung, supra*. Other cases that have adopted the rough and ready method calculation include: *Johal*, *supra*;

Morriss v. Prism Properties Inc., 2011 BCSC 615; *King v. TD Canada Trust*, 2013 BCSC 2283.

[122] The close relationship between actual legal fees and special costs is well documented in the jurisprudence. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309, aff'd [1992] B.C.J. No. 1657, Bouck J. described the relationship at p. 319:

> As I understand the notion of Special Costs under Rule 57(3), they are meant to provide a much higher indemnity than Ordinary Costs where the circumstances warrant. They are assessed under paragraphs (a) to (g) of Rule 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that the successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the *Legal Profession Act*, S.B.C. 1987 ch. 25, Part 10, as amended by the *Justice Reform Statutes Amendment Act*, 1989, s. 26; in force 1 September 1990; B.C. Reg. 267/90. Instead, Special Costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the *Legal Profession Act* represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as Special Costs will be less than a bill taxed under the *Legal Profession Act*. This is because Special Costs still fall under the category of party and party costs, whereas fees due under the *Legal Profession Act* are assessed in a similar way to the old method of solicitor and own client costs.
>
> A taxation of Special Costs is objective in nature while a taxation under the *Legal Profession Act* is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for Special Costs will usually be about 80% or 90% of a similar bill assessed under the *Legal Profession Act*.

Rule 57(3) discussed in *Bradshaw Construction* is the present R. 14-1(3).

[123] In *A.B.C.*, Kirkpatrick J. noted that while special costs are not necessarily the fees that a successful solicitor would recover from his or her client there may well be circumstances in which special costs and a bill taxed under the *Legal Profession Act* would be equivalent. She noted the similarities between the provisions in the then R. 57(3) and s. 71(4) of the *Legal Profession Act* which a registrar must consider on a review of a lawyer's bill.

[124] This Court in *Lee* also noted the comparison between the special costs rule and the provisions of the *Legal Profession Act*. Both incorporate most of the factors in *Yule v. Saskatoon (City)* (1955), 16 W.W.R. 305 (Sask. Q.B.). In *Lee,* K. Smith J.A., writing for the Court, noted that in *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 (C.A.), this Court had approved the formula suggested by Bouck J. in *Bradshaw Construction* that special costs will "in most instances" be less than a bill assessed under the *Legal Profession Act*.

[125] The Court went on to note, however, that the rule of thumb approach of a deduction from legal fees is merely an aid to a proper assessment and each case will turn on what is proper or reasonably necessary in the particular circumstances within the meaning of the words in R. 57(3). Smith J.A. concluded his discussion at para. 49:

> In my view, the legislative intention is clear that special costs under Rule 57(3) are in their nature to resemble closely the reasonable fees that would be charged by a lawyer to his or her own client. It may be that, in some cases, they will be equal in amount. However, special costs and lawyers' reasonable fees are not identical.

[126] The rough and ready approach pursuant to which special costs are set at a fixed sum has a much shakier legal foundation. It is based on the comments of Southin J.A. in *Interclaim* where she said at para. 40:

> Taking it all in all, I consider that justice will be done in this case if this Court adopts the rough and ready old-fashioned method of determining the sum to be awarded under s. 197(2) at a sum per half day, which sum will cover also a reasonable award for preparation, but not including in those days those spent arguing the issue of champerty before Brenner J. Five thousand dollars per half day or less seems right to me.

[127] Madam Justice Southin's comments must be placed in their proper context. *Interclaim* was a complex bankruptcy proceeding which began with the petitioner's *ex parte* application for an interim receiving order and other ancillary relief. The proceedings were subsequently characterized as involving the most extraordinary use of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], ever seen in Canada.

[128] In due course the trial judge had to deal with the costs of the proceeding. His reasons are found at 2001 BCSC 1303. At the outset he had to determine whether the court should fix lump sum costs. He noted that the reason underlying the usual practice of referring such matters to the registrar was that, in customary litigation, much of the pre-trial proceedings are conducted outside of the purview of the trial judge. Pre-trial discoveries and interlocutory steps may go on for several years before the case ultimately comes to the trial judge who renders the final trial judgment, which usually includes a costs disposition. He found this proceeding was different. He had heard the initial *ex parte* application and then all subsequent proceedings related to the efforts to set aside the *ex parte* orders. Because of this he had as much detailed knowledge about the nature of the case, including its novelty and complexity, as anyone was ever likely to have, and because of his knowledge of the proceeding it was his view that costs ought not be referred to the registrar and he should fix the costs in a lump sum.

[129] While the proceedings had been brought under the *BIA* it was recognized that the tariff for costs set out in the *BIA* was hopelessly out dated. All parties agreed that the trial judge was not bound by the tariff amounts. He assessed costs based on the provisions of the 1990 *Supreme Court Rules*.

[130] At that time the *Rules* included not only party and party and special costs but also increased costs. Increased costs could be awarded where a court determined that for any reason an award of ordinary costs would lead to an unjust result. Increased costs were often given in the circumstances where there was a considerable discrepancy between an award of party and party costs and special costs.

[131] The main parties who were seeking to recover costs were the Downs Group and the Renoir Group. Fasken Martineau DuMoulin (“Fasken”) was lead counsel for the Downs Group. Their legal fees totalled $1,299,199.10. The Renoir Group’s counsel, Shapray Cramer & Associates, had legal accounts totalling $149,952.50.

[132] The trial judge awarded the Downs Group 60% of their legal fees and the Renoir Group 80% of their fees. In dollar terms the Downs Group was entitled to recover $779,519 while the Renoir Group would recover $119,962.

[133] When the matter came on for appeal, Southin J.A. found that the applications had been misconceived because the proceedings were under the *BIA*. She held the costs provisions found in the *Rules* had no application and that counsel had led the judge below down the wrong road. At the hearing, no one suggested that if the Court concluded that the *Rules* were irrelevant, that they should send the matter back for reconsideration.

[134] Southin J.A. was of the view that the award to the Downs Group could not be justified because they had mounted a full frontal attack on many issues when the matter could have been resolved more economically. It was in this context that Southin J.A. made her comments concerning the rough and ready calculation. In a subsequent hearing, the reasons of which are found at 2003 BCCA 201, Southin J.A. fixed the number of half days for the purpose of assessment of costs at 80 which led to an assessment of $400,000. That sum represented but 30.79% of Faskens' fees (an award closer in amount to a party and party costs award). We would also note Southin J.A. saw no problem with the award that had been made to the Renoir Group and she upheld the trial decision awarding them 80% of their actual legal fees.

[135] As noted above, there have in recent years been numerous trial decisions which have purported to follow Southin J.A.'s rough and ready method. None of the decisions have discussed the context in which Southin J.A. made her award. None have noted that *Interclaim* was not a case about special costs, or that the award in *Interclaim* was but 30% of the actual legal fees incurred.

[136] It was not until 2008 that a judge was asked to consider a rough and ready assessment. In *Insurance Corp. of British Columbia v. Eurosport Auto Co.*, 2008 BCSC 935, the rough and ready approach suggested an amount of $390,000. The actual legal fees incurred however were but $291,297, a difference of almost

$100,000. The judge considered the various factors set out in the R. 57(3) and awarded as special costs the actual legal fees incurred.

[137] In *Buchan,* counsel referred Bauman C.J.S.C. to Southin J.A.'s comment in *Interclaim.* Bauman C.J.S.C. reproduced a table provided by counsel at para. 27:

> The Moss defendants also note that in many cases an award for special costs will be made in the range of 75% to 90% of the actual costs charged. Counsel then produces this table:

1. Actual Legal Costs	The actual legal fees were $286,878.00. Fees plus disbursements and taxes total $364,663.94.
2. The rough-and-ready ($5,000 per half day) approach	The $5,000 per half day approach leads to $240,000.00 for fees based on a 24 day trial. Alternatively, using all 28 days of court appearances, this approach leads to $280,000.00. Taxes and disbursements would be added to these amounts.
3. The percentage of actual legal costs approach	Actual legal fees were $286,878.00. Thus 75% equals $215,158.50. 90% equals $258,190.20. Taxes and disbursements would be added to these sums.

[138] He then proceeded at para. 28 to make his award:

> In my view a special costs award of $240,000.00 plus taxes and disbursements in this matter is an award that represents an inherently reliable assessment of the value, on a special costs basis, of the work performed on this file by counsel for the Moss defendants.

[139] It is important to note that in making the award the Chief Justice did not purport to adopt the rough and ready method. The award that he did make was 83.66% of the actual legal fees.

[140] In *Morriss*, the trial judge applied the rough and ready calculation to assess special costs. She noted that *Interclaim* had been decided in 2002 and that the value

of $5,000, adjusted to inflation, was now $5,800. She used that figure to make awards of special costs in the amount of $104,400 for one defendant and $69,600 for the other defendant. The judgment does not provide any information concerning the actual legal fees incurred.

[141] In *Mayer*, the trial judge assessed special costs for five successful parties. In regard to the approaches for assessing lump sum awards for special costs, he said:

> [101] In *Buchan*, Bauman C.J.S.C. described three different approaches to assessing a lump sum award for special costs:
>
> (a) actual legal costs;
>
> (b) a percentage of actual legal costs (often 80% to 90% of actual legal fees incurred as assessed);
>
> (c) $5,000 per half day, plus disbursements and taxes, also known as the "rough and ready" approach.
>
> [102] The first two approaches have been affirmed by the Court of Appeal in *Lee (Guardian ad litem of) v. Richmond Hospital Society*, 2005 BCCA 107 at paras. 38-40, 46-49 and *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 2 B.C.L.R. (3d) 13 at para. 16. The third, or "rough and ready" approach, has been adopted in *Interclaim* and in *Morriss v. Prism Properties Inc.*, 2011 BCSC 615.

[142] On the facts in *Mayer* the use of the rough and ready approach led to significantly different results for the five parties, summarized at para. 140 of the reasons:

> Applying the rough and ready approach would result in the following assessments of the legal fees portion of special costs, exclusive of the special costs hearing:
>
> (a) Richard Mayer group of defendants - $385,000 (the amount claimed is $475,133.40);
>
> (b) Mr. Furnemont - $265,000 (the amount claimed is $161,246);
>
> (c) Mr. Seccombe - $5,000 (the amount claimed is $21,899);
>
> (d) Gina Mayer and Rita Webb - $395,000 (the amount claimed is $236,630); and
>
> (e) Bhora Mayer - $395,000 (the amount claimed is $218,259).

[143] For three of the parties an assessment based on the rough and ready approach would have led to awards far in excess of the amount of legal fees paid. In regard to the other main party, the rough and ready approach led to an award approximately $100,000 less than the legal fees incurred. In the result, the trial judge awarded three of the parties their actual legal costs while the other two parties were given an award based on the rough and ready calculation. That sum worked out to 81.03% and 20.83% of actual legal fees.

[144] In *Bradshaw*, as already discussed, the judge proceeded in the absence of any legal account. The parties were seeking $465,000 based on the $5,000 per half day which the judge indicated had been accepted in *Interclaim* and applied in *Buchan*. The judge ultimately awarded special costs of $465,000 but did so inclusive of $24,000 in disbursements. The trial judge in this case purported to follow *Bradshaw* and also made the award inclusive of disbursements.

[145] We should note that leave to appeal was sought in *Bradshaw*. Leave was refused in reasons found at 2012 BCCA 481. The chambers judge was aware that the trial judge had not commented on the fact that the award of costs in *Interclaim* had been made pursuant to the *BIA* and the recovery in *Interclaim* was less than one-third of the actual solicitor-client costs. However, he did not feel in all the circumstances that the application by the trial judge of the rough and ready guide was a compelling enough basis upon which leave to appeal should be granted.

[146] An application was then brought to reconsider the leave decision. Those reasons are found at 2013 BCCA 61. The division hearing the reconsideration matter acknowledged that the question of the necessity of a legal account and the uncritical application of the half day fees may be issues for resolution by this Court. However, the particular circumstances of the case were not found to rise to the level that warranted leave being granted. An important factor in the decision to refuse leave was that the appellant, in the trial court, had not pursued the need for evidence of the fees charged and had proceeded on the basis that $465,000 represented full indemnity.

[147] In *Hundal* actual legal fees were $180,658. Using the $5,000 per day rough and ready approach from *Interclaim* would have led to fees of $225,000. The judge set the fees at $144,526, representing 80% of the fees incurred.

[148] In *Clare's Cove* legal costs totalled $351,636. The trial judge noted that $5,000 in 2002 when *Interclaim* was decided is the equivalent of $6,250 today. He awarded special costs based on $6,000 per half day which came to $168,000 which represented 47.7 % of actual legal fees.

[149] In *King,* following a proceeding that lasted three half days, the trial judge awarded special costs of $18,000 based on the rate of $6,000 used in *Clare's Cove*. There is nothing in the reported decision to indicate that the trial judge had information concerning the actual legal fees incurred.

[150] The purpose of this analysis has been to consider the legal underpinning for using the rough and ready approach in summary assessments of special costs. *Mayer* is the only case in which a judge has attempted to justify using the rough and ready approach:

> [137] In my opinion, given the circumstances of this case, and having regard to the interests of the applicants and Mhinder Mayer, assessing costs using the rough and ready approach of $5,000 per half day, as a purposeful guide, is the most fair and appropriate manner in which to assess special costs. I say that because this approach:
>
> (a) obviates concerns expressed by Mhinder Mayer regarding variations in hourly rates, potential duplication of effort, potential failure to always delegate work to the lawyer with the most appropriate hourly rate, and inadequacies in some of the materials submitted in support of the legal fees claimed;
>
> (b) obviates Mhinder Mayer's concerns about unnecessary or unnecessarily prolonged legal research, because the rough and ready figure of $5,000 per half day incorporates preparation time;
>
> (c) addresses the concerns expressed by Levine J. in [*Genesee Enterprises Ltd. v. Abou-Rached*, 2001 BCSC 1172] about the size of accounts;
>
> (d) avoids the difficulty faced in assessing actual fees billed in the absence of the lawyers' entire files; and

> (e) avoids disclosure of privileged file material at this stage of the litigation, where the dispute between Mhinder and Bhora Mayer remains extant (the trial is scheduled to proceed in September 2011) and in the face of Mhinder Mayer's outstanding appeals from my previous reasons for judgment.

[151] While considerations such as the above may explain why judges have been attracted to the rough and ready approach, they are not factors that are relevant to an assessment of special costs. Under R. 14-1(3) special costs are limited to the fees that are proper and reasonably necessary to conduct the proceeding. If a judge intends to assess special costs he or she must consider all of the circumstances, including but not limited to those set out in R. 14-3(b), and then allow those fees that were properly or reasonably necessary to conduct that particular proceeding. The rough and ready method is the antithesis of that process. It sets a fixed fee based on the number of hearing days regardless of the actual circumstances of the litigation or the expense incurred in conducting it.

[152] The cases show that the relationship between the rough and ready method and actual legal fees is completely capricious. In some cases, the rough and ready amount reaches an amount well in excess of the actual fees incurred; in others considerably less. It sets a fee without any reference as to whether or not the services that were provided were proper or reasonably necessary. The comments of Saunders J.A. in the *Bradshaw Review* as to the precedential value of *Interclaim* are apposite:

> [17] ... Obviously *Interclaim* does not impose a rule or principle dictating the amount to assess as special costs for a half day. It could not do so, nor did it purport to do so. An assessment is required to be case specific and must respond to the language of Rule 14 of the *Supreme Court Civil Rules*. It seems to me that *Interclaim* is simply a case in which, in the interests of efficiency, in proceedings that had consumed a vast amount of court resources with legal accounts that exceeded well over a million dollars, this court made an assessment. That assessment was made with appreciation of the nature of the issues and positions taken below, the degree to which the services were provided in relation to the litigation and for the party entitled to costs, and the enthusiastic engagement of all the parties in the full blown extenuated litigation. Not much more can be said about it than that.

[153] We adopt her comments. *Interclaim* does not impose a rule or principle dictating the amount to assess as special costs. The rough and ready approach based on a fixed fee per half day should not be used to assess special costs. Those cases that have applied the rough and ready assessment are, in our respectful opinion, wrongfully decided and should not be followed.

vi. Summary of General Principles

[154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

[155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).

[156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

vii. Assessment in This Case

[157] Having set out and considered the principles that apply to a special costs assessment, we return to this case. In making her assessment the trial judge made two fundamental errors of principle. First, she assessed the costs in the absence of any evidence as to the legal fees actually incurred. Second, she used the rough and ready method to determine the amount of costs. In fairness to the trial judge, she is one of many to make these mistakes.

[158] In these circumstances the assessment of costs cannot be sustained. If Mr. Smith wishes to enforce his special costs order he will have to have those costs assessed by the registrar. The assessment will be at large and the registrar will be free to assess a sum which may be more or may be less than that set by the trial judge. We note that Mr. Gichuru in his supplemental written submissions advises that if the special costs award is upheld he would consent to special costs being assessed in the amount of $38,000.

[159] In the course of submissions, Mr. Smith requested that if we did not uphold the trial judge's assessment, we should summarily assess his party and party costs based on the draft bill which was put before the trial judge. The stated reason for the request was that Mr. Smith wanted to avoid the costs of a registrar's assessment given the strong possibility that the costs award may prove to be uncollectable.

[160] Mr. Gichuru opposes a summary assessment of the draft bill of party and party costs. He notes that the draft bill is not supported by affidavit evidence and that Mr. Smith has claimed the maximum or close to the maximum number of units for several items. He also submits that there are serious problems with several of the disbursements that are claimed. He does advise that if he is unsuccessful on every ground of appeal other than the awarding of special costs he would consent to party and party costs being fixed by this Court in the amount of $34,000.

[161] We agree with Mr. Gichuru that we should not summarily assess Mr. Smith's party and party bill. The difficulty with that suggestion is that many of the tariff items in the draft party and party bill contain a range of units. Pursuant to s. 3(3) of Appendix B when there is a maximum and minimum number of units provided for an item the registrar has a discretion in determining the appropriate number and in exercising his discretion the registrar must have regard for the following principles:

> (a) one unit is for matters in which little time should ordinarily have been spent;
>
> (b) the maximum number of units is for a matter in which a great deal of time should ordinarily have been spent.

[162] These are matters that we cannot decide summarily in an evidentiary vacuum. Similarly there is no evidence before us concerning the disbursements claimed in the draft bill. We cannot accept on faith the amounts claimed. If Mr. Smith elects to limit his costs award to party and party costs those costs will still have to be assessed by the registrar. We do note that the taxation of a party and party bill is a much simpler process than the taxation of a bill of special costs.

Conclusion

[163] In the result, we would dismiss Mr. Gichuru's appeal save and except the assessment of special costs is set aside. Mr. Smith can elect to have his special costs fixed at $38,000. Alternatively he can elect to present for assessment before the registrar a bill of special costs or a bill of party and party costs.

[164] Mr. Gichuru's appeal has been largely unsuccessful. The only issue upon which he has had some success is in regard to the manner in which costs are to be assessed. For that reason, we would award Mr. Smith 80% of his costs of the appeal.

"The Honourable Mr. Justice Harris"

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Stromberg-Stein"

ALBERTA

SUPREME COURT — FARTHING, J.

Hector's Ltd. v. **26th Avenue Estates Ltd. et al**

J. M. Robertson, Q.C., for applicant.

G. R. Forsyth, for respondent, 26th Avenue Estates Ltd.

A. L. Barron, Q.C., for other respondents.

R. A. F. Montgomery, for Burns and Dutton Construction (1962) Ltd.

M. McDill, for Southal Construction Ltd.

I. Blackstone, for Kohn Electric Ltd.

K. Murphy, for Joe Podetz Plumbing Ltd.

D. J. Welbourn, for Consolidated Concrete Ltd.

R. L. Purdy, for Manufacturers Life Assur. Co.

June 12, 1963.

FARTHING, J. — On Tuesday, June 11, 1963, I heard two motions in this matter in chambers, one by the applicant, which is by far the largest creditor, for an order directing sale of the property, and the other by David M. Wright of Calgary, barrister and solicitor, for an order directing sale of the property to him.

In response to advertisements published in several newspapers in various cities and in the *Financial Post,* only three offers to purchase were received. One was for only $125,500. The next highest was one for $201,000 from Burns and Dutton Concrete and Construction Co. Ltd. of Calgary. The third was for $202,000 from David M. Wright aforesaid.

The two motions were argued together. Counsel for the applicant urged that the offer of Burns and Dutton Concrete Construction Co. Ltd. be accepted. He said that this company had undertaken to purchase at a set price the steel ordered from the applicant but not delivered to the site, a considerable part of which had already been fabricated and would be useless to any other purchaser. This purchase would save the applicant from very considerable loss.

The Burns and Dutton company will also give to each lien creditor other than itself its proportionate share of the $1,000 excess of the offer of Mr. Wright over its own.

Mr. Wright's application was strongly supported by counsel for the second and third respondents, who are the contractors. Counsel for the first respondent, the owner of the property at the time these proceedings were instituted, asked for a delay of a couple of weeks because he said that he knew that his client had a good chance of obtaining an offer of $20,000 or so in excess of any of those already received. None of the other parties represented supported this request.

It was urged upon me by Mr. Wright that I was bound to accept his offer because it was the highest. Mr. Barron said that I was bound to disregard the undertakings mentioned above given by the Burns and Dutton company.

In my opinion, I am not bound to order sale to the highest bidder. It seems to me to be the clear duty of the court to consider the interests of the lien creditors rather than those of prospective purchasers. Acceptance of the Burns and Dutton offer would be of very real advantage to the applicant, whose claim is for three times as much as those of all the other lien creditors put together. None of the other creditors would be

financially prejudiced by acceptance of the Burns and Dutton offer.

Counsel for all the other lien creditors present, save two who were non-committal, supported the position of counsel for the applicant. Furthermore—and in my opinion this is a most important consideration—it was assumed at the hearing before me, and not contradicted, that Mr. Wright was acting for an undisclosed principal. Burns and Dutton company is well known to be financially strong, whereas nothing whatever is known of the real purchaser in Mr. Wright's offer.

For these reasons the motion of David M. Wright is dismissed, and on that of the applicant it is ordered that the offer of Burns and Dutton Concrete and Construction Co. Ltd. be accepted.

All through the proceedings it was understood that the name of the Burns and Dutton company concerned was as above stated. Since the first draft of the above was made I have been informed that the proper name and style is Burns & Dutton Construction (1962) Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hy's North Transportation Ltd. v. Yukon Zinc Corporation,* 2014 BCSC 2291

Date: 20141204
Docket: S50453
Registry: Kamloops

Between:

Hy's North Transportation Ltd.

Plaintiff

And

Yukon Zinc Corporation

Defendant

Before: The Honourable Madam Justice Donegan

Reasons for Judgment re Costs

Counsel for the Plaintiff:	R. Lammers
Counsel for the Defendant appearing by teleconference:	P.J. Reardon
Counsel for the Receiver, Ernst & Young, appearing by teleconference:	H.L. Williams
Counsel for HSBC Bank Canada appearing by teleconference:	V.L. Tickle
Place and Date of Hearing on Costs:	Kamloops, B.C. July 29, 2014
Written submissions filed by the Defendant:	August 25, 2014
Written submissions filed by the Receiver:	August 26, 2014
Written submissions filed by the Plaintiff:	September 3, 2014
Place and Date of Judgment:	Kamloops, B.C. December 4, 2014

Contents

1. INTRODUCTION

[1] On July 29, 2014, I dismissed the plaintiff's application for an injunction. The plaintiff sought to prohibit the defendant from paying out money owing to Ernst & Young Inc., a court appointed receiver (the "Receiver") of the assets of Maple Leaf Loading Ltd. ("Maple Leaf"). The defendant and the Receiver both seek costs of the application in the form of special costs, on a full indemnity basis. In the alternative, the defendant seeks party and party costs in any event of the cause.

[2] For the reasons that follow, I award special costs to be assessed to both the defendant and the Receiver.

2. BACKGROUND FACTS

a) Key Players and Their Relationships

[3] The defendant, Yukon Zinc Corporation ("Yukon"), is a large mining company that owns and operates, among other things, Wolverine Mine, a mine located in the Yukon.

[4] Maple Leaf is a transportation company which owned and operated a fleet of heavy hauling equipment for transportation of ore concentrate.

[5] Maple Leaf and Yukon entered into a written contract for the transportation of ore concentrate from Wolverine Mine. This contract permitted Maple Leaf to subcontract some of its carrying services.

[6] The plaintiff, Hy's North Transportation Ltd. ("Hy's"), is a trucking company that hauls goods throughout North America. Hy's transported materials between Wolverine Mine and the Vancouver ship yards for a period of time. Hy's standard practice was to invoice Maple Leaf for these services. No written contract existed between Hy's and Maple Leaf.

[7] These business relationships broke down as a result of Maple Leaf's insolvency in and around June of 2014.

b) Receivership of Maple Leaf

[8] As a result of a petition filed in Vancouver Action No. S144996 by HSBC Bank Canada against Maple Leaf and others, on June 27, 2014, Ernst & Young Inc. was appointed as Receiver of all assets, undertakings and properties of Maple Leaf (the "Receivership Property") by order of Madam Justice Gray (the "Receivership Order").

[9] At approximately the same time, Maple Leaf stopped providing services to Yukon, a step which Yukon viewed as a breach of contract by Maple Leaf.

[10] The Receivership Order authorizes the Receiver to receive and collect monies owing to Maple Leaf. It also empowers the Receiver to settle, extend or compromise any indebtedness owing to Maple Leaf. Among the Receivership Property is listed accounts receivable from Yukon. Yukon withheld these payments from Maple Leaf following Maple Leaf's breach of contract in order to set off the payments against damage suffered by Yukon as a result of the breach.

[11] The Receivership Order provides for a stay of proceedings against Maple Leaf or the Receivership Property. Paragraph 7 of the Receivership Order provides:

> 7. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation on the Debtor and the Receiver.
>
> [the "Stay Order"]

[12] The Receivership Order further provides that funds collected by the Receiver, including the collection of accounts receivable, are to be held by the Receiver and paid only in accordance with the Receivership Order or further order of the court.

[13] When Maple Leaf stopped providing services to Yukon, Yukon was faced with possible suspension of its operations at Wolverine Mine. To prevent or mitigate this potential loss, Yukon engaged in considerable negotiations with the Receiver. On or about July 25, 2014, Yukon entered into an asset purchase and settlement agreement with the Receiver, subject to court approval. Included in this agreement was the settlement of all accounts payable by Yukon to Maple Leaf (the "Settlement Agreement").

c) Hy's Injunction Application

[14] Hy's alleges that invoices it rendered to Maple Leaf for carrying services to Wolverine Mine between April 23, 2014 and June 26, 2014 remain unpaid. In this litigation, Hy's does not sue Maple Leaf for payment. Rather, it takes the position that these unpaid invoices, amounting to nearly $600,000.00, are the sole obligation of Yukon. In other words, Hy's claims that Yukon's account listed as Receivership Property is actually a debt Yukon owes to Hy's, not Maple Leaf. Hy's asserts that Maple Leaf was merely a freight forwarder or broker in Hy's dealings with Yukon, acting as agent between Hy's and Yukon. Alternatively, Hy's claims that it had a contractual relationship, directly or indirectly, with Yukon. Yukon denies such a contractual or other relationship with Hy's, asserting that its only contractual relationship was with Maple Leaf.

[15] Aware of the impending application for court approval of the Settlement Agreement, Hy's acted quickly. It filed both its notice of civil claim against Yukon and its injunction application on Friday, July 25, 2014.

[16] It is not in dispute that Hy's was aware of the Receivership Order and all of its terms when it filed the injunction application. It is also undisputed that Hy's did not seek the consent of the Receiver or leave of the court to do so.

[17] Hy's first sought to obtain the injunction prohibiting Yukon from paying out any amount owing to the Receiver on an *ex parte* basis on the same day as filing. Mr. Justice Dley declined to hear the application on an *ex parte* basis and ordered Hy's to serve both Yukon and the Receiver with the application. Short leave was granted and the application was scheduled to be heard on Tuesday, July 29, 2014.

[18] Counsel for Hy's served the application materials on counsel for Yukon later that same day. Although aware the Receiver also had counsel, counsel for Hy's served the Receiver directly, again later that same day. As a result, counsel for the Receiver did not receive the materials until the following day, Saturday, July 26, 2014.

[19] On Sunday, July 27, 2014, counsel for the Receiver wrote to counsel for Hy's expressing the Receiver's position that the application, affecting Receivership Property contrary to the Stay Order, was inappropriately brought on an *ex parte* basis. After urging a course of action that would not put Hy's in breach of the Stay Order, the Receiver made its position on costs, should the application proceed, very clear. Counsel wrote:

> …If your client does not withdraw the application as it affects the Receiver and the assets of Maple Leaf, we will oppose. Given the complete disregard of the Receivership Order, and that the other creditors of Maple Leaf ought not to be prejudiced, we will be seeking costs on a full indemnity basis.

[20] Yukon and the Receiver each filed application responses and affidavits opposing Hy's application for an injunction. Counsel for Yukon and counsel for the Receiver were both permitted to appear at the half-day hearing on July 29, 2014 by telephone. Counsel for HSBC Bank Canada also appeared by telephone and made brief submissions, but filed no response and seeks no costs.

[21] Following the hearing, I dismissed the plaintiff's application, finding the strength of Hy's *prima facie* case questionable and the balance of convenience resting heavily with Yukon.

3. ISSUES AND POSITIONS OF THE PARTIES

[22] Entitlement to costs and, if entitled, the appropriate award are the issues for my determination. All counsel have provided thorough written and oral submissions. In summarizing their positions, it is not my intention to detract from their fulsome arguments, which I have considered in their entirety.

[23] The Receiver seeks "full indemnity costs". I take this to mean special costs, assessed as actual legal costs. Yukon adopts these submissions and, alternatively, seeks party and party costs in any event of the cause. Both the Receiver and Yukon submit that Hy's brought this application, directly affecting Receivership Property, with full knowledge and in violation of the Stay Order. The unmeritorious application was bound to fail. It required unnecessary expenditure of resources by the Receiver and Yukon, as well as interference with the Receiver's work and increased

receivership costs, depleting Receivership Property to the detriment of all creditors. In these circumstances, Yukon and the Receiver say the jurisprudence supports an award of full indemnity costs.

[24] Hy's takes the position that costs to Yukon should be in the cause and no costs ought to be awarded to the Receiver. Hy's submits that the Receiver is not a party. Its only role in this application was to inform the court of the receivership proceedings in the best interests of all parties. If entitlement is found, Hy's conduct falls far short of justifying an award of special costs.

4. DISCUSSION

Issue #1 - Entitlement to Costs

a) Rule 14-1 of the Supreme Court Civil Rules

[25] The Rules governing costs are set out in Rule 14-1 of the *Supreme Court Civil Rules* [*Civil Rules*]. A trial judge cannot impose cost sanctions that are not authorized by the *Civil Rules*: *Gichuru v. Smith*, 2014 BCCA 414 at para. 84.

[26] The following provisions of Rule 14-1 are relevant to this application:

> **How costs assessed generally**
>
> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
>
> …

Assessment of special costs

(3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(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.

…

Costs of applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

…

Costs of whole or part of proceeding

(15) The court may award costs

> (a) of a proceeding,
>
> (b) that relate to some particular application, step or matter in or related to the proceeding, or
>
> (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
>
> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

b) Non-parties

[27] No case authorities were specifically provided by counsel on this topic, but non-party entitlement to costs has been discussed in a number of decisions. Those authorities make it clear that non-parties who have had notice of the proceedings and have taken steps in the proceedings, or prepared to do so, may recover costs: *Manufacturer's Life Insurance Company v. Dahl Estate,* 2005 BCSC 1800; *Martel v. Wallace*, 2008 BCSC 436 and *Krafta v. F.L.E.X. Excavating Ltd.*, 2012 BCSC 616.

[28] In *Krafta*, Mr. Justice Armstrong discussed the above and other authorities at para. 20. He wrote:

> [20] Mr. Linton relies on several authorities including:
>
> (a) *Martel v. Wallace*, 2008 BCSC 436, which involved a credit union non-party to the proceedings in a matrimonial action that was granted costs of attendance on a motion. In *Martel*, the credit union had been served as a person with an interest in the proceedings.
>
> (b) *Manufacturers Life Insurance Company v. Dahl Estate*, 2005 BCSC 1800, a case where it was found possible to award costs against a non-party.
>
> (c) *Tirling Sheet Metal Ltd. v. Troutman Estate*, 2010 BCSC 958, where creditors opposed a plaintiff's application for money owing due to a purported equitable assignment of sale proceeds. It was held that the creditors had a clear economic interest because if the application succeeded there would be insufficient funds to pay their outstanding claims.
>
> (d) *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, where a non-party successfully obtained special costs. The court said at para. 83:
>
> Bhora Mayer did not stand as a volunteer (as suggested by Mhinder Mayer) or akin to an intervener (as was argued in *Re*

> *Pacifica Papers Inc.*, 2001 BCCA 464). I accept Mr. Fraser's submission that Bhora Mayer is entitled to special costs in respect of VA S907716 even though he was not a named defendant in that action because:
>
> (a) he had special knowledge that was necessary to put before the Court (e.g., the Bhagwan Mayer action, the Bhagwan Mayer Settlement Agreement, and Mhinder Mayer's proposed amendments concerning the Brothers' Trust);
>
> (b) many of the allegations made and some of the proposed amendments sought to be made in VA S097716 were the same or similar to those sought in VA S073324; and
>
> (c) Bhora Mayer was successful in having abusive or meritless claims made against him barred and successful in resisting all but one of Mhinder Mayer's proposed amendments because they were abusive or without merit.

[29] Non-party entitlement to costs was addressed by Mr. Justice Hall in *Pacifica Papers Inc. (Re)*, 2001 BCCA 464. In making such an award, Hall J.A. held at para. 7:

> [7] It appears to me that it can fairly be said that here Norske Skog occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. Norske Skog had entered into an agreement, (requiring subsequent approvals), to acquire the equity of Pacifica with a view to Pacifica becoming a subsidiary of Norske Skog. In these circumstances, Norske Skog had a clear economic interest in seeing the proposed arrangement proceed to completion. It was no doubt legally possible for it to stand aside from and take no part in these proceedings but it is wholly understandable that Norske Skog would feel it was appropriate for it to participate in and lend assistance to the successful petitioner, Pacifica. I believe its participation in the Chambers proceedings in both courts was quite appropriate. It might well have sought status as a party but there was no particular necessity for it to do so since it had already been served with process and was undoubtedly an interested party with a stake in the outcome of the proceedings. Given its interest in the outcome of the proceedings, it seems doubtful that a court would refuse to hear submissions from Norske Skog.

[30] In *Pacifica Papers*, the court awarded the non-party, Norske Skog, costs, but only two-thirds of its costs and full disbursements. Full costs were not awarded because the petitioner had carried the main burden of the application, making it less necessary for Norske Skog to make extensive submissions.

c) Analysis

[31] The purpose of a court-appointed receiver is to:

> …preserve and protect the property in question pending resolution of the issues between the parties… In most cases, the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors.

Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011) at 6.

[32] A stay order is common in receivership orders. It prohibits the commencement of any proceedings against the debtor or receivership property unless consent of the receiver or leave of the court is obtained. The purpose of requiring leave has been described as a:

> …procedural safeguard set up to protect the receiver from frivolous and vexatious actions or claims without merit or foundation.

Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011) at 905.

[33] Hy's injunction application specifically targeted Receivership Property. The Receiver and Yukon both had notice of the application and were required to take steps to defend it. I do not agree with Hy's characterization of the Receiver's role in this application as only "…to act in a fiduciary role to the Plaintiff, a creditor of Hy's, and to assist the Court with a fulsome discussion of the circumstances of Maple Leaf's insolvency."

[34] As no consent by the Receiver or leave of the court was sought or obtained by Hy's, the Receiver was forced to respond directly to the application along with Yukon. Hy's application was clearly brought in violation of the Stay Order.

[35] In my view, the Receiver had a clear obligation to participate in and oppose Hy's injunction application not only because it was brought in contravention of the Stay Order, but because it had the potential to derail the Settlement Agreement, to the detriment of other creditors of Maple Leaf. To borrow the words of Hall J.A. at para. 7 in *Pacifica Papers*, the Receiver "occupied a position more vitally involved in the issue before the Court than would normally be the case with an intervener. … I believe its participation in the Chambers proceedings … was quite appropriate."

[36] I have no hesitation in concluding the Receiver and Yukon are both entitled to costs. The central issue for my determination is the appropriate award.

Issue #2 - Award of Costs

[37] The Receiver seeks special costs and asks that I assess them as full indemnity costs. In short, it submits that Hy's conduct in bringing an unfounded application, contrary to the Stay Order, is reprehensible conduct deserving of rebuke. The Receiver was forced to expend resources to the detriment of all of Maple Leaf's creditors, a result that the Stay Order was intended to prevent. It argues that those expenditures ought to be borne by the party who brought the unmeritorious claim, Hy's. Yukon adopts these submissions.

[38] Hy's submits its claim was not frivolous because the "proper debtor for this account is not yet decided". Armed with knowledge of the Receivership Order and the pending application for court approval of the Settlement Agreement, Hy's says that it could not stand idly by while Yukon purported to negotiate away Hy's property. Its conduct was not "reprehensible" such that an award of special costs is required.

a) Special Costs

[39] Party and party costs is the standard costs award. These costs are awarded on a principle of partial indemnity, using Scales A, B or C of Appendix B of the *Civil Rules*.

[40] The other costs award is special costs. Special costs are usually intended to indemnify a successful litigant fully or at least substantially: *Gichuru* at para. 91.

[41] In *Gichuru*, the court traced the foundation of the present cost rules, noting that the distinction between "party and party" and "solicitor-client" costs recognized in the original *Supreme Court Rules*, continues to the present day. The 1990 *Supreme Court Civil Rules* introduced the term "special costs" in place of "solicitor-client" costs: *Gichuru*, paras. 87-89.

[42] An award of special costs should be made where the conduct of the party required to pay costs was "reprehensible, scandalous or outrageous": *Young v. Young*, [1993] 4 S.C.R. 3 at 134.

[43] Special costs may be appropriate where a litigant has engaged in reprehensible conduct. The term "reprehensible" is a word of wide meaning. It includes not only scandalous or outrageous conduct, but also milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17.

[44] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, Mr. Justice Walker summarized the law of special costs. He then set out a non-exhaustive list of circumstances that may attract such an award, at para. 11:

> [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.
>
> See: *Garcia* at 748; *International Hi-Tech* at paras. 7-13; *Webber v. Singh*, 2005 BCSC 224 at para. 28; *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at paras. 26, 29; *Buchan v. Moss Management Inc.*, 2008 BCSC 1286 at paras. 11-12; and *Edwards v. Bell*, 2004 BCSC 399 at paras. 12, 43-45.

[45] In *Dawson v. Dawson*, 2014 BCSC 44, Mr. Justice Barrow described that an award of special costs generally serves two purposes, writing at para. 58:

> …first, it compensates the party in whose favour the award is made, usually to the point of indemnifying that party for the legal expenses incurred; and second, it serves to sanction the party whose conduct gives rise to the award.

b) Receivers

[46] In respect of the specific issue of costs payable to a receiver, several authorities provide guidance, although I note that none involve costs payable to a receiver outside of the actual receivership litigation.

[47] In *Naramalta Development Corporation v. Therapy General Partner Ltd.*, 2012 BCSC 191, Mr. Justice Kelleher was called upon to decide whether the costs of a receiver should be borne by one of the parties. Although in a different context, the court's general observations regarding receivership costs as a result of improper interference with the receiver, are instructive. In this regard, Kelleher J. wrote at para. 44:

> [44] Generally speaking, court ordered receivers are officers of the court and as such as are entitled to be paid out of the property they are managing. However, as between the parties involved, one may be entitled to indemnity for the costs of the receiver if the other's conduct interferes with the receiver or otherwise causes a depletion of the assets of the enterprise.

[48] In reaching this conclusion, Kelleher J. relied upon an Ontario decision, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. C.J.), writing at para. 49:

> *…MacPherson* stands for the principle that a party who exacerbates receivership costs by disputatious proceedings and interference with the receiver should indemnify the innocent parties in the enterprise.

[49] Similarly, in *Royal Bank of Canada v. Komtech Enterprises Limited*, 2014 ONSC 3647, the court dealt with the issue of costs where the party required to pay costs was found to have engaged in conduct that disregarded a stay of proceedings order contained within a receivership order. The court awarded elevated costs, writing at para. 34:

> [34] I award the Receiver its full indemnity costs of $12,529.46 set out on its Costs Outline, payable by Surgenor to the Receiver within 30 days of the date of this order. Elevated costs are justified on this motion because of the "reprehensible" conduct[3] of Surgenor in removing the Truck from the possession of the court-appointed Receiver without the Receiver's consent or the approval of this Court. Parties which disregard the standard stay of proceedings contained in receivership orders must expect that their resort to illegal self-help most likely will expose them to an award of elevated costs.
>
> [Footnotes omitted]

[50] In *Pinnacle Capital Resources Limited v. Kraus Inc.*, 2013 ONSC 674, the receiver was awarded "substantial indemnity costs" where one of the stakeholders in the insolvency proceedings brought what was found to be an irrelevant, unreasonable, and unmeritorious application that the receiver was required to answer. The court concluded that the applicant stakeholder, and not the other stakeholders involved in the insolvency proceeding, should bear the brunt of the receiver's cost in defending the application: para. 10.

c) Analysis

[51] In the case at bar, Hy's was aware of the Receivership Order and all of its terms when it sought an injunction that clearly targeted Receivership Property. To do so without seeking consent of the Receiver or leave of the court is a clear violation of the Stay Order. Such an action, on its own, is reprehensible conduct deserving of rebuke. This violation was exacerbated by Hy's initial attempt to obtain this extraordinary remedy without notice to either Yukon or the Receiver. A costs award must serve to sanction this conduct.

[52] Hy's application was unsuccessful. I could not conclude that Hy's *prima facie* case was strong, and found that even if it was, the application overwhelmingly failed the balance of convenience test. To have the costs incurred by the Receiver in responding to such an unmeritorious application deplete the assets of Maple Leaf to the detriment of all of its creditors, would defeat the purpose of the Receivership Order and the very purpose of the appointment of the Receiver. A costs award must serve to compensate Yukon and the Receiver for these unnecessary expenses.

[53] In these circumstances, I find an award of special costs to both the Receiver and Yukon is appropriate.

[54] The Receiver and Yukon have asked that I assess these special costs on a "full indemnity" or "actual legal cost" basis. No evidence has been provided regarding those costs.

[55] Historically, lump sum awards for special costs have been assessed using three different approaches:

1) Full indemnity basis (full recovery of actual legal expenses);

2) Substantial indemnity basis (a percentage - usually 80 - 90% of actual legal costs; or

3) The so-called "rough and ready approach".

Buchan v. Moss Management Inc., 2010 BCSC 121 at para. 27; *Dawson* at para. 64

[56] This third approach has now been clearly rejected by our Court of Appeal in *Gichuru*. The court stressed that regard must be had to the governing principle of costs assessments, writing:

> [101] The principle governing cost assessments under the *Rules* is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or

interlocutory application. This principle follows from the plain and ordinary meaning of the *Rules* and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily.

[57] The court summarized general principles at paras. 154 - 156:

> [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.
>
> [155] When assessing special costs, summarily or otherwise, a judge must only allow those fees that are objectively reasonable in the circumstances. This is because the purpose of a special costs award is to provide an indemnity to the successful party, not a windfall. While a judge need not follow the exact same procedure as a registrar, the ultimate award of special costs must be consistent with what the registrar would award in similar circumstances. Thus, a judge must conduct an inquiry into whether the fees claimed by the successful litigant were proper and reasonably necessary for the conduct of the proceeding as set out in R. 14-1(3)(a), taking into account all of the relevant circumstances of the case and with particular attention to the non-exhaustive list of factors in R. 14-1(3)(b).
>
> [156] A special costs assessment, whether before a judge or a registrar, cannot proceed in absence of evidence of the amount of legal fees incurred. Usually this will be provided in the same form as a bill between a solicitor and client under the *Legal Profession Act*. This is necessary to allow a court to inquire as to the objective reasonableness of the fees claimed by a litigant, as the fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. Where production of a bill of special costs would lead to a loss of solicitor-client privilege, the party seeking special costs must either waive privilege or can elect to preserve privilege by having its costs assessed after all appeals are exhausted.

[58] It follows then that I decline to assess the special costs award. Assessment will be conducted by the registrar in the ordinary course.

"S.A. Donegan J."

DONEGAN J.

THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2007 SKCA 72 Date: 20070625

Between: Docket: 1443
Docket: 1452

ICR Commercial Real Estate (Regina) Ltd.

Appellant

- and -

Bricore Land Group Ltd., Bricore Investment Group Ltd.,
624796 Saskatchewan Ltd. 603767 Saskatchewan Ltd.,
583261 Saskatchewan Ltd. and Horizon West Management Ltd.

Respondents

Coram:
Klebuc C.J.S., Jackson & Smith JJ.A.

Counsel:
Fred C. Zinkhan for the Appellant
Jeffrey M. Lee for the Respondents
Kim Anderson for the Monitor, Ernst & Young

Appeal:

From:	Q.B.G. No. 8 of 2006, J.C. Saskatoon
Heard:	June 7, 2007
Disposition:	Appeal Dismissed June 13, 2007
Written Reasons:	June 25, 2007
By:	The Honourable Madam Justice Jackson
In Concurrence:	The Honourable Chief Justice Klebuc

The Honourable Madam Justice Smith

Jackson J.A.

I. Introduction

[1] This appeal concerns a claim arising on a "post-filing" basis after a restructuring order had been made under the *Companies' Creditors Arrangement Act*[1] (the "*CCAA*"). The restructuring failed. The principal assets of the companies have been sold and the net proceeds are being held for distribution. The post-filing claim is asserted against: (i) the companies, which are subject to the *CCAA* order; and (ii) against the companies' Chief Restructuring Officer.

[2] The post-filing claimant is ICR Commercial Real Estate (Regina) Ltd. ("ICR"). ICR claims a real estate commission with respect to the sale of a building belonging to Bricore Land Group Ltd. Bricore Land and four related companies (collectively "Bricore") are all subject to an initial order ("Initial Order") granted by Koch J. on January 4, 2006 pursuant to s. 11(3) of the *CCAA*. The Chief Restructuring Officer, Maurice Duval (the "CRO"), was appointed by Koch J. on May 23, 2006 (the "CRO Order"). Koch J. has been the supervising *CCAA* judge since the Initial Order.

[1] R.S.C. 1985, c. C-36.

[3] The Initial Order and the CRO Order impose the usual stay of proceedings against Bricore and prohibit the commencement of new actions against Bricore and the CRO, without leave of the Court.

[4] ICR applied to Koch J. for directions and, in the alternative, for leave to commence actions against Bricore and the CRO. By fiats dated April 9, 2007 and April 25, 2007, Koch J. held that the Initial Order and the CRO Order prohibiting the commencement of actions apply to ICR and that leave of the Court is required. He refused leave and also awarded substantial indemnity costs against ICR.

[5] On May 23, 2007, ICR applied in Court of Appeal chambers for leave to appeal, pursuant to s. 13 of the *CCAA*, and received leave to appeal the same day. The appeal was heard on June 7, 2007 and dismissed in relation to the lifting of the stay application and allowed in relation to the costs order on June 13, 2007, with reasons to follow. These are those reasons.

II. Issues

[6] The issues are:

1. Does the stay of proceedings imposed by the supervising *CCAA* judge J. under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

3. If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

III. Background

[7] ICR's claim to a real estate commission arises as a result of these brief facts. Bricore owned four commercial real estate properties in Saskatoon and three such properties in Regina (the "Bricore Properties"). ICR argued that it had marketed one of the Regina properties, known as the Department of Education Building (the "Building"), to the City of Regina.

[8] Bricore sold the Building, at a purchase price of $700,000,[2] to a proposed purchaser, which assigned its interest to 101086849 Saskatchewan Ltd. 101086849 Saskatchewan in its turn sold the Building to the City of Regina for a price of $1,075,000.[3] The certificate of title to the Building issued in early January, 2007 to 101086849 Saskatchewan, and the certificate of title issued to the City of Regina in late January, 2007. The Building came to be sold pursuant to a series of Court Orders made by Koch J., which I will now summarize.

[2] Appeal Book, pp. 17a and 22a [Affidavit of Paul Mehlsen].
[3] *Ibid*. at pp. 27a and 32a.

[9] As I have indicated, the Initial Order was made on January 4, 2006. On February 13, 2006 Koch J. appointed CMN Calgary Inc. as an Officer of the Court to pursue opportunities and to solicit offers for the sale or refinancing of the Bricore Properties. He also authorized Bricore to enter into an agreement with CMN Calgary dated as of January 30, 2006 entitled "Exclusive Authority To Solicit Offers To Purchase."

[10] In May 2006, it was determined that Bricore could not be reorganized and, therefore, all the Bricore Properties should be sold. On May 23, 2006, Koch J. appointed Maurice Duval, C.A., of Saskatoon, Saskatchewan as an officer of the Court to act as CRO, and to assist with the sale of the assets.

[11] The CRO Order confers these powers on the CRO pertaining to the proposed sale of the Bricore Properties:

> 7 ...
>
> (e) subject to the stay of proceedings in effect in these proceedings, the power to take steps for the preservation and protection of the Bricore Properties, including, without restricting the generality of the foregoing, (i) the right to make payments to persons, if any, having charges or encumbrances on the Bricore Properties or any part or parts thereof on or after the date of this Order, which payments shall include payments in respect of realty taxes owing in respect of any of the Bricore Properties, (ii) the right to make repairs and improvements to the Bricore Properties or any parts thereof and (iii) the right to make payments for ongoing services in respect of the Bricore Properties;
>
> . . .
>
> (g) subject to paragraphs 7C, 7D and 7E hereof, **the power to work with, consult with and assist the court-appointed selling officer (CMN Calgary Inc.) to negotiate with parties who make offers to purchase** the Bricore Properties in a manner substantially in accordance with the process

> and proposed timeline for solicitation of such offers to purchase the Bricore Properties recommended by the Monitor in the Monitor's Third Report. ...[4] [Emphasis added.]

[12] On June 19, 2006, Koch J. authorized the CRO to accept an offer to purchase the Bricore Properties, including the Building, made by an undisclosed purchaser (the "Proposed Purchaser"), which offer to purchase was filed with the Court and temporarily sealed. The order directed that any further negotiations between the CRO and the Proposed Purchaser were to be completed by August 1, 2006.

[13] Negotiations were protracted resulting in a further series of orders:

(a) August 1, 2006: Koch J. extended the timeframe for due diligence and further negotiations to be completed by August 15, 2006;[5]

(b) August 18, 2006: Koch J. authorized the CRO to accept an Amended Offer to Purchase made the 15th day of August, 2006. The Amended Offer to Purchase contemplated the sale by Bricore to the Proposed Purchaser of six of the seven Bricore Properties including the Building;[6]

(c) September 25, 2006: The closing date for the proposed sale by Bricore to the Proposed Purchaser of the six properties was extended from October 15, 2006 to November 15, 2006;[7]

---

[4] Order (Appointment of Chief Restructuring Officer, Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.
[5] Order (Extension of Stay of Proceedings) made August 1, 2006.
[6] Order (Extension of Stay of Proceedings) made August 18, 2006.
[7] Order (Extension of Stay of Proceedings, Extension of Appointment of CRO and Increase in

(d) October 10, 2006: Koch J. approved the sale of the six properties to their respective purchasers; in the case of the Building, it was sold to 101086849 Saskatchewan Ltd.[8]

Koch J. ultimately approved the sale of the Building to 101086849 Saskatchewan Ltd. as of November 30, 2006.

[14] ICR said it had introduced the City of Regina to the opportunity to purchase the Building and it was therefore entitled to a real estate commission based on the sale price to the City of Regina. Once its claim was denied by the Monitor, ICR applied to Koch J. on March 22, 2007 contending that (a) "prior Orders of this Court requiring leave to commence action" against Bricore and the CRO "do not apply in the circumstances"; and (b) in the alternative, "it is entitled to an order granting leave to commence the proposed proceedings." In support of its notice of motion, ICR filed a draft statement of claim and a supporting affidavit with exhibits.

[15] This is the substance of ICR's draft statement of claim against Bricore and the CRO:

> 4. At all material times Duval's actions in relation to the matters in issue in the within proceedings were carried out in his capacity as chief restructuring officer for the Bricore Group.
>
> …
>
> 7. Duval, pursuant to Order of the Court under the *Companies' Creditors Arrangement Act*, was authorized in accordance in such order to market various assets of the Bricore Group, including the [Building]. [sic]

Maximum CRO Remuneration; Increase to Administrative Charge) made September 25, 2006.
[8]Order (Approving Sale; Extending Stay of Proceedings; Extending Appointment of CRO) made October 10, 2006.

> 8. In the course of his efforts to market the [Building], Duval enlisted the aid of the plaintiff and its commercial realtors, licensed as brokers under *The Real Estate Act*.
>
> 9. The plaintiff, in its efforts to market the properties of the Bricore Group under the direction of Duval, including the [Building], introduced a prospective purchaser to Duval, namely the City of Regina.
>
> 10. By agreement dated September 27, 2006 made between the Plaintiff, the Bricore Group and Duval, it was agreed that the Plaintiff would be protected as the agent of record to a commission for the sale of any of the Bricore Group Properties for which the Plaintiff had located a purchaser.
>
> 11. The Plaintiff says that at the time of execution of the said Agreement by Duval on September 28, 2006, the City of Regina was in the process of doing its "due diligence" on the [Building] and it was expected that a sale of the [Building] to the City of Regina would be completed in the near future.
>
> 12. The Plaintiff says that, contrary to the Agreement entered into between the Plaintiff and the Defendants, Duval, **without the Plaintiff's knowledge and in bad faith,** proceeded to arrange to sell the [Building] to a third party, namely 101086849 Saskatchewan ltd., which became the owner of the [Building] on or about January 3, 2007.[9] [Emphasis added.]

[16] While the words "bad faith" are not repeated in the affidavit evidence, Paul Mehlsen, the principal of ICR, swore an affidavit in support of the application for leave, stating that he had examined the statement of claim and that to the best of his knowledge the allegations contained therein are true. His affidavit also states:

> 13. Insofar as the attached letter states that "ICR is protected as agent of record", this is commonly understood in the industry as meaning that in the event a sale of the property took place in the protected period to a purchaser introduced by the agent of record, then they would receive the usual commission for such sale, which in this case would be 5%.
>
> 14. It would appear from the attached exhibit "A" that Larry Ruf arranged to have the Respondent, Maurice Duval, agree to the arrangement, as well as adding that the protection would extend to the closing of any sale or December 31, 2006, whichever was the earlier.

[9] Appeal Book, p. 7a-8a.

15. Attached hereto and marked as exhibit "B" to this my Affidavit is a true copy of an email dated October 31, 2006 from Larry Ruf to Evan Hubick, Jim Kambeitz and Jim Thompson of the proposed plaintiff, ICR. Such email states in part:

> I can confirm, on behalf of the CRO, that protection for the potential deals referenced in your letter of September 27, 2006 will be honoured to November 30, 2006.[10]

[17] Exhibit "A" is a letter dated September 27, 2006 from Mr. Jim Thompson of ICR to Mr. Larry Ruf of Horizon West Management Inc. It reads, in material part, as follows:

> Please be advised that we have had ongoing discussions with potential buyers and tenants as follows:
>
> 1. 1500 – 4th Avenue [Department of Education Building] – we have been in regular contact with the City of Regina Real Estate Department for over a year regarding the possibility of this site being acquired by the City. In July a large contingent of City employees including a number from the Works and Engineering Department toured the building over several hours. We have had continuous follow up with a Real Estate Department official who confirmed recently that there still is an interest in the property and officials are in the due diligence stage. In addition, we have exposed the property to Alfords Furniture and Flooring who have an ongoing interest.
>
> . . .
>
> The purpose of this memo is to reinforce our ongoing efforts to market and represent the Bricore assets in Regina. We are aware that the properties are under contract to sell and request that ICR be protected in the specific situations as outlined.
>
> In the event we are not able to carry on in a formal fashion we would ask that you sign where indicated to acknowledge that ICR is protected as the agent of record for the Tenants/Buyers noted herein for a period to extend to December 31, 2006.[11]

[10] *Ibid*. at p. 12a.
[11] *Ibid.* at pp. 14a-15a.

The words "December 31, 2006" are struck out and these words are added: "Date of closing of a sale or December 31, 2006 whichever is earlier." Mr. Ruf's name is crossed out and the signature of Maurice Duval, Chief Restructuring Officer is added in its place.

[18] Mr. Ruf, on behalf of Bricore, refuted ICR's claim in a sworn affidavit stating:

> 3. At no time did I approach ICR Regina in 2006 to initiate discussions regarding the sale or lease of the Department of Education Building.
>
> 4. I received two or three unsolicited telephone calls regarding the Department of Education Building in September of 2006 from representatives of ICR Regina (including Paul Mehlsen, Jim Kambeitz and Evan Hubick). During those calls, representatives of ICR Regina informed me that they knew of certain parties who would be interested in purchasing the Department of Education Building. In response to each of these inquiries, I informed representatives of ICR:
>
> (a) that I had no authority to participate in communications regarding a sale of the Department of Education Building, and that all such inquiries should be directed to Maurice Duval, the court-appointed Chief Restructuring Officer of Bricore Group; and
>
> (b) that further information on the status of the restructuring of Bricore Group could be obtained on the website of MLT.[12]

[19] The CRO filed a report in response to ICR:

> 6. At the time of my review of the September 27, 2006 letter from ICR Regina, I was working very hard to attempt to negotiate and conclude the final closing of the sale of the Bricore Properties to the purchasers identified in the Accepted Offer to Purchase. I fully expected that sale to close (as it ultimately did effective November 30, 2006). However, I determined that, in the event that such sale failed to close, Bricore Group would need to identify other potential purchasers of the Bricore Properties very quickly. I therefore decided that it would be appropriate for Bricore Group, by the CRO, to agree to protect ICR Regina for a commission in the unlikely event that the sale contemplated by the Accepted Offer to Purchase did not

[12] *Ibid*. at p. 46a.

close, and it subsequently became necessary for Bricore Group instead to conclude a sale of the Bricore Properties to one or more of the prospective purchasers of the three Bricore Properties located in Regina (as specifically identified in Mr. Thompson's September 27, 2006 letter). For that reason, and that reason only, I agreed to sign the September 27, 2006 letter.

7. In signing the September 27, 2006 letter, my intention, as court-appointed CRO of Bricore Group, was to strike an agreement that, in the unlikely event that:

(a) the sale of the Bricore Properties identified in the Accepted Offer to Purchase fell apart; and

(b) it subsequently became necessary for Bricore Group to sell the Bricore Properties to one or more of the prospective purchasers identified in the September 27, 2006 letter;

then Bricore Group would agree to pay a commission to ICR Regina. In regard to the Department of Education Building located at 1500 - 4th Avenue in Regina (the "Department of Education Building"), the two prospective purchasers in respect of which ICR Regina was protected for a commission were the City of Regina and Alford's Furniture and Flooring. The reference to closing date was to the closing of the Avenue Sale, which occurred effective November 30, 2006.

8. In January of 2007, after much effort and expenditure of resources, the sale of the Bricore Properties contemplated in the Accepted Offer to Purchase was unconditionally closed (effective November 30, 2006). The entity named as purchaser of the Department of Education Building in the final closing documents was a numbered Saskatchewan company controlled by Avenue Commercial Group of Calgary. Such entity was a nominee corporation operating entirely at arm's length from the City of Regina and Bricore Group. At all times after June 2006, the CRO had no authority to sell the property, as it was already sold.

9. It was subsequently brought to my attention that the numbered company which purchased the Department of Education Building had promptly "flipped" such property to the City of Regina. I knew nothing of such a proposed flip prior to learning of it from ICR Regina.[13]

[20] To rebut this, Mr. Mehlsen of ICR swore a further affidavit deposing:

3. As indicated in my Affidavit sworn March 22, 2007, ICR had an ongoing relationship with the Bricore Companies prior to 2006. This relationship continued after the Initial Order in January 2006 in that ICR continued to show Bricore Properties for lease or sale, including the [Building].

[13] *Ibid*. at pp. 38a-39a.

4. Attached hereto and marked as Exhibit E to this my Affidavit is a true copy of an e-mail from my contact at the City of Regina ... dated April 13, 2006 advising that the City was interested in purchasing the [Building].

5. I immediately passed this information along to Larry Ruf, as evidenced in the e-mail dated April 13, 2006 attached hereto and marked as Exhibit "F" to this my affidavit.

6. In reply to paras. 2 and 12 of Mr. Duval's Report, it was not known to ICR that all of the Bricore Properties were sold as claimed; rather, it was known that some of the Bricore Properties had been sold, but not the subject property, [the Building], as it was the “ugly duckling” of the Bricore Properties and therefore had been excluded from the reported sale. ICR's efforts were directed at the sale of [the Building] and leasing the other two Regina properties.

7. In response to para. 13 of Mr. Duval's Report, it is true that there were no direct communications between ICR and Mr. Duval as all communications were with Larry Ruf, who indicated that he acted under the authority and with the knowledge of Mr. Duval.

8. As a result of contact in early summer with Mr. Ruf, ICR actively marketed the [Building] by placing signage on the property, developing an "information" or "fact" sheet detailing aspects of the building, and showed the property to the City of Regina and other prospective purchasers.

. . .

11. Because of delays on the part of the City of Regina in its due diligence and the fact that ICR has been working without any formal agreement, I caused the letter of September 27, 2006 (exhibit "A" to my Affidavit sworn March 22, 2007) to be sent.

12. At no time did either Mr. Ruf or Mr. Duval advise that the [Building] was sold and that ICR's role was merely that of a "backup offer". The signed letter of September 27, 2006 and Mr. Ruf 's e-mail of October 31, 2006 make no mention of these events and this was never disclosed to myself or ICR.

. . .

14. In hindsight, it would appear that the confidential information concerning the intention of the City of Regina to purchase the [Building] that was provided by myself and representatives of ICR to Mr. Ruf and Mr. Duval was communicated to the [Proposed Purchaser], who then incorporated 101086849 Saskatchewan Ltd. to take advantage of this opportunity. Attached hereto and marked as exhibit "I" to this my Affidavit is a true copy of a Profile Report from the Corporate Registry indicating that 101086849 Saskatchewan Ltd. was incorporated by solicitors as a "shelf company" on May 31, 2006, with new Directors in the form of Garry Bobke and Steven Butt taking office on August 17, 2006.

> 15. My understanding is that the [Proposed Purchaser] initially excluded the [Building] from their offer to purchase the Bricore Group properties and made a separate offer through 101086849 Saskatchewan Ltd. when they were made aware of the confidential information about the City of Regina's plans to purchase the property.[14]

[21] In refusing ICR leave to commence action, Koch J. wrote:

> [1] On January 4, 2006, I granted an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") protecting the respondent corporations Bricore Land Group Ltd. et al. (collectively "Bricore"), from claims of their respective creditors. The order (paragraph 5) explicitly provides in accordance with the authority conferred upon the Court pursuant to s. 11(3) of the *CCAA* that "no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property". The initial period of 30 days has been extended many times. The stay of proceedings continues in effect. Ernst & Young Inc. was appointed monitor. That appointment continues.
>
> …
>
> [16] Although the interpretation of s. 11.3 of the *CCAA* is not necessarily well settled in all aspects, it appears that the import of s. 11.3, which was introduced as an amendment to the Act in 1997, is this:
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. If s. 11.3 is interpreted too literally, it can render the stay provisions ineffective, leaving the collective good of the restructuring process subservient to the self-interest of a single creditor. Clearly, s. 11.3 must be construed so as not to defeat the overall objectives of the Act. See *Smith Brothers Contracting Ltd. (Re)* (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.).
>
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).

[14] *Ibid*. at p. 51a-52a.

(c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. Counsel have cited the case of *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc*., [2006] 2 S.C.R. 123, 2006 SCC 35. The circumstances in that case are somewhat analogous but it is of limited assistance because the *CCAA* does not contain a provision equivalent to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which expressly provides that no action lies against the superintendent, an official receiver, an interim receiver or a trustee in certain circumstances without leave of the Court.

[17] For reasons outlined *supra*, I do not find the cause of action ICR asserts against Bricore to be tenable, not even as against Bricore Land Group Ltd. Therefore, the application to lift the stay of proceedings to permit the proposed action against Bricore is dismissed.

[18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.

[19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order. [15]

[15] *ICR v. Bricore*, 2007 SKQB 121.

IV. Issue #1: Does the stay of proceedings imposed by the supervising *CCAA* judge under the Initial Order apply to an action commenced by ICR, a post-filing claimant, such that leave to commence an action against Bricore is required?

[22] ICR argues that, as a post-filing creditor, the Initial Order does not apply to it, either as a matter of law or on the basis of a proper interpretation of the Initial Order.

[23] The authority to make an order staying and prohibiting proceedings against a debtor company is contained in s. 11(3) of the *CCAA*:

> 11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[24] Pursuant to s. 11(3) of the *CCAA*, Koch J. granted the Initial Order providing for a stay and prohibition of new proceedings in these terms:

> 5. During the 30-day period from and after the date of filing of this application on January 4, 2006 or during the period of any extension of such 30-day period granted by further order of the Court (the "Stay Period"), no Person shall commence or continue any Enforcement or Proceeding of any kind against or in respect of Bricore Group or the Property. Any and all Enforcement or Proceedings

already commenced (as at the date of this Order) against or in respect of Bricore Group or the Property are hereby stayed and suspended.

6. During the Stay Period, no person shall assert, invoke, rely upon, exercise or attempt to assert, invoke, rely upon or exercise any rights:

a) against Bricore Group or the Property;

b) as a result of any default or non-performance by Bricore Group, the making or filing of this proceeding or any admission or evidence in this proceeding, or

c) in respect of any action taken by Bricore Group or in respect of any of the Property under, pursuant to or in furtherance of this Order.

. . .

11. Notwithstanding any of the provisions of this Order:

a) no creditor of Bricore Group shall be under any obligation, by reason only of the issuance of this Order, to advance or re-advance any monies or otherwise extend any credit to Bricore Group, except as such creditor may agree; and

b) Bricore Group may, by written consent of its counsel of record, agree to waive any of the protections that this Order provides to them, whether such waiver is given in respect of a single creditor or class of creditors or is given in respect of all creditors generally.

…

13. Any act or action taken or notice given by creditors or other Persons or their agents, from and after 12:01 a.m. (local Saskatoon time) on the date of the filing of the application for this Order to the time of the granting of this Order, to commence or continue Enforcement or to take any Proceeding (including, without limitation, the application of funds in reduction of any debt, set-off or the consolidation of accounts) is, unless the Court orders otherwise, deemed not to have been taken or given.

"Proceeding" is defined in para. 22 of Schedule "A" to the Initial Order as "a lawsuit, legal action, court application, arbitration, hearing, mediation process, enforcement process, grievance, extrajudicial proceeding of any kind or other proceeding of any kind."

[25] The authority to extend an initial order is contained in s. 11(4) of the *CCAA:*

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Koch J., pursuant to this subsection, extended the stay many times and the stay continues in force.

[26] As authority for the proposition that the Initial Order does not stay proceedings with respect to claims that arise after the Initial Order, ICR's counsel cites Professor Honsberger's *Debt Restructuring Principles & Practice*:

> The scope of an order staying proceedings extends only to claims that arose prior to the order. A proceeding based on a claim that arose after an order was made staying proceedings is not affected by the stay.[16] [Footnote omitted.]

The only case footnoted is *Ramsay Plate Glass Co. v. Modern Wood Products Ltd.*[17] In my respectful view, the facts in *Ramsay Glass* narrow its application.

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[16] John D. Honsberger , *Debt Restructuring: Principles and Practice*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 9.61.

[17] (1954) 34 C.B.R. 82 (Que. S. C.). There are no cases referring to *Ramsay Glass* on the point that Prof. Honsberger raises in his text. (*Ptarmigan Airways Ltd. v. Federated Mining Corp.*, [1973] 3

[27] In *Ramsay Glass*, the initial *CCAA* order, dated April 12, 1951, suspended all proceedings against Modern Wood Products Ltd. Modern Wood Products made an offer of compromise that was accepted by its existing creditors and approved by the Court on May 21, 1951. Ramsay Glass sought to enforce a claim against Modern Wood Products that arose in 1953. Modern Wood Products sought to strike Ramsay Glass's claim on the basis that its proceedings were stayed by the April 1951 order.

[28] In dismissing the application to strike, Prevost J. wrote:

> CONSIDERING that said claim is not provable in bankruptcy and that under *The Bankruptcy Act* an order staying proceedings would not apply to such a claim: *Richardson & Co. v. Storey*, 23 C.B.R. 145, [1942] 1 D.L.R. 182, Abr. Con. 301; *In re Bolf*, 26 C.B.R. 149, [1945] Que. S.C. 173, Abr. Con. 303;
>
> CONSIDERING that s. 10 of *The Companies' Creditors Arrangement Act* and the judgments rendered under its authority should receive the same interpretation in this respect as s. 40 of *The Bankruptcy Act*;
>
> CONSIDERING that the present claim is in no way affected by the judgment rendered on April 12, 1951 by Boyer J. under *The Companies' Creditors Arrangement Act*, ordering suspension of all proceedings against defendant company the present claim being posterior to said date and having not been made the subject of any compromise or arrangement homologated by this Court;
>
> CONSIDERING that the present claim arose in 1953, two years after the judgment of Boyer J. homologating the compromise following the non-payment by defendant company of merchandise purchased by it from plaintiff company during said year;[18]

I do not interpret *Ramsay Glass* as permitting a post-filing claimant to commence an action against a debtor company without obtaining leave while the *CCAA* stay is in effect. In my opinion, *Ramsay Glass* can be read as

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W.W.R. 723 (N.T.S.C.) mentions *Ramsay Glass* but not in reference to the point made here.)

[18] *Ibid*. at p. 83.

authority for the proposition that a post-filing creditor need not apply for leave after the stay has been lifted. In that respect, it parallels *360networks Inc., Re;*[19] *Stelco Inc., (Re);*[20] and *Campeau v. Olympia & York Developments Ltd.*[21]

[29] In *360networks*, a creditor (Caterpillar Financial Services Limited) had both pre-filing and post-filing claims. Caterpillar applied, *inter alia*, for an order lifting the stay of proceedings. Tysoe J. wrote:

> 8 On the hearing of the applications, Caterpillar continued to take the position that all of its claims could properly be determined within the *CCAA* proceedings on the first of its two applications. I agree that the Deficiency Claim and the Secured Creditor Claim are properly determinable within the *CCAA* proceedings, but it is my view that it would not be appropriate to make determinations in respect of the Trust Claim or the Post-Filing Claim in the *CCAA* proceedings. The only remaining thing to be done in the *CCAA* proceedings is the determination of the validity of claims for the purposes of the Restructuring Plan (with Caterpillar's claims being the only unresolved ones). **Neither the Trust Claim nor the Post-Filing Claim falls into this category of claim because each of these types of claim is not affected by the Restructuring Plan.** Indeed, the Post-Filing Claim was not asserted in Caterpillar's proof of claim and surely cannot be adjudicated upon within Caterpillar's appeal of the disallowance of its proof of claim. The B.C. Court of Appeal has recently affirmed, in *United Properties Ltd. v. 642433 B.C. Ltd.*, 2003 BCCA 203 (B.C.C.A.), that it is appropriate for the court to decline jurisdiction to resolve a dispute in *CCAA* proceedings which, although it may relate to them, is not part and parcel of the proceedings. [Emphasis added.]
>
> . . .
>
> 11 Counsel for Caterpillar relies for the first ground on the fact that s. 12 of the *CCAA* authorizes the court to deal with secured and unsecured claims. However, s. 12 deals with the determination of claims for the purposes of the CCAA and does

[19](2003), 45 C.B.R. (4th) 151 (B.C.S.C.), appeal dismissed (2007), 27 C.B.R. (5th) 115 (B.C.C.A.).
[20](2005), 15 C.B.R. (5th) 283 (Ont. S.C.J. [Commercial List]).
[21] (1992), 14 C.B.R. (3d) 303 (Ont. Ct. (Gen. Div.)).

> not authorize the court to determine claims which fall outside of *CCAA* proceedings, such as the Trust Claim and the Post-Filing Claim.[22]

In the result, Tysoe J. lifted the stay so as to permit an action to be commenced to resolve all of Caterpillar's claims. The significance of the decision for our purposes is that the Court in *360networks* considered the stay as applying to claims that arose after the initial order.

[30] In *Stelco*, Farley J., relying on *360networks*, also held that the post-filing creditor's claim in that case "continues to be stayed and is to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection is terminated."[23]

[31] *Campeau* does not deal with a post-filing creditor, but it does address the situation where a creditor, whose claim is not accepted as part of the plan of arrangement, wants to commence action. Blair J. (as he then was) refused an application brought by Robert Campeau and the Campeau Corporations to lift the stay of proceeding imposed by the initial order. In doing so, he wrote:

> 24. In making these orders, I see no prejudice to the Campeau plaintiffs. The processing of their action is not being precluded, but merely postponed. Their claims may, indeed, be addressed more expeditiously than might have otherwise been the case, as they may be dealt with – at least for the purposes of that proceeding – in the C.C.A.A. proceeding itself. On the other hand, there might be great prejudice to Olympia & York if its attention is diverted from the corporate restructuring process and it is required to expend time and energy in defending an action of the complexity and dimension of this one. While there may not be a great deal of prejudice to National Bank in allowing the action to proceed against it, I am satisfied that there is little likelihood of the action proceeding very far or very

[22] *360networks, supra* note 19.
[23] *Stelco, supra* note 20 at para. 11.

effectively unless and until Olympia & York – whose alleged misdeeds are the real focal point of the attack on both sets of defendants – is able to participate.

25 In addition to the foregoing, I have considered the following factors in the exercise of my discretion:

> 1. Counsel for the plaintiffs argued that the Campeau claim must be dealt with, either in the action or in the C.C.A.A. proceedings and that it cannot simply be ignored. I agree. However, in my view, it is more appropriate, and in fact is essential, that the claim be addressed within the parameters of the C.C.A.A. proceedings rather than outside, in order to maintain the integrity of those proceedings. Were it otherwise, the numerous creditors in that mammoth proceeding would have no effective way of assessing the weight to be given to the Campeau claim in determining their approach to the acceptance or rejection of the Olympia & York Plan filed under the Act.
>
> 2. In this sense, the Campeau claim – like other secured, undersecured, unsecured, and contingent claims – must be dealt with as part of a "controlled stream" of claims that are being negotiated with a view to facilitating a compromise and arrangement between Olympia & York and its creditors. In weighing "the good management" of the two sets of proceedings – i.e. the action and the CCAA proceeding – the scales tip in favour of dealing with the Campeau claim in the context of the latter: see *Attorney General v. Arthur Andersen & Co.* (United Kingdom) (1988), [1989] E.C.C. 224 (C.A.), cited in *Arab Monetary Fund v. Hashim, supra.*
>
> **I am aware, when saying this, that in the initial plan of compromise and arrangement filed by the applicants with the court on August 21, 1992, the applicants have chosen to include the Campeau plaintiffs amongst those described as "Persons not Affected by the Plan".** This treatment does not change the issues, in my view, as it is up to the applicants to decide how they wish to deal with that group of "creditors" in presenting their plan, and up to the other creditors to decide whether they will accept such treatment. In either case, the matter is being dealt with, as it should be, within the context of the C.C.A.A. proceedings.[24] [Emphasis added.]

Campeau is further authority for the proposition that a supervising *CCAA* judge can refuse a prospective creditor, who is not part of the plan of arrangement, leave to commence proceedings and that the creditor may commence action after the stay is lifted.

[24] *Campeau, supra* note 21.

[32] Each of *360networks*[25], *Stelco*[26] and *Campeau*[27] supports the proposition that while a stay of proceedings is extant, an application to lift the stay must be made to permit an action to be commenced against a debtor that is subject to a *CCAA* order, regardless of whether the claim arises before or after the initial order, or whether the prospective creditor is able to take part in the plan of arrangement.

[33] Prevost J. in *Ramsay Glass* points out that under the *Bankruptcy and Insolvency Act*[28] (*the* "*BIA*") the stay of proceedings does not extend to a claim not provable in bankruptcy. This is so, however, because of the definition of "claim provable in bankruptcy" and ss. 69.3(1) and s. 121. (See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*.[29]) While s. 12 of the *CCAA* defines "claim" by reference to "claim provable in bankruptcy," it has not been interpreted as limiting the extent of the stay.

[34] On the face of ss. 11(3) and (4) of the *CCAA*, the authority to safeguard the company is not limited to staying existing actions, but extends to "prohibiting, until otherwise ordered by the court, the commencement of … any other action, suit or proceeding against the company." Unlike the *BIA* there are no words limiting this phrase to debts or claims in existence at the time of the initial order.

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[25] *360networks*, *supra* note 19.
[26] *Stelco*, *supra* note 20.
[27] *Campeau*, *supra* note 21.
[28] R.S.C. 1985, c. B-3.
[29] Lloyd W. Houlden & Geoffrey B. Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at pp. 562 and 789.

[35] With respect to the wording of the Initial Order, there can be no question that it applies to post-filing creditors. The broad wording of paras. 5 and 6 of the Initial Order and the definition of "proceeding" confirm this. No distinction is made between creditors in existence at the time of the Initial Order and those who become creditors after. Paragraph 11(b) also establishes a mechanism for post-filing creditors to seek relief by obtaining an exemption from the protection afforded Bricore, which would include the prohibition of proceedings. The obvious implication is that the prohibition of proceedings applies to post-filing creditors, subject, of course, to obtaining leave of the Court to commence action.

V. Issue #2. Does s. 11.3 of the *CCAA* mean that a post-filing claimant cannot be subject to the stay of proceedings imposed by the Initial Order?

[36] ICR argued that by the addition of s. 11.3 in 1997[30] to the *CCAA*, Parliament intended to grant a post-filing creditor the right to sue without obtaining leave.

[37] In my respectful view, s. 11.3 cannot be interpreted in the way in which ICR contends. Indeed, a more logical and internally consistent reading of s. 11.3 and the other sections of the *CCAA* is to permit the supervising judge to determine, as a matter of discretion, whether an action commenced by a post-filing creditor should be permitted to proceed.

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[30] *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 124.

[38] Section 11.3 forms part of a comprehensive series of sections addressing the question of stays added in 1997 and 2001:[31]

> No stay, etc., in certain cases
>
> 11.1 (2) No order may be made under this Act **staying or restraining** the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association. (Added by S.C.1997, c. 12, s. 124)
>
> No stay, etc., in certain cases
>
> 11.11 No order may be made under this Act **staying or restraining**
>
> (a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act;*
>
> (b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or
>
> (c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*. (Added by S.C. 2001, c. 9, s. 577.)
>
> No stay, etc. in certain cases
>
> 11.2 No order may be made under section 11 **staying or restraining any action, suit or proceeding** against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company. (Added by S.C.1997, c. 12, s. 124)
>
> 11.3 No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit. (Added by S.C.1997, c. 12, s. 124)
>
> [Emphasis added.]

[31] *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9, s. 577.

[39] In ss. 11.1(2), 11.11 and 11.2, Parliament uses the words "staying or restraining" to describe those circumstances limiting the scope of the stay power, but these words are not repeated in s. 11.3. This application of the *expressio unius* principle supports the obvious implication that s. 11.3 does not limit the authority of the court to stay all proceedings.

[40] While the debates of the House of Commons in Hansard do not comment on s. 11.3, several text book authors assist with the task of interpretation. Professor Honsberger states:

> A distinction is made between the compulsory supply of goods and services and the extension of credit by suppliers to a debtor company in CCAA proceedings.
>
> Suppliers may be enjoined from cutting off services or discontinuing the supply of goods by reason of there being arrears of payment provided the debtor commences regular payments for current deliveries.
>
> However, no order made under s. 11 of the Act has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration after the order is made.
>
> . . .
>
> ... A court could make a similar order after the 1997 amendments provided it stipulated that the debtor company made immediate payment for "goods, services, use of leased or licensed property or other valuable consideration after the order is made. [32]
>
> [Footnotes omitted.]

[41] Professor McLaren similarly comments in his text "Canadian Commercial Reorganization":[33]

> 3.800 ... Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in

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[32] *Debt Restructuring Principles and Practice, supra* note 16 at p. 9-88.1.

[33] Richard H. McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy*, looseleaf (Aurora, Ont.: Canada Law Book, 2007) at p. 3-17.

> issuing stays. Under s. 11.3(*a*), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(*a*) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.

[42] Finally, Professor Sarra in *Rescue! The Companies' Creditors Arrangement Act*[34] provides this insight:

> While the court cannot compel a supplier to continue to extend credit to the debtor during a *CCAA* proceeding, the court can protect trade suppliers that choose to supply goods or credit during the stay period by granting them a charge on the assets of the debtor that will rank ahead of other claims. While section 11.3 of the *CCAA* states that no stay of proceedings can have the effect of prohibiting a person from requiring immediate payment for goods, services or the use of leased or licensed property, or requiring the further advance of money or credit, trade suppliers were often continuing credit only to find that they had lost further assets during the workout period because of their priority in the hierarchy of claims. Hence the practice of post-petition trade credit priority charges developed, first recognized in Alberta.[35] [Footnotes omitted.]

[43] *Smith Bros. Contracting Ltd. (Re)*[36] also supports a narrow reading of s. 11.3. After citing *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[37] and *Quintette Coal Limited. v. Nippon Steel Corporation*[38] with respect to the intention of Parliament and the object and scheme of the *CCAA*, Bauman J. in *Smith Bros.* wrote:

> 45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

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[34] Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007).
[35] *Ibid.* at pp. 110-11.
[36] (1998), 53 B.C.L.R. (3d) 264 (B.C.S.C.). See also *Air Canada, Re*, (2004), 47 C.B.R. (4th) 182 (Ont. S.C.J. [Commercial List]), and *Mosaic Group Inc., Re.* (2004), 3 C.B.R. (5th) 40 (Ont. S.C.J.).
[37] [1991] 2 W.W.R. 136 (B.C.C.A.).
[38] (1990), 51 B.C.L.R. (2d) 105 (C.A.).

> ... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...
>
> 46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court's jurisdiction to stay proceedings under s. 11.
>
> 47 To repeat the relevant portion of the section:
>
> 11.3 No order made under s. 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;
>
> It is noted that the remedy which is preserved for creditors is a relatively narrow one; it is the right to require immediate payment for the use of the leased property.[39]

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament's intention and the object and scheme of the C*CAA* as creating a narrow right – the right to withhold services without immediate payment.

[44] I agree with Bricore's counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the *CCAA*, s. 11.3 allows the supplier the right:

(a) to refuse to supply any such goods or services at all;

(b) to supply such goods or services on a "cash on demand" basis only;

(c) to negotiate with the insolvent corporation for the amendment of the *CCAA* Order to create a post-filing supplier's charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or

(d) to take the risk of supplying goods or services on credit.

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[39] *Smith Bros., supra* note 36.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or services to sue without obtaining leave of the court to do so.

VI. Issue #3: If leave is required, did the supervising *CCAA* judge commit a reviewable error in refusing ICR leave to commence an action against Bricore?

[45] Having determined that the stay and prohibition of proceedings applies to ICR, notwithstanding its status as a post-filing creditor, the next issue is whether Koch J. erred in refusing to lift the stay on the basis that the claim was not tenable.

[46] The claim against Bricore is presumably against Bricore both in its own right and pursuant to its indemnification agreement with the CRO. Paragraph 18 of the CRO Order requires Bricore to indemnify the CRO:

> 18. Bricore Group shall indemnify and hold harmless the CRO from and against all costs (including, without limitation, defence costs), claims, charges, expenses, liabilities and obligations of any nature whatsoever incurred by the CRO that may arise as a result of any matter directly or indirectly relating to or pertaining to any one or more of:
>
> (a) the CRO's position or involvement with Bricore Group;
>
> (b) the CRO's administration of the management, operations and business and financial affairs of Bricore Group;
>
> (c) any sale of all or part of the Property pursuant to these proceedings;
>
> (d) any plan or plans of compromise or arrangement under the CCAA between Bricore Group and one or more classes of its creditors; and/or
>
> (e) any action or proceeding to which the CRO may be made a party by reason of having taken over the management of the business of Bricore Group.[40]

[40] Order (Appointment of Chief Restructuring Officer; Extension of Stay of Proceedings; Additional DIP Financing) made May 23, 2006.

[47] The authority to lift the stay imposed by the Initial Order against Bricore is contained in s. 11(4) of the *CCAA*:

> 11(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> …
>
> (c) prohibiting, **until otherwise ordered by the court**, the commencement of or proceeding with any other action, suit or proceeding against the company. [Emphasis added.]

[48] This is a discretionary power, which invokes the standard of appellate review stated as follows:

> [22] ... [T]he function of an appellate court is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that members of the appellate court would have exercised the discretion differently. The function of the appellate court is one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order. [41]

It is often expressed as permitting intervention where the judge acts arbitrarily, on a wrong principle, or on an erroneous view of the facts, or when the appeal court is satisfied that there is likely to be a failure of justice as a result of the refusal. See: *Martin v. Deutch.*[42]

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[41] Bayda C.J.S., for the majority, in *Smart v. South Saskatchewan Hospital Centre* (1989), 75 Sask.R. 34 (C.A.), paraphrasing Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 at 1046.

[42] [1943] O.R. 683 at 698.

[49] With respect to discretionary decisions made under the *CCAA*, there is a particular reluctance to intervene. The reluctance is justified on the basis of the specialization of the judges who have carriage of complex proceedings that are often replete with compromised solutions.[43] This does not mean that the Court of Appeal can turn a blind eye or permit an injustice, but it does provide the backdrop against which *CCAA* discretionary decisions are reviewed.

[50] Unlike the *BIA*,[44] the *CCAA* contains no specific statutory test to provide guidance on the circumstances in which a *CCAA* stay of proceedings is to be lifted. Some guidance, nonetheless, can be found in the statute and in the jurisprudence.

[51] Subsection 11(6) of the *CCAA* states:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

While the reference to "order" in the opening clause "[t]he court shall not make an order under s. (3) or (4)" may very well be to the Initial Order and not to the order lifting the stay, s. 11(6) and, in particular, its legislative history, are also relevant to an application to lift the stay.

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[43] *Rescue! The Companies' Creditors Arrangement Act, supra* note 34 at pp. 88-92.
[44] *Supra* note 28.

[52] Subsection 11(6) was brought into effect in 1997 by Bill C-5, which enacted "An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act." When Bill C-5 received third reading on October 23, 1996, s. 11(6) took this form:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that:
>
> (i) the applicant has acted, and is acting, in good faith and with due diligence,
>
> (ii) a viable compromise or arrangement could likely be made in respect of the company, if the order being applied for were made, and
>
> (iii) no creditor would be materially prejudiced if the order being applied for were made.

After Bill C-5 received third reading, it was referred to the Standing Senate Committee on Banking, Trade and Commerce.[45] The Committee reported:

> A number of insolvency experts were of the opinion that the proposed amendment would make it virtually impossible to obtain extensions of the initial 30-day stay under the CCAA and force companies to file plans of arrangement within 30 days after the making of the initial stay order.
>
> Others suggested that some CCAA reorganizations would have turned out differently if the amendment had been in place.
>
> . . .
>
> Of the submissions received about proposed subsection 11(6), all but one condemned the provision. ...
>
> The CLHIA [Canadian Life and Health Insurance Association] argued that the amendment to the bill would be a significant improvement to the CCAA for four reasons:
>
> (a) it would give direction to the courts as to the tests that must be met before the extension order was granted;

[45] Twelfth Report of the Standing Senate Committee on Banking, Trade and Commerce, February 1997, unnumbered p. 3 of the Chairman's Report, and p. 18.

> (b) it would more closely align the CCAA with the BIA;
>
> (c) the tests are well-established under the BIA and have received extensive scrutiny and study; and
>
> (d) the tests would direct the courts to consider how the stay would affect creditors. [Footnote omitted.]
>
> . . .
>
> The Committee shares the concerns expressed about the potential impact of proposed subsection 11(6) of the CCAA, particularly the concern that the CCAA may no longer be a sufficiently flexible vehicle for large, complex corporate reorganizations.
>
> While the Committee fully supports initiatives to align the provisions of the CCAA more closely with those of the BIA, these initiatives must be the subject of thorough discussion and analysis before [making] their way into legislation. Unfortunately, such discussion did not take place prior [to] the introduction of proposed subsection 11(6).[46]

Notwithstanding the submissions of the Canadian Life and Health Insurance Association, the Standing Committee recommended that Bill C-5 be amended by striking subparagraphs 11(6)(b)(ii) and (iii).

[53] The House of Commons concurred in the Amendments recommended by the Senate on April 15, 1997.[47] Bill C-5, as thus amended, received Royal Assent on April 25, 1997 and was proclaimed in its present skeletal form on September 30, 1997.[48] Neither the amending legislation[49] nor the proposed Bill presently before the Senate[50] make any change to s. 11 in this regard.

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[46] *Ibid*. at pp. 17-18.
[47] Canada Legislative Index, 2nd Session, 35th Parliament, Bill C-5, S.C. 1997, c. 12, pp. 1 & 2.
[48] *Ibid.*
[49] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, s. 128.
[50] Bill C-62, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada*, 2005, 1st Sess., 39th Parl., 2006-2007.

[54] The Senate's and Parliament's specific rejection of a limitation on the court's discretion is a strong indication of Parliamentary intention. The fact that Parliament did not see fit to limit the discretion in any significant manner, despite having been given the opportunity to do so, confirms the broad discretion given in ss. 11(3) and (4) to the supervising *CCAA* judge. Discretion is never completely unfettered, but an appellate court should be reluctant to impose rigid tests, standards or criteria where Parliament has declined to do so. Some guidance can be taken from the jurisprudence.

[55] In *Canadian Airlines Corp., Re*[51] Paperny J. (as she then was) indicated that the obligation of the supervising *CCAA* judge is to "always have regard to the particular facts" and "to balance" the interests. As Farley J. said in *Ivaco Inc., Re*,[52] the supervising *CCAA* judge must also be concerned not to permit one creditor to mount "an indirect but devastating attack on the CCAA stay" so as to give one creditor an inappropriate advantage over other unsecured creditors as well as over secured creditors with priority.

[56] In *Ivaco Inc. (Re)*[53] Ground J. stated this to be the criteria to determine whether a stay should be lifted:

> 20 It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve

[51](2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at para 15.
[52] (2003), 1 C.B.R. (5th) 204 (Ont. S.C.J. [Commercial]) at para 3.
[53] [2006] O.J. No. 5029 (Ont. S.C.J.) (QL).

> interpretation of the APAs with respect to the calculation of the working capital adjustments.

Ground J. went on to confirm that finding a tenable or reasonable cause of action is not the only factor to be considered:

> 30 Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

[57] Turning back to the case before us, Koch J.'s reasons for refusing to lift the stay were:

> [16] . . .
>
> (a) An application to lift a stay of proceedings must be addressed in the context of the broad objectives of the *CCAA* which is to promote re-organization and restructuring of companies. ….
>
> (b) The standard for determining whether to lift the stay of proceedings is not, as ICR contends, whether the action is frivolous, analogous to the standard which a defendant applicant under Rule 173 of *The Queen's Bench Rules* must meet to set aside a statement of claim. Rather, to obtain an order lifting the stay ad hoc to permit the suit to proceed, the proposed plaintiff must establish that the cause of action is tenable. I interpret that to mean that the proposed plaintiff has a *prima facie* case. See *Ivaco Inc. (Re)*, [2006] O.J. No. 5029 (Ont. S.C.J.).
>
> (c) In determining whether to lift a stay, the Court must take into consideration the relative prejudice to the parties. See *Ivaco, Inc. (Re), supra*, para. 20; and Richard H. McLaren & Sabrina Gherbaz,

> *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1995) at 3-18.1. ...[54]

He went on to find that the proposed action against Bricore was not "tenable."

[58] On an application made by a post-filing creditor, a supervising *CCAA* judge can refuse to lift the stay on the basis that the creditor's claim is outside the *CCAA* process and the action can be commenced after the *CCAA* order is lifted. (See *360networks*[55] and *Stelco*[56]). Koch J. did not exercise this option. He was no doubt motivated in part by the fact that by the time ICR's claim could be tried, after the stay is no longer in effect, there may be no funds for it to claim as Bricore has now liquidated all of its assets and there remains, for all intents and purposes, a pool of funds only. The funds are subject to a plan of distribution, approved by the creditors, and will be distributed over this year.

[59] Instead of simply rejecting the claim, Koch J. appears to have weighed the evidence to a certain extent as a means of deciding the next step. He concluded that the claim was not frivolous within the meaning of a Queen's Bench Rule 173 striking motion, but it was nonetheless an untenable claim. The question becomes whether a supervising *CCAA* judge can weigh a post-filing claim in this manner.

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[54] *ICR v. Bricore, supra* note 15.
[55] *360networks, supra* note 19.
[56] *Stelco, supra* note 20.

[60] Professor Sarra comments on the anomalous position of liquidating *CCAA* proceedings:

> One policy issue that has not to date been fully explored is whether the *CCAA* should be used to effect an organized liquidation that should properly occur under the *BIA* or receivership proceedings. Increasingly, there are liquidating *CCAA* proceedings, whereby the debtor corporation is for all intents and purposes liquidated, but not under the supervision of a trustee in bankruptcy or in compliance with all of the requirements of the *BIA*. While creditors still must vote in support of such plans in the requisite amounts, there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation. ...[57]

The issue of whether the *CCAA* should be used for a liquidating, as opposed to a restructuring purpose, is not before us. In the case at bar, when the Initial Order was granted, it was thought possible that Bricore could be restructured. It was only some months after the Initial Order that it became clear that all of the assets would have to be sold. Our task at this point is to address the position of an undetermined claim arising post-filing in such a context.

[61] If a claim had some reasonable prospect of success and were otherwise meritorious in the *CCAA* context, it seems inappropriate to refuse simply to lift the stay on the basis that the claim is outside the *CCAA* process knowing that, by the time the matter is heard in the ordinary course, there will be no assets remaining. On the other hand, it also seems inappropriate to delay distribution of the assets under a plan of arrangement, or make some other accommodation, for an action that is likely to fail. I should make it clear that I am not addressing the issue of whether a meritorious claimant can share in

[57] *Rescue! The Companies' Creditors Arrangements Act, supra* note 34 at p. 82.

a proposed plan of distribution as a result of the liquidation of the assets. The issue before this Court is whether a post-filing creditor should be permitted to commence action, in the context of what is now a liquidating *CCAA*, and avail itself of whatever pre-judgment remedies might be available to it as a result of its claim.

[62] In the face of a liquidating plan of arrangement, given the broad jurisdiction conferred by the *CCAA* on the Court, it seems appropriate that the supervising judge establish some mechanism to weigh the post-filing claim to determine the next step. The next step might entail permitting the claimant to commence action and attempt to convince a chambers judge to grant it a pre-judgment remedy in relation to the funds. It is also possible that the supervising judge may delay distribution of the funds, or some portion thereof, with or without full security for costs, or on such other terms as seems fit. Mechanisms to test the claim could include referral to a special claims officer, examination of the pertinent principal parties, or a settlement conference, or, as in this case, a preliminary examination by the supervising *CCAA* judge in chambers based on affidavit evidence.

[63] In the case at bar, having determined that it was appropriate to assess ICR's claim in some way, did Koch J. err either in his statement of the appropriate test or in its application?

[64] Koch J. used *prima facie* case, which he equated with tenable cause of action. "Tenable cause of action" is taken from Ground J.’s decision in

Ivaco,[58] but Ground J. used "reasonable cause of action" or "tenable case," as comparable terms and as only one of four criteria to be considered. The use of "*prima facie* case" defined as "tenable cause of action" is not particularly helpful as the words have been used in different contexts with different purposes in mind. Even in the context of bankruptcy where specific guidelines are given, and the courts have had long experience with the application of the tests, the debate continues as to what is meant by *prima facie* case and whether it is too high of a standard to apply in determining whether an action may be commenced.[59]

[65] Koch J. was clearly correct to hold that the threshold established by s. 173 of *The Queen's Bench Rules* is too low. On the other hand, it is also important not to decide the case. The purpose for passing on the claim is not to determine whether it will or will not succeed, but to determine whether the plan of arrangement should be delayed or further compromised to accommodate a future claim, or some other step need be taken to maintain the integrity of the *CCAA* proceeding.

[66] Given the broad discretion granted to a supervisory judge under the *CCAA*, as well as the knowledge and experience he or she gains from the ongoing dealings with the parties under the proceedings, it would be contrary to the purpose of the *CCAA* for the law under it to develop in a restrictive way. Having regard for this, there ought not to be rigid requirements imposed on

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[58] *Ivaco, supra* note 53.

[59] *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). See Houlden & Morawetz, *The 2007 Annotated Bankruptcy and Insolvency Act*, supra note 29 at p. 403.

how a supervising *CCAA* judge must exercise his or her discretion with respect to lifting the stay.

[67] Nonetheless, a broad test articulated along the lines of that in *Ma, Re*[60] may be of assistance. The test from *Ma, Re* is:

> 3 ... As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

While the *Ma, Re* test was developed for use under the *BIA*, a test based on sound reasons, consistent with the scheme of the *CCAA*, to relieve against the stay imposed by ss. 11(3) and (4) of the *CCAA*, may be a better way to express the task of the chambers judge faced with a liquidating *CCAA* than a test based simply on *prima facie* case. It must be kept firmly in mind that the Court is dealing with a claimant that did not avail itself of the remedy of withholding services under s. 11.3. It is also useful to remind oneself that, in a case such as this, the *CCAA* proceeding began as a restructuring exercise with the attendant possibility of creating s. 11.3 claimants. The threshold must be a significant one, but not insurmountable.

[68] In determining what constitutes "sound reasons," much is left to the discretion of the judge. However, previous decisions on this point provide some guidance as to factors that may be considered:

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[60] *Ibid.*

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e., as was said in *Ma, Re*, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed).

The supervising *CCAA* judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11(6). Ultimately, it is in the discretion of the supervising *CCAA* judge as to whether the proposed action ought to be allowed to proceed in the face of the stay.

[69] While Koch J. did not state the test as broadly as I have, I agree that ICR does not reach the necessary threshold. ICR did not structure its affairs or establish a claim with the specificity that justifies the development of a remedy to allow it to participate in the liquidation of the Bricore assets. There is also no aspect of the liquidation that requires the Court in this case to be concerned. In particular, the stay need not be lifted, and no other step need be taken in the context of the *CCAA* proceedings in light of these facts:

1. as of January 30, 2006, the Building was subject to an exclusive Selling Officer Agreement that provided CMN Calgary with the exclusive right to sell the property and to earn a commission of 1.25% of the purchase price,[61] which is significantly less than that being claimed by ICR at a 5% commission;

[61]Order (Extension of Stay, DIP Financing, Sale Process & Shareholder Proceedings) of Koch J. in Chambers dated February 13, 2006.

2. the sale to the Proposed Purchaser was a sale of six of the seven Bricore properties;
3. the trial judge received a report dated September 25, 2006 from the CRO recommending approval of the sale, which is two days before the alleged contract with ICR was proposed;[62]
4. in the September 25 report, the CRO advised the Court that "the total aggregate purchase price for the Bricore Properties obtained by Bricore in the Accepted Offer to Purchase represented the greatest value which it would be possible to obtain for all of the Bricore Properties;"[63]
5. the September 27, 2006 letter from ICR to Bricore, states "we are aware that the properties are under contract to sell ..."; and,
6. there was no sale from Bricore to the City of Regina.

[70] While ICR denies knowledge of the sale, it is important to come back to the September 27th letter from ICR to Mr. Ruf. It states:

> **We are aware that the properties are under contract to sell** and request that ICR be protected in the specific situations as outlined.[64] [Emphasis added]

The addition by the CRO of these words, "Date of closing of **a sale** or December 31, 2006 whichever is earlier," to that letter adds further support to the veracity of the CRO's report to the effect that the CRO entered into discussions with ICR to provide for the eventuality of a failed sale to the purchaser with whom Bricore already had a contractual relationship.

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[62] Order made September 25, 2006, *supra* note 7.
[63] Appeal Book, p. 37a, para. 3.
[64] *Supra* note 11.

[71] Finally, in assessing Koch J.'s decision, and in determining the deference that is owed to it, I am not unmindful that he issued some 20 orders in 2006, pertaining to the Bricore restructuring, at least five of which dealt substantively with the Building and its prospective sale to the Proposed Purchaser.

[72] Thus, applying the standard of review previously articulated, I cannot say that Koch J. acted arbitrarily, on a wrong principle, or on an erroneous view of the facts, or that a failure of justice is likely to result from the exercise of his discretion in the manner he did.

VII. Issue #4. Did the supervising *CCAA* judge make a reviewable error in refusing leave to commence an action against the CRO?

[73] In addition to the indemnification provided by para. 18 of the CRO Order quoted above, the Order goes on to indicate the only circumstances in which the CRO can be sued personally:

> 20. For greater clarity, the CRO [*sic*]:
>
> ...
>
> (c) the CRO shall incur no liability or obligation as a result of his appointment or as a result of the fulfillment of his powers and duties as CRO, except as a result of instances of fraud, gross negligence or wilful misconduct on his part; and
>
> (d) no Proceeding shall be commenced against the CRO as a result of or relating in any way to his appointment or to the fulfillment of his powers and duties as CRO, without prior leave of the Court on at least seven days' notice to Bricore Group, the CRO and legal counsel to Bricore Group.
>
> 21. Subject to paragraph 20 hereof, nothing in this Order shall restrict an action against the CRO for acts of gross negligence, bad faith or wilful misconduct committed by him.

Setting aside the obvious ambiguity in this Order, it can be taken that to assert a claim against the CRO personally, ICR had to claim "fraud, gross negligence, wilful misconduct or bad faith." ICR claimed "bad faith."

[74] Based on para. 20(d) of the Initial Order, there is no question that ICR was required to obtain prior leave of the court. The issue thus becomes whether the supervising *CCAA* judge erred in exercising his discretion in refusing to lift the stay.

[75] Koch J.'s reasons for refusing to lift the stay are these:

> [18] Neither is there any basis upon which to lift the stay with respect to the proposed action against Maurice Duval, the Chief Restructuring Officer. Considerations applicable to Bricore under s. 11.3 do not apply to a court-appointed restructuring officer. Maurice Duval, as an officer of the Court, has explained his position in a cogent way. I accept his explanation. He did not sell the Department of Education Building to the City of Regina. He was not aware at the relevant time that the purchaser was going to resell. Indeed, his efforts were directed toward closing a single transaction involving all six Bricore properties. Although the proposed pleading accuses Mr. Duval of acting in "bad faith", it is not suggested on behalf of ICR that Mr. Duval has been guilty of fraud, gross negligence or wilful misconduct; that is, any of the limitations or exceptions expressly listed in paragraph 20(c) of the order of May 23, 2006.
>
> [19] As stated previously, the overriding purpose of the *CCAA* must also be considered. That applies in the Duval situation too. The statute is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired.

> Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order. [65]

[76] Again, Koch J. employed the same mechanism that he used to assess the claim against Bricore. He considered the status of the CRO as an officer of the court, noted the ambiguity in the Order and weighed the evidence to a certain extent. The question he was answering was the sufficiency of the claim to permit an action to be commenced against the Court's officer.

[77] Again, applying the standard of review with respect to discretionary orders, there is no basis upon which the Court can intervene with Koch J.'s refusal to lift the stay so as to permit an action against the CRO in his personal capacity.

VIII. Issue #5. Did the supervising *CCAA* judge err in awarding costs on a substantial indemnity basis?

[78] Koch J. awarded substantial indemnity costs for this reason:

> [6] In my view, allegations of misconduct against a court officer are rare and exceptional. Therefore costs on this motion should be imposed on a substantial indemnity scale, although not on the full solicitor and client basis sought. Bricore is entitled to costs on the motion of $2,000.00, and Maurice Duval is entitled to costs of $1,000.00, payable in each instance by the applicant, ICR Commercial Real Estate (Regina) Ltd.[66]

[65] *ICR v. Bricore*, *supra* note 15.
[66] *ICR v. Bricore*, 2007 SKQB 144.

[79] I note that Newbury J.A. in *New Skeena Forest Products Inc., Re*[67] dismissed a challenge to a costs award, holding that "these are the kinds of considerations which the [*CCAA*] Chambers judge ... was especially qualified to make." And, of course, all costs orders are discretionary orders.

[80] Nonetheless in this case, it would appear that the supervising *CCAA* judge erred. There is no basis upon which to order substantial indemnity costs with respect to the application to lift the stay in relation to Bricore. Bad faith was not alleged on its part. With respect to the CRO, the only basis upon which the stay could be lifted was to make an allegation of "bad faith." In the absence of some other factor, ICR cannot be faulted for making the very allegation that it was required to make in order to bring its application within the ambit of the stay of proceedings that had been granted.

[81] In addition, while Koch J. indicated he was not awarding solicitor-and-client costs, there is not a sufficient distinction between substantial indemnity costs and solicitor-and-client costs. An award approaching solicitor-and-client costs is still a punitive order and, as there is no authority for the awarding of substantial indemnity costs, relies upon the same jurisprudential base as solicitor-and-client costs. As such, the award does not seem to meet the test established in *Siemens v. Bawolin*[68] and *Hashemian v. Wilde*[69] wherein it is stated that solicitor-and-client costs are generally awarded where there

[67] [2005] 8 W.W.R. 224 (B.C.C.A.) at para. 23.
[68] 2002 SKCA 84, [2002] 11 W.W.R. 246.
[69] 2006 SKCA 126, [2007] 2 W.W.R. 52.

has been reprehensible, scandalous or egregious conduct on the part of one of the parties in the context of the litigation.

[82] If the parties are unable to agree with respect to costs in the Court of Queen's Bench and in this Court, they may speak to the Registrar to fix a time for a conference call hearing regarding costs.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nuttall v. Krekovic,*
2018 BCCA 341

Date: 20180905
Docket: CA44983

Between:

Robin Giles Nuttall

Respondent
(Plaintiff)

And

Harman Singh Dhillon

Respondent
(Defendant)

And

Arsen Krekovic

Appellant

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated November 30, 2017 (*Nuttall v. Insurance Corporation of British Columbia*, 2017 BCSC 2471, Vancouver Docket S131225).

Oral Reasons for Judgment

Counsel for the Appellant: G. Cameron

No one appearing on behalf of the Respondents

Place and Date of Hearing: Vancouver, British Columbia
September 5, 2018

Place and Date of Judgment: Vancouver, British Columbia
September 5, 2018

Summary:

The appellant, counsel for the plaintiff in the underlying action, appeals an order for special costs made against him personally. The action involved a hit and run accident in which the plaintiff was injured. After a police investigation yielded no results, the appellant took steps to investigate the identity of the driver. Eventually, he obtained an order adding the respondent as a defendant in place of John Doe. In doing so, he relied on information provided to him by counsel for another party. Shortly after serving the order on the respondent, the appellant learned that the information he had received was incorrect. He then took steps to discontinue the action against the respondent. The respondent made an application for an order for special costs to be payable by the appellant personally. The chambers judge granted the order. He found that the appellant failed to inform the application judge of all of the details of his investigation and considered this to be an abuse of process meriting an order for special costs. HELD: Appeal allowed. The appellant's conduct in making the application to add the respondent as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel. The chambers judge erred in principle in failing to consider the cautious approach that is required in making such orders as well as the kind of reprehensible conduct that would justify such an award. He also erred in concluding that the appellant's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs.

[1] **FISHER J.A.**: This is an appeal with leave of an order for special costs made against Arsen Krekovic, counsel for the plaintiff in the action below, arising from an application to add the respondent, Harman Singh Dhillon, in place of an unidentified driver. The underlying action involves a hit and run accident that occurred on May 27, 2012, outside the Wheelhouse Pub in Surrey, British Columbia. After an investigation by the RCMP did not reveal the identity of the driver, Mr. Krekovic took steps to do so himself in order for his client to have access to third party liability insurance.

[2] In making the application, Mr. Krekovic relied on information he obtained from counsel for the Wheelhouse Pub (another party to the action) that Mr. Dhillon was the driver. That information turned out to be erroneous, and after Mr. Krekovic learned this, he discontinued the action against Mr. Dhillon.

[3] When Mr. Krekovic indicated that his client would pay costs when he obtained a settlement or damages award, Mr. Dhillon sought an order for special costs to be made payable personally by Mr. Krekovic. That application was heard and

determined on November 30, 2017. The chambers judge granted the order sought on the basis that Mr. Krekovic's conduct in making the application to add Mr. Dhillon constituted an abuse of process.

[4] Mr. Krekovic asserts that the chambers judge erred in law and principle and misapprehended the evidence.

[5] Mr. Dhillon did not respond to this appeal or appear at the hearing.

Background

[6] Mr. Krekovic's efforts to identify the driver of the other vehicle began in May 2014, and continued for over two years. He retained several private investigators, but the results of those investigations were inconclusive.

[7] In September 2014, after receiving some information from his client's brother, Mr. Krekovic asked two different investigators to determine whether the respondent Mr. Dhillon was the driver. At that time, he had information suggesting that Mr. Dhillon's birthdate was May 3, 1992, and one of the investigators (a Mr. Loncaric) had information suggesting the birthdate was in 1991. Shortly after this however, on October 17, 2014, Mr. Loncaric advised Mr. Krekovic that he had information from the ICBC Special Investigations Unit that Mr. Dhillon's birthdate was November 16, 1994. He also provided an address and B.C. Driver's License number.

[8] In November 2014, Mr. Krekovic received information from the other investigator (a Mr. Westman) suggesting that the driver was a different Mr. Dhillon, but the investigator was unable to obtain any firm information.

[9] In April 2015, Mr. Krekovic shared the information he had received from Mr. Westman with the RCMP and asked them to re-open their investigation. However, the RCMP were not able to obtain any further information and in June 2015, they considered that all avenues of investigation had been exhausted.

[10] In May 2016, Mr. Krekovic was advised by a lawyer at Dolden Wallace Folick LLP, counsel for the Wheelhouse Pub, that Mr. Loncaric had information on the hit and run driver. After trying for several months to contact Mr. Loncaric, Mr. Krekovic was advised that the investigator could no longer assist with finding the driver due to a conflict. Mr. Krekovic continued to make inquiries at Dolden Wallace Folick.

[11] Finally, on December 8, 2016, Mr. Folick advised Mr. Krekovic that his investigator had given him the identity of the driver but was not able to say how he obtained the information. Mr. Folick provided Mr. Dhillon's name, a birthdate of November 16, 1994, a residential address and a B.C. Driver's License number. All of this information was the same as that provided directly by Mr. Loncaric in October 2014.

[12] On February 8, 2017, Mr. Krekovic filed an application to add the respondent Mr. Dhillon to the notice of civil claim in place of John Doe. The affidavit in support of the application included the information provided by Mr. Folick, the fact that the RCMP had investigated without results, and that Mr. Krekovic had also retained investigators who had been unable to obtain any reliable information. The application was heard before Madam Justice Sharma on February 24, 2017. It was opposed by ICBC, whose position was that the evidence was insufficient and failed to explain how Mr. Folick obtained his information. Mr. Dhillon did not appear although duly served. The order was granted.

[13] In March 2017, Mr. Krekovic tried to obtain further information from Mr. Folick's office, in particular "a nexus" between Mr. Dhillon and the vehicle or the night in question. He was advised that their investigator had provided information that the driver was identified as "most likely" Mr. Dhillon, and two other individuals were identified as "possibly" being "correlated with the incident".

[14] The order of Madam Justice Sharma was entered on March 24, 2017 and was served on Mr. Dhillon on April 9, 2017. Meanwhile, Mr. Krekovic also passed along the information identifying Mr. Dhillon to the RCMP, requesting whether they

could investigate him. On April 24, 2017, he sent the RCMP his investigation file and requested that the investigation be reopened.

[15] On April 27, 2017, Mr. Krekovic received correspondence from counsel for Mr. Dhillon advising that he was not the driver. He passed this information along to Mr. Folick's associate, again seeking the evidence on which their investigator had identified Mr. Dhillon. On May 2, 2017, the associate advised him that the information they had provided was incorrect, as the Mr. Dhillon they had identified had a different birthdate of May 3, 1992. That same day, Mr. Krekovic advised Mr. Dhillon's counsel of the error and that he would discontinue the action. The notice of discontinuance was eventually filed on July 17, 2017.

[16] Mr. Krekovic deposed that the identity of the driver was important given the limits on insurance coverage in the circumstances and the value of his client's claim for damages, which he estimated to be between $2.5 and $4 million. He explained:

> [17] The decision to add Harman Singh Dhillon as a defendant in February 2017 was not made lightly. I made the decision to seek instructions to add Harman Singh Dhillon, as I thought it was my duty to pursue every reasonable avenue to obtain justice for my client. I did not seek those instructions with any malice or in bad faith. I sought those instructions after consideration of the available information at hand, while endeavoring to obtain every remedy available for my client.

The chambers judge's reasons

[17] The chambers judge considered that the naming of the respondent arose as a "case of mistaken identity", and that the question before him was

> [2] … who bears the blame for that mistaken identity and who bears responsibility for the cost the applicant was consequently put to as well as the degree of culpability for that step having been taken.

[18] His conclusion that Mr. Krekovic was responsible stems from the following finding:

> [13] There is no evidence of Mr. Krekovic in the course of that application having disclosed to the court any of the substance of the investigation that had taken place over the previous more than two years, including the fact that there were multiple suggested parties whose names had come forward as possibly being drivers and/or owners, and other information that would have

> tended to cast doubt on the likelihood of the applicant's involvement. He failed to disclose the inconsistent information as to the birth date of the applicant and the target of his investigation. Justice Sharma was given no reason to doubt or be concerned as to the validity of the positive identification of the applicant.

[19] The judge viewed this conduct as "indefensible and an abuse of process meriting sanction in the form of an order of special costs payable by him personally". Despite Mr. Krekovic's motivation to act in pursuance of his duty to his client, he considered the failure to disclose information about the history of the investigation to be in breach of his duty to the court to be forthright:

> [21] Mr. Krekovic, however, provides no explanation for his failure to disclose to Sharma J. the history of the investigation, including the multiple parties identified as possible targets, and particularly, the information in his possession as to the inconsistent birth dates. Had he done so, the application may very well have had a different outcome.
>
> [22] While it is true that Mr. Krekovic was conducting the application in pursuance of his duty to his client, Mr. Krekovic, as an officer of the court, was also under a duty to the court to be forthright in disclosing the entire circumstances of his investigation into the driver's identity. Chapter 2 of the *Code of Conduct* sets out the Canons of Legal Ethics. Section 2.1-2(a) of the Canons provides, "A lawyer's conduct should at all times be characterized by candour and fairness." That duty was breached.

[20] The chambers judge concluded that this finding alone was sufficient to justify an order for special costs, and that the fault was compounded by serving Mr. Dhillon "without further investigation to substantiate the hearsay evidence he had from Mr. Folick" (at para. 23). He held that Mr. Krekovic's conduct was of the nature contemplated by Rule 14-1(33) of the *Supreme Court Civil Rules* "and is deserving of reproach".

On appeal

[21] Mr. Krekovic asserts that the chambers judge erred in law and principle by

(a) inaccurately characterizing his conduct as an abuse of process and failing to apply the principle that the discretion to award costs against counsel must be exercised with restraint and only in rare and exceptional cases;

(b) proceeding on the basis that where counsel fails to bring to the Court's attention all possible theories or facts which are known to them and which are later found to be material, their conduct is *ipso facto* reprehensible and thus must attract the sanction of special costs; and

(c) applying an *ex parte* standard of disclosure on a contested application.

[22] He also asserts that the judge erred in misapprehending the evidence relating to the birthdate of Mr. Dhillon, which was a key issue underlining his finding of a breach of the duty of candour.

Standard of review of costs awards

[23] It is clear that awards of costs, being discretionary, are given a high degree of deference by this Court. A costs award should only be set aside on appeal if the judge below has made an error in principle or if the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. Applying these principles in *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170, this Court stated that it will only interfere:

> [17] … "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26, 47 B.C.L.R. (4th) 36. Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 24, 77 B.C.L.R. (4th) 142.

[24] It is also clear that findings of fact may only be reversed by an appellate court where there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. A misapprehension of evidence will result in a reversible error only where it goes to the core of the reasoning process of the judge: see *Tambosso v. Holmes*, 2016 BCCA 373 at para. 30 and the cases cited therein.

Analysis

[25] It is my view that the chambers judge made several errors that warrant intervention by this Court.

[26] First, special costs have a punitive or deterrent element and are only appropriate where the conduct in issue is deserving of punishment or rebuke. This well-known principle stems from numerous cases, most recently enunciated in *J.P. v. British Columbia (Children and Family Development),* 2018 BCCA 325 at para. 28. The chambers judge erred in principle by failing to consider the cautious approach to an award of special costs against a lawyer personally, as well as the kind of reprehensible conduct that would justify such an award, mandated by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 and more recently in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26.

[27] In *Young* the court directed judges to be "extremely cautious" in awarding costs personally against lawyers given their duties to guard confidentiality of instructions and to bring forward with courage even unpopular causes:

> ... A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties or his or her calling.

[28] In *Jodoin*, the court confirmed that the threshold for exercising the power to award costs against lawyers is high, such that there must be a finding of reprehensible conduct by the lawyer. Reprehensible conduct "represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (at para. 27). Mr. Justice Gascon, for the majority, described the kind of conduct that would justify such an order at para. 29:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate...

[29] Consistent with these decisions, this Court has long held that such orders should be made only in "very special circumstances", and not on the basis of mistake, error in judgment or even negligence: see *Hannigan v. Ikon Office*

Solutions Inc. (1998), 61 B.C.L.R. (3d) 270 (C.A.); *Pierce v. Baynham*, 2015 BCCA 188 at para. 41.

[30] Second, the chambers judge erred in concluding that Mr. Krekovic's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs. A special costs order is not justified only because counsel fails to disclose evidence that ultimately proves to be material or incorrect: see *Pierce* at para. 43. The chambers judge made no finding of dishonesty, accepting that Mr. Krekovic's motivation to bring the application was "in pursuance of his duty to his client". Given that, his failure to disclose more about his investigation does not constitute reprehensible conduct sufficient to justify an award of special costs. This is particularly so in the context of the evidence in the application that Mr. Krekovic clearly informed the court that his own investigation had not yielded any reliable information and he was relying only on information provided to him from another lawyer, the basis for which had not been disclosed.

[31] Moreover, I cannot agree that disclosure of further information would necessarily have yielded a different outcome in the application. The chambers judge placed considerable importance on "the discrepancy between the date of birth that he had given for the Mr. Dhillon identified by Mr. Folick, and the date of birth of the Mr. Dhillon whom his investigation had previously identified as a potential defendant". In fact, there was no discrepancy in the most recent date of birth provided by the investigator, Mr. Loncaric, and the date of birth later provided by Mr. Folick. The only discrepancy was with the earlier information Mr. Loncaric had given, which had not been confirmed. Had the application judge been informed of these or other details – such as the inconclusive information pointing to another Mr. Dhillon – the order may have nonetheless been granted. It is also important, in my view, that Mr. Dhillon did not attend himself to oppose the application. Instead, the application was opposed only by ICBC, who put the issue of the sufficiency of the information squarely before the court.

[32] Additionally, Mr. Krekovic's conduct after the order was granted demonstrates an effort to be prudent. He did not enter the order or serve the amended notice of civil claim without making further inquiries of Mr. Folick's office about the reliability of the information, and as soon as he learned that the information was in fact incorrect, he advised Mr. Dhillon's' counsel that the action would be discontinued against him.

[33] In my opinion, Mr. Krekovic's conduct was far from being characterized as reprehensible.

[34] Finally, the chambers judge referred to Rule 14-1(33) as allowing for an order for special costs. Rule 14-1(33) gives the court discretion to make various orders if it considers that a party's lawyer "has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". One of those orders is that the lawyer "be personally liable for all or part of any costs that his or her client has been ordered to pay to another party".

[35] This rule, which does not distinguish between party and party costs and special costs, has expanded the scope of conduct which might support a costs order against a lawyer. As explained in *Nazmdeh v. Spraggs*, 2010 BCCA 131, there is no requirement for "serious misconduct" to justify an order that a lawyer pay party and party costs, but it is still necessary to find reprehensible conduct on the part of the lawyer to justify an order for special costs. Moreover, the lower standard mandated by Rule 14-1(33) must also be exercised with restraint, as the Court reasoned at paras. 103–104:

> [103] The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of the Rule and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint. All cases are consistent in holding that the power, whatever its source, is to be used sparingly and only in rare or exceptional cases.
>
> [104] The restraint required in the exercise of the court's discretion is not to be confused with the standard of conduct which may support its use. Care and restraint are called for because whether the unsuccessful party or his lawyer caused the costs to be wasted may not always be clear, and lawyer and client privilege is always deserving of a high degree of protection.

[36] In conclusion, it is my view that Mr. Krekovic's conduct in making the application to add Mr. Dhillon as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel.

[37] I would allow the appeal and set aside the order of the chambers judge that Mr. Krekovic personally pay the special costs of Mr. Dhillon. I would also award costs to the appellant of this appeal and for the application for special costs in the court below.

[38] **WILLCOCK J.A.**: I agree.

[39] **FENLON J.A.**: I agree.

[40] **WILLCOCK J.A.**: The appeal is allowed. The order for costs below is set aside and the appellant will have costs in this Court and on the application for special costs in the court below.

[Submissions by counsel]

[41] **WILLCOCK J.A.**: I do not know if you need an order dispensing with approval on form of order given that counsel did not appear, but in the event that any question arises in the registry, there will be an order dispensing with the approval on form of order.

"The Honourable Madam Justice Fisher"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pierce v. Baynham,*
2015 BCCA 188

Date: 20150501
Docket: CA041933

Between:

Brent Pierce

Respondent
(Plaintiff)

And

Rahim Jivraj and Mercer Gold Corporation (British Columbia)

Respondents
(Defendants)

And

Bryan G. Baynham, Q.C. and Daniel J. Reid

Appellants

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated May 28, 2014 (*Pierce v. Jivraj*, 2014 BCSC 926, Vancouver Docket No. S116400).

Counsel for the Appellants: M. Andrews, Q.C.

Appearing in Person and on behalf of Mercer Gold Corporation (B.C.): R. Jivraj

No one appearing on behalf of B. Pierce

Place and Date of Hearing: Vancouver, British Columbia
March 23, 2015

Place and Date of Judgment: Vancouver, British Columbia
May 1, 2015

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris

Summary:

Appellants are former counsel to Mr. Pierce, who sued the Respondent Mr. Jivraj for defamation relating to comments made in two online newsletters entitled "Fraud Alert". These referred to sanctions levied in the past against Mr. Piece by securities regulators and alleged he was now currently engaging in fraudulent and criminal conduct involving different companies . Appellants successfully applied for Anton Pillar order to assist in identifying publisher of the newsletters. Mr. Jivraj was identified by these means. However, chambers judge later set aside Anton Piller order on the grounds Appellants had not provided full disclosure relating to the past sanctions. Although chambers judge found counsel did not act dishonestly, he found their conduct, which resulted in the search of Mr. Jivraj's home, to be reprehensible. He ordered special costs against them.

***Held: Appeal allowed**. Special costs are not automatically justified where counsel fails to make full disclosure on an ex parte application unless such failure is reprehensible or very serious indeed. In this case, while previous sanctions were relevant and should have been disclosed in detail, counsel honestly believed they were not relevant to whether the allegations in the Fraud Alerts relating to Mr. Pierce's current conduct were defamatory. Anton Piller order would have been fully justified even if full disclosure had been made concerning the past sanctions. While Appellants had not fulfilled their duty to make full and frank disclosure, chambers judge erred in finding their conduct "reprehensible" in the circumstances. Counsel had become too focused on the allegations they perceived to be defamatory, forgetting that the chambers judge was coming 'cold' to the case and would need more information.*

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] As every litigation lawyer should know, counsel who seeks a court order *ex parte* is bound to make "full and frank disclosure" of all relevant facts to the court. The judge hearing the application must in turn exercise "the utmost scrupulosity and care". (See *Gulf Islands Navigation Ltd. v. Seafarers International Union of North America (Canadian District) et al.* (1959) 18 D.L.R. (2d) 216 at paras. 5 and 3 respectively.) The usual consequence of counsel's failure to make full disclosure is the vacating of the *ex parte* order: see *Girocredit Bank Aktiengesellschaft der Sparkassen v. Bader et al.* (1999) 28 C.P.C. (4th) 264 (B.C.C.A.) at paras. 47-9.

[2] In the case at bar, experienced counsel were found not to have made full and frank disclosure in applying for an Anton Piller order *ex parte* and indeed were said have deflected a question of the Court as a "deliberate tactic to avoid reference to relevant and important information that would have been material to the determination of the application." In a later hearing, the Court found that counsel had not acted dishonestly, but that their conduct was "reprehensible and deserving of rebuke" in the form of an order that they pay special costs. Counsel, represented in this court by Mr. Andrews, appeal the special costs order.

Factual Background

[3] The facts of the case are rather complicated. In the deep background is a contractual dispute between Mr. Jivraj and a company controlled by him, Mercer Gold Corporation ("Mercer BC") on the one hand, and on the other, Mr. Pierce and a Nevada company in which he was involved, Tresoro Mining Corporation ("Tresoro"). Tresoro was formerly known as Mercer Gold Corp., or "Mercer Nevada". It appears that Mr. Jivraj was the CEO and President of Tresoro for about a year ending in the spring of 2011. He contends that during his tenure, he became aware of certain illegal share transactions carried out by Tresoro in contravention of rules of the U.S. Securities and Exchange Commission ("SEC").

[4] Mr. Pierce's past record as a businessman was not exemplary: in 1993, the Securities Commission of this province found he had filed false documents and improperly used funds from a public offering. The Commission imposed a 15-year trading ban on him and prohibited him from acting as a director. In 2009, an administrative judge in the U.S. issued an initial ruling ordering Mr. Pierce to cease violating certain sections of the *Securities Act of 1933* and the *Securities Exchange Act of 1934* relating to the unregistered distribution of shares in Lexington Resources Inc. The judge observed in his ruling:

> Pierce's conduct was egregious and recurrent. He sold 325,000 shares of Lexington stock acquired from the IMT Option Plan over a period of four months without filing a registration statement to cover the transactions. As a control person making unregistered sales, he deprived the investing public of valuable information. He took measures to evade the beneficial ownership reporting requirements under Section 16(a) of the *Exchange Act*, and ignored the reporting requirements of Section 13(d) of the *Exchange Act* for more than two years. Pierce's failure to make disclosures regarding his beneficial ownership also deprived the investing public of valuable information. Pierce's failure to give assurances against future violations or to recognize the wrongful nature of his conduct is underscored by his failure to appear in person and give testimony on these or any other topics. Although a finding of scienter is not required to find any of the violations of Section 16(a) of the *Exchange Act*, the record is replete with evidence that Pierce acted with a high degree of scienter in attempting to conceal his ownership of Lexington stock.

Mr. Pierce, who (the administrative judge noted) failed to appear at the hearing because he was also the target of a federal criminal investigation, was ordered to disgorge the sum of $2,043,362.33 to the SEC.

[5] Two years later, in July 2011, the SEC issued another decision, again in connection with Lexington Resources Inc. ("Lexington"). Among other things, Mr. Pierce was found to have used a company called Newport Capital Corp. ("Newport"), incorporated in Belize and domiciled in Switzerland, to conceal his illegal sale of shares in Lexington. Mr. Pierce's conduct on this occasion, which included providing misleading information and fraudulent concealment, was described as "relatively egregious, recurrent, and long-lasting". He was ordered to disgorge $7,247,635.75. I am not aware of whether he has complied with either of the disgorgement orders.

[6] Evidently, differences arose between the Jivraj and Pierce camps when the former purported to terminate an option agreement that had been entered into between Mercer BC and (then) Mercer Nevada in respect of a mining property located in Colombia. Counsel for Mercer BC sent a letter dated August 25, 2011 terminating the option agreement between Mercer BC and Mercer Nevada. He also stated various "concerns" of his client, including the following:

> By virtue of Mr. Pierce's beneficial ownership in Newport, Newport's position in the Optionee [Tresoro] exceeds or exceeded the 5% ownership reporting requirement of the SEC by way of schedule 13d. Additionally, this information was not disclosed to the public or the Optionor. This is but one actionable misrepresentation by the Optionee and its agents, including Brent Pierce, which induced Mercer BC to enter the option agreement, to its detriment.

[7] Counsel for Mr. Pierce replied by letter the same day, denying that the SEC had found Mercer Nevada was controlled by Mr. Pierce via Newport, that Mr. Pierce exercised "full control" over Mercer Nevada, or that he had made any actionable misrepresentation. The letter ended as follows:

> Please be advised that in the event further defamatory statements are made or the August 25 Letter is disseminated further Mr. Pierce may take legal action against your client and insofar as the above misinformation originated with Mr. Rahim Jivraj, against Mr. Jivraj personally.
>
> Finally, Mr. Pierce reserves all rights to pursue a claim for damages, the extent of which are presently unknown and depend, in part, on your response to this letter.

[8] As I understand it, a lawyer at a firm other than Mr. Baynham's was retained to act for Mercer Nevada, now Tresoro, in the resulting litigation against Mercer BC (S.C.B.C., Vancouver Registry No. 116184). Mr. Baynham, on the other hand, was retained by Mr. Pierce as "defamation counsel". He commenced an action for defamation against Mr. Jivraj and Mercer BC by amending the notice of civil claim already filed in the present proceeding (S.C.B.C., Vancouver Registry No. S116400). Mr. Pierce pleaded that the termination letter was defamatory, and that Mr. Jivraj had sent it to "at least 14" persons and posted it on the Mercer BC website. In addition, Mr. Pierce alleged that Mr. Jivraj had, by email to certain persons associated with a company called Mainland Resources, again defamed Mr. Pierce.

The termination letter, the email and another alleged statement were said to have injured him "in his character, credit and professional reputation".

[9] Various allegations and counter allegations were traded between the parties and the pleadings were amended and re-amended over the ensuing months. Eventually, the termination letter was removed from the Mercer BC website and Mr. Baynham was instructed to discontinue the allegations relating to that letter and then with respect to the email – in an effort, he later deposed, to "streamline, simplify and condense the issues set out in the pleadings". I note that the "regulatory history" of Mr. Pierce was not denied by him in his notice of claim; nor was it advanced by the defendants as supporting any of their defences as pleaded.

[10] The foregoing allegations, however, are not of central importance to the present appeal. Rather, it concerns the publication of two newsletters entitled "Fraud Alert" that were circulated publicly, allegedly by Mr. Jivraj or his company in 2012. The first was dated February 16, 2012. It purported to have been mailed to some 5,400 "market-related professionals." In a column on page 2 headed "Partial Regulatory offences of Brent Pierce", the newsletter stated that Mr. Pierce had been ordered by the SEC to disgorge funds (as described *infra*). The newsletter featured various quotations, not from the SEC decisions, in large print. These included "Accounting fraud committed by a Chartered Accountant by creating backdated documents and perjuring" and "There is criminal fraud and gross professional misconduct related to the activities at Tresoro."

[11] The chambers judge below described the other main components in the body of the first Fraud Alert as follows:

> It contains the following comments which are alleged to be defamatory. It starts with a heading "Public Company Fraud Alert", and then with reference to Brent Pierce says that:
>
> > He is offending still today and is suspected to have reaped hundreds of millions from innocent victims globally in his career.
>
> It goes on to say:

> > Accounting fraud and gross professional misconduct and further conspiracy and concealment of securities offender Gordon Brent Pierce.
> >
> > …
> >
> > If you invested in Mercer Gold Corp., now called Tresoro Mining Corp., you have been defrauded by Pierce and his associates.
> >
> > …
> >
> > This company, among others, controlled by Pierce has committed notable civil regulatory and criminal frauds in areas including, but not limited to, accounting, corporate professional and fiduciary misconduct.
>
> It recommends that the readers of the newsletter:
>
> > Contact your local police and regulator now to report this fraud. If you have more information about Pierce, his associates, or his dealings, you are strongly encouraged to share with the authorities.
>
> Within the body of the newsletter itself there is reference to the three actions that I have referred to. It is apparent from reading that correspondence that the comments were designed to be defamatory and the plain reading of the comments would provide a reader with the reasonable inference that Mr. Pierce and his associates were dishonest and fraudulent people. [At paras. 7-10.]

[12] The second "Alert", undated, was distributed on or about March 6, 2012. This time, the SEC orders and their background were described at greater length. Parallels were drawn between what had been found by the SEC to have occurred in 2009 and 2011 with respect to Lexington (characterized in the Fraud Alerts as "pump and dump" schemes) and what had occurred with respect to Tresoro. The March Alert stated:

> … that these knowingly committed acts by Pierce and his organization are criminal with the intent to profit from illicit gains through a network of corporate veils domiciled in tax havens for the purpose of evading tax liabilities associated to the financial gains.

Various other individuals associated with Tresoro were also implicated in the alleged "pump and dump" scheme, and photos of them, and of various lawyers who were acting for and against Mr. Pierce in the legal actions already extant, were featured.

[13] The chambers judge summarized the contents of this 'Alert' as follows:

> … Again there is a reference to Mr. Pierce. It repeats some of the allegations from the first newsletter such as "he is offending still today and is suspected to have reaped hundreds of millions from innocent victims globally in his career."
>
> There is reference to Mr. Thomas, an employee of the company [Mercer Nevada, or Tresoro], and the following is said:
>
> > Thomas clearly violated his duty of care and fiduciary obligations to the company and its shareholders through these knowingly committed acts, non-disclosure and fraud, which also include aiding and abetting the criminal act of money laundering. He continues to do so today as a co-conspirator of Pierce who seeks to profit from elicit gains through pump-and-dump schemes like Tresoro.
>
> In that newsletter there are various photographs and one column identifies the following people as "participating in Pierce's fraudulent activity"; Bill Thomas, CFO and director of Tresoro Mining Corp.; Gary Powers, president and director; Gary Jardine director Tresoro Mining Corp.; Thomas J. Deutsch, legal counsel for Tresoro Mining Corp., and J. Bradley Stafford, auditor for Tresoro Mining Corp.
>
> Also included in that newsletter are photographs depicting the counsel representing Mr. Pierce and the company. Those photographs are of Mr. MacInnis, Mr. Baynham, Mr. Reid and Mr. George. There is a column with photographs under the heading "Alleging Fraud," Rahim Jivraj, former president, director, Tresoro Mining Corp., and Carey Veinotte, litigator for Jivraj in all matters.
>
> Without repeating all of the comments contained in that newsletter it is similar to the first in the sense that the comments could be taken as being defamatory. [At paras. 11-15.]

[14] On behalf of Mr. Pierce, Mr. Baynham wrote to counsel for Mr. Jivraj on February 22, 2012 demanding that he "cease and desist" publishing the allegations in the Fraud Alerts and apologize to Mr. Pierce. Mr. Baynham enclosed a draft notice of civil claim in which the claim for defamation arising out of the first Alert was asserted. The proposed pleading sought injunctive relief, special damages and special costs. In reply, counsel for Mr. Jivraj denied that Mr. Jivraj had "anything to do whatsoever with the production or dissemination" of the publication. He made a similar denial again in April 2012.

[15] The defamation claim in respect of the two newsletters was pleaded as an amendment to the notice of claim in the present defamation action. I reproduce part of the Amended Notice:

29. In their natural and ordinary meaning, the words set out in the First Defamatory Newsletter meant and were understood to mean that the plaintiff:

    (a) Participated in "accounting fraud";
    (b) Is involved in a "conspiracy";
    (c) Has received "ill-gotten gains";
    (d) Is "offending still today";
    (e) Has "reaped $ 100's of millions from innocent victims globally in his career";
    (f) Has "defrauded investors in Tresoro Mining Corp.";
    (g) Has "has committed notable civil, regulatory and criminal frauds";
    (h) Poses a risk to the public, "requiring immediate intervention by the authorities to protect the public's interest";
    (i) Sanctioned fraud on the British Columbia Supreme Court;
    (j) Is part of a conspiracy to illicit financial gains through the manipulation of stock;
    (k) Participated in and directed criminal fraud and gross professional misconduct;
    (l) Exercises "hidden control" of a "manipulative pump-and-dump scheme" to manipulate stock for illicit financial gain;
    (m) Poses a risk to the public, necessitating actions to "protect the public by contacting the authorities".

30. In the alternative, the First Defamatory Pamphlet by way of innuendo or inferential meaning meant and was understood to mean that the plaintiff:

    (a) Is a criminal;
    (b) Is a fraudster;
    (c) Is dishonest;
    (d) Is not to be trusted;
    (e) Ought to be imprisoned;
    (f) Poses a risk to the public;
    (g) Sanctioned perjury;
    (h) Has stolen or is suspected of having stolen $ 100's of millions;
    (i) Has committed criminal, regulatory and civil fraud; and
    (j) Has committed securities fraud in respect of Tresoro Mining.

. . .

39. In their natural and ordinary meaning, the words set out in the Second Defamatory Newsletter meant and were understood to mean that the plaintiff:

    (a) "Continues to blatantly violate two SEC Administrative Orders;"
    (b) Is involved in a "conspiracy";
    (c) Has received "ill-gotten gains"'
    (d) Is "offending still today";
    (e) Has "reaped $ 100's of millions from innocent victims globally in his career";
    (f) "Knowingly committed" criminal acts "with the intent to profit from illigit gains through a network of corporate veils domiciled

in tax havens for the purpose of evading tax liabilities associated to the financial gains";
(g) Is committing "recurring and criminally fraudulent activity";
(h) Sanctioned or encouraged perjuries for the purpose of "fraudulent concealment";
(i) Has a "strong criminal element" in his "organization's schemes;"
(j) "launders money";
(k) Makes "illicit gains" and "evades tax";
(l) Is involved in "On-Going SEC Violations and Money Laundering";
(m) Commits "dishonest behavior";
(n) Is "involved in numerous pump and dump schemes happening even today";
(o) "blatantly continues to offend and harm the investing public";
(p) Should be subject to an injunction and criminal contempt proceedings;
(q) Is part of a "recurrent scheme", which includes "money laundering and securities fraud to reap illicit gain;"
(r) Participated in and organized a "knowingly committed and intended fraud", which is criminal in nature;
(s) "Will continue to offend and reap illicit gains until the authorities do something to stop it"; and
(t) The "investing public is at harm from his schemes."

The pleading does not assert that the SEC orders had not been made – only that the allegations of new or continuing illegal conduct were false and defamatory.

[16] Faced with Mr. Jivraj's denial of responsibility for the Fraud Alerts, Mr. Pierce and his counsel embarked on an effort to identify who had assembled the information in, and published, the newsletters. Eventually, Mr. Pierce applied to the Supreme Court to have Shaw Cable disclose the IP address and any other identifying information relating to an account from which someone had accessed various websites of law firms and lawyers named and pictured in the second newsletter. Mr. Justice Leask made the order on March 16, 2012, which by its terms was to be disclosed to Mr. Jivraj on March 30. On March 28, 2012, Mr. Baynham on behalf of Mr. Pierce brought an application before the chambers judge, *in camera* and *ex parte,* seeking an Anton Piller order.

The Anton Piller Hearing

[17] Mr. Baynham and a more junior lawyer in his firm, Mr. Reid, appeared before the chambers judge on March 28, 2012. Mr. Baynham began his oral submissions regarding the two Fraud Alerts by referring to the "business dispute" regarding the Colombia property between Mr. Pierce and Mr. Jivraj that had resulted in the two existing lawsuits. Mr. Baynham then began to review the subject matter of the newer pleadings – the Fraud Alerts and the allegedly defamatory statements contained therein. The judge interrupted to ask if Mr. Pierce had been fined $9.4 million "as stated". Mr. Baynham replied:

> There are – Mr. Reid can deal with that in more detail. There were fines assessed in the United States by the Securities and Exchange Commission.
>
> If I could turn to page 2 – I should say just in that respect, the defence in the defamation action – I will come to that in greater detail – is truth. It doesn't relate to these allegations; it relates to the earlier allegations which were of a similar – a similar nature, but much less broadly disseminated, and not in a public manner like this. [Emphasis added.]

As I read this comment, Mr. Baynham was here attempting to differentiate between the allegations involving the termination letter, the related email and the third statement that had led to the filing of the defamation action in October 2011, and the allegations in the newer pleading. The defence pleaded by Mr. Jivraj to the 2011 allegations of defamation was that the statements complained of were true. With respect to the Fraud Alerts, in contrast, Mr. Jivraj's defence was that he was not the publisher. (Evidently, he did not admit he had published the two newsletters until he was examined for discovery in September 2012.)

[18] After Mr. Baynham had spoken for some time regarding the circumstances that had led to the Anton Piller application, Mr. Reid explained to the Court how the IP logs of the various persons who had accessed the websites of the lawyers whose names and photos had been published, had led to the IP address Mr. Reid hoped to identify. Obviously, if the "owner" of that IP address could be identified, Mr. Pierce could hope to prove that that person was the author of the newsletters.

[19] Mr. Reid then reviewed the legal requirements for obtaining an Anton Piller order, with particular reference to *Celanese Canada v. Murray Demotion Corp*. 2006 SCC 36. One of the requirements established therein is the existence of a strong *prima facie* case. In *Grant v. Torstar* 2009 SCC 61, Mr. Reid noted, the elements of a defamation claim had been summarized:

> At paragraph 28 of that case the court just summarized the requirements for – to prove a case in defamation. The three things:
>
> > (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.
>
> And I'll pause there. Your Lordship had a question at the outset about were there fines actually levied against Mr. Pierce by the SEC. I will pause and address that at this point in time.
>
> First, that is but one of the allegations in there. So now our submission is that the allegations aren't just [that] there's been a fine levied. As Mr. Baynham went through, the allegations are incredibly serious that there is ongoing criminal account frauds and hundreds of millions of dollars stolen.
>
> But secondly, whether or not a matter is true doesn't change whether or not a *prima facie* case in defamation is made out. Truth is an affirmative defence. So something can be both defamatory and true. Our submission is on this hurdle, there is a strong *prima facie* case, not is there a potential defence to defamation being raised. So that addresses the issue of that fine.
>
> It's our submission that there is no question [indiscernible] these two newsletters is highly defamatory. There are allegations, and Mr. Baynham has gone over them, of a reaping hundreds of millions of dollars from innocent victims globally, allegations of notable civil regulatory and criminal frauds, an allegation that if you have invested in Mercer Gold Corp. you have been defrauded by Pierce and associates. The second newsletter refers to Mr. Pierce as a criminal, suggests that he is engaged in tax evasion and is perpetrating a fraud against investors. And I have set out again some of the material there … [Emphasis added.]

[20] The judge did not seek any further information regarding the SEC orders. He was persuaded at the end of the hearing that the criteria for the granting of an Anton Piller order had been met. In his analysis:

> An Anton Piller is an extraordinary remedy granted as an interlocutory order.
>
> It is done *ex parte* and *in camera*. The applicant must satisfy four conditions:
>
> 1. There must be a strong *prima facie* case;

> 2. The damage to the plaintiff of the alleged misconduct, potential or actual, must be serious;
>
> 3. There must be convincing evidence that the defendant has in its possession incriminating documents or other evidence; and
>
> 4. The applicant must show that there is a real possibility that the defendant may destroy the material before ordinary discovery process can accomplish disclosure: *Celanese Canada*, para. 35.
>
> Based on the wording of the newsletters, I am satisfied that there is a strong *prima facie* case with respect to the allegations of defamation made by the plaintiff.
>
> Secondly, the plaintiff is involved in this kind of business and the kinds of allegations that have been made would damage his reputation. That damage would be very serious.
>
> I am also satisfied that based on the disclosure made by Shaw and the linking of the IP address to Mr. Jivraj's residence, … the evidence is likely in his possession; that evidence being the newsletters. [At paras. 26-29.]

[21] The judge was also satisfied there was a "real possibility" Mr. Jivraj might destroy evidence in his possession before he could be examined for discovery. Again in the Court's words:

> There are two factors that I have taken into account in determining that there is a real possibility that Mr. Jivraj may destroy such evidence as it exists. One is that in the face of a demand by counsel for Mr. Pierce there was an outright denial. That denial seems to be at least questionable in light of the evidence provided by the IP address. Second, and most importantly, is the fact that there is an injunction in place prohibiting Mr. Jivraj from dealing or communicating in any way with Mercer Nevada's employees, consultants, investors and contractors.
>
> The evidence would indicate firstly with respect to the 5,400 distribution list of the February 2012 newsletter that this was a far and wide ranging publication. There is no specific number attached to the March 2012 publication, but based on comments contained in the February newsletter I am satisfied that it is reasonable to infer that the newsletter publication would have gone to consultants, investors and contractors.
>
> The prohibition against communicating with Mercer Nevada's consultants, investors and contractors was a court order. If that has been deliberately disobeyed then there is a real possibility that, absent a court order, Mr. Jivraj would likely pay little heed to his obligations to preserve and disclose relevant evidence.
>
> Accordingly, I am satisfied that this case is an appropriate case for an Anton Piller order to issue and the order will issue essentially on the terms as submitted. [At paras. 31-34.]

[22] The resulting order incorporated several specific terms usual in Anton Piller orders relating to the entry of Mr. Jivraj's premises by a "search party" under the supervision of an independent solicitor, the seizure of evidence, provision for persons in "apparent control" to seek legal advice, etc. The search and seizure were duly carried out on or about March 30, 2012.

[23] By October 11, 2012, Mr. Pierce had sufficient evidence to satisfy Madam Justice Loo in chambers that it was Mr. Jivraj who had published the Fraud Alerts. She ordered Mr. Jivraj and Mercer Gold (BC) to pay special costs to Mr. Pierce for costs incurred between February 22 and September 19, 2012 as a result of the defendants' "refusal to acknowledge authoring and publishing the two Public Company Fraud Alerts". Loo J. also ordered the defendants to pay $41,664 in respect of disbursements incurred by Mr. Pierce in connection with the Anton Piller order and the forensic analysis of the defendants' computers.

The Second Hearing: Reversal

[24] In September 2013, however, events took a different turn. Mr. Jivraj applied to the chambers judge who had made the Anton Piller order, to have it set aside on the basis that Mr. Pierce had not provided "full and frank disclosure" at the *ex parte* hearing.

[25] The chambers judge began his reasons (indexed as 2013 BCSC 1850) by reproducing the exchanges between counsel that I have set forth above, noting that they captured "the full extent to which counsel for Mr. Pierce addressed the court's inquiry regarding the fines referred to in the two newsletters." (Para. 15.) He then referred to the order made by the B.C. Securities Commission in 1993 against Mr. Pierce, and the two disgorgement orders of the SEC. These three decisions, he observed, had not been referred to or provided to the Court at the time of the Anton Piller application. (Para. 22.) In his analysis, they "paint an entirely different picture of Mr. Pierce than was urged upon this court during the *ex parte* application. Most troubling is the fact that the original picture was deceptive and misleading". (Para. 26.)

[26] Having seen this evidence, the chambers judge was of the view that Mr. Pierce could "no longer demonstrate that he has a strong *prima facie* case" or that he had "serious potential or actual damages." (Paras. 32-3.) In these circumstances, the first two conditions for the granting of the order were not met. The order was set aside.

[27] Under the heading "Full and Frank Disclosure", the judge went on to review case authority that requires full disclosure on an *ex parte* application. Applying this principle to this case, he continued:

> There is no dispute that both Mr. Pierce and his counsel were aware of the three regulatory sanctions. Mr. Pierce deliberately chose not to disclose those facts. It was not his function to decide what was or was not relevant material for the court to analyze. Whether something is or is not a material fact is for the court to determine.
>
> In his application for the Anton Piller Order there was a deliberate decision by Mr. Pierce to avoid reference to the regulatory decisions. The two SEC decisions set out the sanctions against Mr. Pierce and the reasons for them. The response to an inquiry from the court as to whether Mr. Pierce had been fined $9.4 million as set out in the newsletters was met with evasion at best. The manner in which the initial question was deflected to co-counsel and then subsequently brushed off causes me to conclude that this was a deliberate tactic to avoid disclosure of the sanctions. Counsel should have answered the simple question as to whether there had been a significant fine levied. The proper and responsive answer would have led to a further inquiry that undoubtedly would have resulted in a disclosure of the sanctions, which would not have assisted Mr. Pierce's application. The sanctions and the reasons for them were clearly relevant to the complaints being made by Mr. Pierce. The regulatory decisions were material facts.
>
> . . .
>
> This was not an innocent breach of the duty to disclose all material facts. It was a deliberate tactic to avoid reference to relevant and important information that would have been material to the determination of the application.
>
> It is particularly troubling in these circumstances where the court made a specific inquiry that would have alerted the applicant as to the materiality of the undisclosed facts. The courts rely on applicants in ex parte hearings to be cognizant of the duty to make full and frank disclosure. The courts expect a specific inquiry to be answered candidly. Failure to do so deprives the applicant of any benefit that might be granted in the case of an innocent breach.
>
> The failure to provide full and frank disclosure was particularly egregious given the specific inquiry that I made. The applicant cannot, under these

> circumstances, be permitted to gain any advantage. [At paras. 39, 40, 43-45; emphasis added.]

[28] Left for a later day was Mr. Jivraj's application for an award of special costs against Mr. Pierce and against Messrs. Baynham and Reid jointly and severally. Mr. Jivraj also sought the dismissal of execution proceedings taken with respect to the costs order of Loo J. in October 2012. (In order to enforce that order, Mr. Pierce had filed a claim of pending litigation and a garnishing order after judgment against Mr. Jivraj, and had registered a certificate of judgment against real property registered in his name.)

The Special Costs Application

Counsel's Affidavit Evidence

[29] The parties – Mr. Jivraj representing himself, and Messrs. Baynham and Reid, represented by Mr. Andrews – returned to the judge in chambers in February of 2014. Through Mr. Andrews, the two lawyers apologized to the Court for failing to disclose what was referred to as "Mr. Pierce's regulatory history". Both filed affidavit evidence in response to the application for special costs.

[30] In his affidavit, Mr. Baynham denied that Mr. Pierce had had any part in deciding what material had been put before the Court at the Anton Piller hearing. He acknowledged that with the benefit of hindsight, and having reviewed the chambers judge's reasons, he should have provided the judge with more information concerning Mr. Pierce's "historical involvement with public companies and the regulatory sanctions levied by the B.C. Securities Commission and the Securities and Exchange Commission". He apologized to the Court for failing to provide a more "fulsome" answer to the Court's question and for failing to amplify on Mr. Reid's submissions.

[31] In his affidavit, Mr. Baynham traced the history of his retainer by Mr. Pierce, which had commenced in December 2010 when *Stockwatch* had published a series of articles on-line and "persons unknown" had posted allegedly defamatory statements about Mr. Pierce in response. The *Stockwatch* articles themselves

referred to the July 2008 order of the SEC (confirmed in 2009 as seen above), and no complaint was made by counsel on that score. Rather, Mr. Baynham's concern had related to anonymous statements posted to the articles on the *Stockwatch* website. Eventually *Stockwatch* stopped accepting anonymous 'posts' and began to permit only persons who subscribed to *Stockwatch*, to post comments on its stories. Mr. Baynham's affidavit continued:

> Accordingly, from the outset of my retainer by Mr. Pierce, my focus was on the anonymous statements that were being made online. In my view, these and other posts were clearly defamatory and affected his ability to carry on business. In my mind the fact that he had a regulatory history with the BC Securities Commission and the Securities and Exchange Commission did not excuse these defamatory statements or render them any less actionable. The regulatory history would only go to the issue of quantum of damages if an action proceeded to trial. Put another way, past regulatory sanctions or other similar evidence of "bad character" did not give rise to a defence to new defamatory statements. Similarly, the regulatory sanctions, in my view, would not prohibit Mr. Pierce from seeking equitable relief from the Court such as a Norwich Order (to identify the source of defamatory statements) or an injunction (to prohibit further defamatory statements being made in the future). [At para. 19; emphasis added.]

[32] As we have seen, Mr. Pierce's regulatory history was referred to in the newsletters, but Mr. Baynham states in his affidavit that the publications "went much further than that." In his mind, the fact Mr. Pierce had been sanctioned by the SEC and the BC Securities Commission was "not legally relevant". It did not occur to him, he deposed, that these regulatory orders could "form the basis for a defence of the allegations of criminal wrongdoing, fraud, and tax evasion, found in the Fraud Alerts." His affidavit continued:

> As noted above, I thought that these allegations seriously harmed Mr. Pierce's ability to carry on business and earn a living. I also noted that Mr. Reid had identified a further basis to assert that the Fraud Alerts were causing serious damage, that being the blatant attempt to intimidate counsel representing Mr. Pierce.
>
> It did not occur to me at that time that Mr. Pierce's regulatory history might be considered relevant to the second element of the Anton Piller test. I was proceeding on the basis that there were potentially 5,400 of the Fraud Alerts in circulation, as asserted on the face of the Fraud Alerts. As I saw it, the allegation that Mr. Pierce was a criminal who was committing ongoing fraud more than established the requirement to show serious damage. Furthermore, my focus was on identifying the person responsible for

> publishing the Fraud Alerts and thereafter seeking the assistance of the Court in preventing further publication.
>
> It simply did not occur to me that the regulatory findings should be included in the materials in support of the Anton Piller order. Had it occurred to me I would certainly have included them in the materials. [At paras. 30-32; emphasis added.]

[33] Finally, Mr. Baynham deposed that when the chambers judge inquired about Mr. Pierce's being fined $9.4 million, his (Mr. Baynham's) answer was correct and truthful. Again, he said, it did not occur to him that the chambers judge was under any misapprehension in this regard. In his words:

> … In answering the question I was attempting to be responsive to the Court's unanticipated question. I had not reviewed the SEC decisions for several months and had only a general understanding of what was in issue before the SEC. All I recalled at the time was that the Securities and Exchange Commission had ordered Mr. Pierce to pay several millions of dollars. I had not looked into the underlying facts, the status of the proceedings before the Securities and Exchange Commission or whether or not the amounts ordered to be paid had been paid by Mr. Pierce. From my perspective, there was no need for me to look into these matters, since they did not affect the underlying defamation lawsuit nor did they form any part of the complaint that Mr. Pierce had about Fraud Alerts. Accordingly, Mr. Justice Dley's question did not cause me to appreciate that the findings of the Securities and Exchange Commission were relevant, or could be relevant, to the test for granting an Anton Piller Order. [At para. 33; emphasis added.]

[34] For his part, Mr. Reid, who is an associate at Mr. Baynham's firm, deposed that his "mindset" was that the new allegations of criminal accounting, perjury, fraud, etc. were "separate and distinct" from Mr. Pierce's regulatory history. He said he thought the chambers judge had understood from Mr. Baynham's response to his question that the SEC had indeed imposed sanctions totalling $9.4 million and that "pointing out that the Fraud Alert contained other, different, defamatory statements was a proper and responsive answer to the question." His affidavit continued:

> To the extent that the Judge might not see the same distinction as I saw between statements about the Regulatory Sanctions and statements about the other matters such as ongoing criminal fraud, and looked at the allegations in the Fraud Alerts as all connected, it seemed to me that there was a second point to be made. This was that truth or justification was an affirmative defence that did not need to be considered on this application. I had just cited the Supreme Court of Canada's decision in *Grant v. Torstar* 2009 SCC 61 for the elements that had to be proved to make out a case in

> defamation. These were made out. I believed that it was unnecessary, in order to establish a strong *prima facie* case of defamation, to address the possible defences such as justification that might be raised in regards to the statements contained in the Fraud Alert including the imposition of the Regulatory Sanctions.
>
> I now understand that this view is likely not correct and that it may be incumbent on an applicant in such a case to go further than establishing the elements of a *prima facie* case of defamation. But that was my understanding at the time I made the submission.
>
> I did not make these submissions to "brush off" the Court's question or as a deliberate tactic to avoid disclosure of the Regulatory Sanctions. I thought that the Court was aware that the Regulatory Sanctions had been levied and that I was providing legitimate and appropriate answers as to why that did not matter. It did not occur to me that the submissions I made in answer to the Court's question had given any false comfort or misled the Court in any fashion. I did not have the impression there was more information that needed to be provided to the Court in light of the Court's interest in the matter. Perhaps that should have occurred to me but it did not. [At paras. 34-36; emphasis added.]

[35] It appears that the affidavit evidence of Mr. Baynham, with its emphasis on drawing a line between the regulatory history of Mr. Pierce on the one hand and on the other, the allegations of fraud, criminal activity, perjury, etc., indicates a 'mindset' slightly different from that of his associate. Mr. Reid seems to have been anxious to include the allegations regarding Mr. Pierce's regulatory history in the allegedly defamatory material being complained of: thus his submission that "whether or not a matter is true doesn't change whether or not a *prima facie* case in defamation is made out." Yet it seems there is no doubt the regulatory history was true and thus the reporting of it could not have been defamatory. The fact that truth is a defence that must be made out by the defendant was mere quibbling in this context. At the same time, Mr. Reid's response to the chambers judge's question did suggest the regulatory history was true and thus could have signalled to the chambers judge that the answer to his question was 'Yes, Mr. Pierce was ordered to disgorge $9.4 million to the SEC.' Unfortunately, this did not happen.

[36] As I understand it, no application was made by Mr. Jivraj to cross-examine Mr. Baynham or Mr. Reid on their affidavits.

Special Costs Reasons

[37] In its reasons indexed as 2014 BCSC 926, the Court noted that Mr. Baynham had over 37 years at the bar and ought to have known that an Anton Piller application requires fastidious disclosure and that counsel be "profoundly fair" in presenting facts to the court. The consequences of the order had been very serious – Mr. Jivraj's expectation of and right to privacy and security in his own home had been breached. (Para. 31, citing *Girocredit Bank, supra.*) The judge then reasoned:

> Previous counsel's evidence states that they were aware of Mr. Pierce's regulatory sanctions, but did not think it relevant to the Anton Piller application. I have no reason to reject their evidence and, for the purposes of this decision, accept that previous counsel were not acting dishonestly.
>
> Previous counsel decided what evidence to place before the court at the Anton Piller application. Previous counsel determined what evidence was relevant and, in spite of an inquiry by the court that pointed to Mr. Pierce's regulatory history, previous counsel failed to address the issue. By deciding what evidence they thought was relevant, previous counsel did not discharge their duty at an *ex parte* hearing to fairly present all of the evidence whether favourable or not. Previous counsel did not enable the court to make an informed decision. In essence, counsel usurped the function of the court by deciding what evidence was material.
>
> Previous counsel succeeded in getting the court's endorsement and authority to enter and search Mr. Jivraj's home based on their representations at the *ex parte* hearing. Their representations were glaringly deficient, but the court only discovered the deficiencies after Mr. Jivraj's home was entered and searched.
>
> Previous counsel's failure to provide the court with fair disclosure at the *ex parte* hearing was reprehensible and deserving of rebuke. The level of deficient conduct by previous counsel was egregious. That is particularly so given the court was misled into authorizing entry into a citizen's home – a place where a person can expect to be secure against unlawful entry. Although the punitive aspect of special costs is a factor, the overriding focus on deterrence requires that special costs be granted in this case. [At paras. 37-40; emphasis added.]

[38] With respect to the remaining relief sought by Mr. Jivraj, the Court ruled that since Mr. Pierce had not participated in the impugned conduct, special costs should be awarded award against Messrs. Baynham and Reid only, and not against Mr. Pierce; that the award should include the $41,664 in disbursements incurred by Mr. Pierce; that a copy of Mr. Jivraj's computer hard drive should be returned to him, but that that order should be stayed for 60 days to permit appellate review; that the

execution proceedings taken against Mr. Jivraj pursuant to the costs order should be set aside; and that he and Mr. Pierce should bear their own costs of the application.

[39] It is from the order that the appellants personally pay Mr. Jivraj's special costs, costs of the appeal and costs of the hearing below, that Messrs. Baynham and Reid appeal.

On Appeal

[40] In this court, the two lawyers submit that the chambers judge below erred as follows:

> A. His Lordship misdirected himself in law and failed to take into account legally probative considerations, specifically:
>
> (a) He proceeded on the basis that where counsel decide what evidence to put before the Court on an *Anton Piller* application and leave out facts later found to be material they usurp the function of the Court;
>
> (b) He proceeded on the basis that where counsel fails to bring to the Court's attention on an *Anton Piller* application facts which are known to them and which are later found by the Court to be material, their conduct is *ipso facto* abusive of the process of the Court and reprehensible;
>
> (c) He failed to consider the explanation given by counsel as to why it did not occur to them that Mr. Pierce's Regulatory History was material to the application and failed to determine whether their conduct, *as so explained*, merited an award of special costs;
>
> (d) He ordered counsel to pay special costs on the basis of a need for deterrence, when there was no such need in this case;
>
> (e) Although he stated the principle that the discretion to award costs against counsel must be exercised sparingly, with restraint, and only in rare and exceptional cases, His Lordship did not apply it.
>
> B. Alternatively, His Lordship was clearly wrong in finding that counsel's conduct was reprehensible and warranted an order for special costs;
>
> C. His Lordship erred in law in varying [Loo J's] Costs Order.

In my view, the appeal can be decided on the second and most important ground – i.e., the assertion that the chambers judge erred in finding counsel's conduct was "reprehensible" and thus warranted an order for special costs against them.

[41] I begin, as the appellants' factum did, with the principle that an order of costs against a lawyer personally should be made rarely and only where serious misconduct has been shown. In *Young v. Young* [1993] 4 S.C.R. 3, McLachlin J., as she then was, stated:

> … courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in the situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [At 136.]

In a similar vein, Chief Justice McEachern in *Hannigan v. Ikon Office Solutions Inc.* (1998) 61 B.C.L.R. (3d) 270 (C.A.) stated:

> No useful purpose will be served by reviewing the numerous cases that were cited by Mr. Sugden as it will be sufficient to say that the authorities are clear that very serious misconduct is required before counsel will be required to pay costs personally. I agree with Mr. Sugden who submitted that an award against a solicitor should only be made in very special circumstances, and should not be made on the basis of mistake, error in judgment or even negligence. [At para. 20.]

[42] I also note at the outset that the chambers judge's reasons for the special costs order attenuated to some degree his earlier reasons at the 'set aside' hearing. In the earlier reasons, the statement that Mr. Pierce – not counsel – made a "deliberate decision" to avoid reference to the regulatory decisions, coupled with the suggestion that Mr. Baynham "deflected" the court's question to co-counsel as a "deliberate tactic to avoid disclosure of the [SEC] sanctions", would in my view have supported the conclusion that the lawyers did engage in very serious misconduct.

[43] However, in his reasons for granting special costs, the chambers judge did, as Mr. Andrews emphasizes, accept counsel's evidence that they did not think Mr. Pierce's regulatory record was relevant. As we have seen, the judge stated that Messrs. Baynham and Reid had not acted "dishonestly", but he was critical of

counsel for "deciding what evidence they thought was relevant". On such an application, counsel should, of course, err on the side of inclusion when deciding what evidence is to be brought to the Court's attention. I agree with Mr. Andrews, however, that it cannot be that in every case in which counsel wrongly leaves out evidence that ultimately proves to be material, a special costs order will be justified.

[44] The most important consideration in the chamber judge's analysis seems to have been that he felt he had been "misled into authorizing entry into a citizen's home" for purposes of enforcing the Anton Piller order. With respect, it seems to me that if counsel had been more complete in their response to the judge's question, they would have answered that yes, Mr. Pierce had been ordered to disgorge $9 million by the SEC, but that the SEC's findings could not be said to constitute findings of "criminal fraud and gross professional misconduct", the execution of a "manipulative 'pump and dump' "scheme in respect of Tresoro "for illicit financial gain", or apparently dishonest dealings with respect to the affairs of a company known as Westrock Land Corp. Arguably, the latter allegations, which related to different companies and purported to describe conduct in 2012, not between 2008 and 2011, went much farther than the allegations relating to the SEC orders.

[45] In these circumstances, I cannot agree that the Court was "misled" into making the Anton Piller order. To the contrary, it seems to me that had Mr. Baynham or Mr. Reid been more careful and complete about answering the judge's question, the Court likely would still have granted the order and Mr. Jivraj's premises would still have been the subject of the search that ultimately demonstrated that he had indeed published the two Alerts.

[46] While Mr. Pierce's regulatory history was not "irrelevant" to the later and fuller allegations made in the Fraud Alerts, one can appreciate how counsel in Mr. Baynham's position might not have appreciated the import of the chambers judge's question regarding the SEC orders. Mr. Baynham deposed that he did not believe the regulatory history or the penalties levied by the SEC against Mr. Pierce needed to be raised "because there was no connection between the relief sought

and the past misconduct by Mr. Pierce." A line could certainly be drawn, in that the SEC sanctions (which Mr. Baynham did acknowledge in his answer to the chambers judge) were known to be true as a matter of fact. Thus any reference to them could not ultimately be defamatory.

[47] Given the chambers judge's finding in his costs reasons that Messrs. Baynham and Reid were "not acting dishonestly", I cannot agree that their conduct was "reprehensible" in all the circumstances. There is no doubt that counsel were preoccupied with the more extreme allegations made in the Fraud Alerts against Mr. Pierce and with identifying who had published those allegations. It was careless on the part of Mr. Baynham in particular, but also of Mr. Reid, to fail to appreciate that the chambers judge had to be fully informed concerning exactly what allegations were alleged to be defamatory and which were admitted to be true. The trial of this action will likely be a long and complicated one that may turn on exactly where this line falls. But in my respectful view, counsel's unfortunate "focus" on those matters and failure to respond more fully to the judge's question did not rise to the level of "reprehensible" conduct that deserved rebuke by a special costs award against them. Indeed, counsel's mistake was a very common one in my experience – having spent many months on their file, they lost sight of the fact that the chambers judge was coming "cold" to the case, with no prior knowledge of even the broad outlines of the litigation.

[48] I would allow the appeal and set aside the order of the chambers judge that the appellants personally pay the special costs of the respondent. The effect of this order is also to leave undisturbed the order of Loo J. that Mr. Jivraj pay special costs in respect of the Anton Piller hearing, including the related disbursements of carrying out the order.

[49] I would also order that the parties should pay their own costs of the appeal and of the hearing below.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Harris"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation,* 2024 BCCA 318

Date: 20240909
Docket: CA50020

Between:

QRD (Willoughby) Holdings Inc., QRD (Willoughby) Limited Partnership, QRD (Willoughby) GP Inc., Quarry Rock Developments Inc., Richard Lawson and Matthew Weber

Appellants
(Respondents)

And

MCAP Financial Corporation

Respondent
(Petitioner)

And

Canadian Mortgage Servicing Corporation, Overland Capital Canada Inc., Wubs Investments Ltd., and Steelcrest Construction Inc.

Respondents
(Respondents)

And

MNP Ltd.

Respondent
(Receiver)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated July 9, 2024 (*MCAP Financial Corporation v. QRD (Willoughby) Holdings Inc.*, Vancouver Docket S237489).

Counsel for the Appellants: D.A.T. Moseley

Counsel for the Respondent, MCAP Financial Corporation: C.D. Brousson

Counsel for the Respondent, Canadian Mortgage Servicing Corporation:	H.D. Powell
Counsel for the Respondents, MNP Ltd.:	W.L. Roberts S.B. Hannigan B. Hunt
Place and Date of Hearing:	Vancouver, British Columbia August 14, 2024
Place and Date of Judgment, with Written Reasons to Follow:	Vancouver, British Columbia August 16, 2024
Place and Date of Written Reasons:	Vancouver, British Columbia September 9, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

Summary:

Appellants are debtors under and personal guarantors of mortgages related to a suspended real estate development project in Langley. In proceedings pursuant to the Bankruptcy and Insolvency Act ("BIA"), court below appointed respondent "MNP" receiver of the assets. Receiver did not obtain an appraisal of the property. After less than 2.5 months of marketing efforts, receiver appeared before the chambers judge and presented two bids, and advised that one of the bids, despite being lower, offered better value to creditors owing to the earlier closing date. The result would be to pay out the first mortgagee and only part of the amount owing to the second. Appellants opposed the sale on the grounds that another purported bidder was prepared to offer substantially more for the property, if given time to 'firm up' its bid. Chambers judge was ultimately not satisfied that this potential bid was anything beyond speculative, and approved the sale on the receiver's advice.

Appeal, heard by right under s. 193(c) of the BIA, dismissed. The chambers judge erred in balancing the Soundair factors in a way that was fair, or could be seen to be fair, by all parties. The judge ought to have concluded that the possibility of a significantly higher bid, in these circumstances, warranted a reasonable extension of time. However, time has since passed and in the absence of new or fresh evidence demonstrating the progression of the possible bid, it would not be provident to delay the sale any further. Discussion of 'stalking horse' bids.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal and application for leave were heard on an expedited basis and arise from an Approval and Vesting Order made by a judge in chambers in the Supreme Court of British Columbia on July 9, 2024. Leave to appeal was sought before a justice in chambers in this court on July 30, but because of time constraints, that application was deferred to be heard by the division that, if leave were granted, would hear the appeal.

[2] Following the hearing in this court on August 14, we notified counsel in writing of our decision that the appellants were entitled to appeal as a matter of right but that the appeal was dismissed, for reasons to follow. These are our reasons.

Factual Background

[3] The respondent QRD (Willoughby) Holdings Inc. ("QRD") is the owner of a large parcel of land in Langley, British Columbia, on which it planned to construct 87 three-storey townhouse units in three phases. The first mortgagee of the property

was the petitioner (respondent in this court) MCAP Financial Corporation ("MCAP"), which was owed some $33.6 million by the time of the hearing below. MCAP also holds security over the personal property comprising the project. QRD's indebtedness to MCAP was guaranteed personally by the respondents Messrs. Weber and Lawson.

[4] The Langley property is also subject to a second mortgage in favour of the respondent Canadian Mortgage Servicing Corporation ("CMSC") under which more than $8 million is outstanding, and later mortgages in favour of the respondents Overland Capital Canada Inc. ("Overland") and Wubs Investments Ltd. ("Wubs"). (I understand the two later mortgages are being challenged in other proceedings.) All four mortgages were duly registered against the property, as was a builder's lien filed by the main contractor, Steelcrest Construction Inc. ("Steelcrest").

[5] Unfortunately, construction of QRD's planned project came to a halt in the fall of 2023, due, the appellants say, to development approval delays and high interest and construction costs. QRD defaulted under the mortgages and other security instruments. By this time, two of the seven buildings comprising Phase 1 of the project were complete or nearing completion.

[6] On October 23, MCAP issued a demand letter and Notice of Intention to Enforce Security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and a demand letter to the guarantors. When payment was not received, MCAP petitioned in the Supreme Court on November 3, 2023 for, *inter alia*, a declaration of indebtedness (said to be $29,521,907.02 on October 23 plus interest accruing at the rate of $6,842.13 per day), and the foreclosure of the mortgage and other security. Rules 20-4, 21-7 and 13-5 of the *Supreme Court Civil Rules*, and s. 55(6) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, were cited in the petition as the legal bases for the relief sought.

[7] The Court granted an order appointing MNP as the receiver of all the assets and undertakings of QRD, QRD (Willoughby) Limited Partnership and QRD (Willoughby) GP Inc. on November 8, 2023. (I will refer to these entities collectively

as the “Debtors”.) The order was granted pursuant to s. 243(1) of the *BIA* and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. After receiving the receiver’s First Report dated December 6, the Court gave the receiver authority on December 15 to borrow the funds necessary to ‘winterize’ the existing buildings and complete construction of the unfinished buildings in Phase 1. This work was carried out by Steelcrest.

[8] In April 2024, the receiver told the Court in its Second Report that it estimated total interest costs of some $317,000 per month were accruing on the debt and that MCAP and CMSC were the only creditors likely to recover some or all of their loans. No appraisal of the property was suggested or provided to the Court, although the receiver did state that it had obtained “marketing proposals and opinions of value from commercial and residential real estate brokerages.” By order dated April 19, the Court granted MNP the authority to market all or any of the property for sale on an “as is” basis, subject to court approval. According to MNP, it began marketing the property on or about April 24, through a real estate agency, Colliers International.

[9] Also in April, Mr. Weber advised the receiver about the possibility of a sale to “BC Builds”, a program of the provincial government that “partners” with developers to increase the availability of rental homes in the Province. According to Mr. Weber’s affidavit, the BC Builds program had launched in February 2024. He had met in March with an official of the program who recommended that he contact a non-profit organization that might be interested in purchasing the property with BC Builds’ assistance. Mr. Weber assembled a package of information requested by Mr. Kwong of BC Builds “as part of Step 01 of the Application Process” for consideration by the governmental body. On the same day, Mr. Weber told the receiver that he had submitted that application, suggesting that it would not be necessary for Colliers to market the project given Mr. Weber’s expectation that the project would be “accepted as part of the BC Builds program and that a non-profit would purchase the Lands.” According to its later Supplemental Report, MNP responded that it was open to any solution that would provide “superior recovery” to creditors, but that unless

and until the proposed transaction became "sufficiently certain as to present a viable solution", it would carry on with the existing marketing plan.

[10] On June 24, 2024, the receiver filed an Application for orders approving the sale to, and vesting title to the property in, Redekop Ferrario Properties (DD) Corp. ("Redekop") free and clear of all liens and encumbrances; an order approving the receiver's activities since April 4 (as set out in MNP's Third Report dated June 21); and increasing the receiver's borrowing to a total of $2,589,000 and increasing its secured charge accordingly. MNP cited ss. 31 and 235 of the *BIA* in support of the orders, as well as the *Law and Equity Act* and Rules 13-5 and 21-7 of the *Civil Rules.* The Report made no mention of the BC Builds proposal.

[11] In its Application, the receiver stated that there had been "relatively strong interest" in the property, mainly from developers or builders who would purchase the property "as is" and take on the costs of completing the project. Between 10 and 15 parties had completed detailed due diligence and had calculated the costs of completing the project. Colliers had circulated a copy of *Practice Direction No. 62* of the Supreme Court to interested parties, together with notice of MNP's Application. (The *Practice Direction* sets out the 'default' procedure for obtaining and managing sealed bids for court-ordered sales of real property.)

[12] On May 30, Redekop had made a "no subjects" offer to purchase the property. After some negotiation, the receiver and Redekop had entered into an agreement of sale and purchase for the price of $35,000,000, subject to court approval. (As I understand it, this then became the "Original Bid" as defined in the *Practice Direction*.) The agreement provided for a "break fee" of $200,000 payable to Redekop in the event a higher offer was ultimately approved. Redekop was also amenable to structuring the deal as a reverse vesting order ("RVO"), which was expected to increase the net amount available for the second mortgagee by some $800,000.

[13] In its Application, the receiver acknowledged the well-known "factors" set out by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (1991) 4

O.R. (3d) 1 for consideration by courts in motions of this kind, including the "interests of all parties" and whether the receiver has made a sufficient effort to obtain the price and has not acted improvidently. The Application continued:

> 21. In consideration of the *Soundair* principles and section 243(1)(c) of the *BIA*, this Court has the authority to (a) approve the sale of, and vest title in, the Property to the Purchaser free and clear of all claims and encumbrances.
>
> 22. The Receiver used an efficient process with integrity to market each parcel for sale. In particular, the Receiver engaged Colliers to market the Property for sale, who listed and marketed each parcel on an "as is, where is" basis, starting in April 2024. To ensure maximum exposure of the Real Property to interested parties, Colliers maintained a dedicated webpage, engaged a professional photographer to prepare advertisements, conducted tours of the Property, and engaged in direct discussions with prospective purchasers.
>
> 23. The Receiver made a sufficient effort to get the best price by way of the broad and open marketing process described above. As of the date of the Second Report, the Receiver has received one offer to purchase the Property. Based on its review and analysis of the offer received, the Receiver concluded that the Offer was the best given the circumstances. There was no unfairness in the working out of the sale process, which was fair, open and transparent. Finally, the Receiver considered the interests of all parties, including the Debtors and their primary secured creditor in determining to recommend the Offer to this Honourable Court for approval.
>
> 24. Ultimately, the Receiver has acted prudently and in a commercially reasonable manner with respect to the sale process for the Property. The processes followed by the Receiver had integrity, were fair and transparent, and took into account the interests of all parties. [Emphasis added.]

I note that the "break fee" in Redekop's bid was not mentioned in the receiver's Application itself, but was contained in the form of agreement between MNP and Redekop that was attached to MNP's Third Report. It was of course disclosed to the chambers judge by counsel at the later hearing.

[14] MNP's Application was heard by a judge in chambers on July 9. Counsel for the receiver told the judge that aside from Redekop's offer, two other parties had expressed interest in the property. One of them, from a numbered company, failed to materialize at the hearing. The second had been received on the day before the hearing and contemplated a price of $37 million. In the receiver's opinion, it had too

long a closing date given the significant 'burn' rate involved in maintaining the property. It also assumed an RVO structure for the deal. Counsel estimated that on an asset purchase, this offeror's bid would equate to about $35.4 million.

[15] The Debtors brought forward another proposal — this one from the Foundation Residence Society ("FRS"), a non-profit society reportedly backed by the provincial government through the BC Builds program. At the time of the hearing, it contemplated a purchase price of $64 million, of which $21 million would be accounted for by a mortgage back to the vendor. It also contemplated a long closing date and required the satisfaction of many conditions, including a funding commitment from the Province, via BC Builds, in favour of FRS. Counsel for the receiver described this proposal as "incredibly speculative" in his submissions to the chambers judge. There was no evidence as to how the purchase price of $64 million had been arrived at.

[16] The Debtors and guarantors Messrs. Lawson and Weber opposed MNP's Application and supported the FRS deal. Their Application Response and the supporting affidavit of Mr. Weber emphasized that acceptance of the Redekop offer would result in a shortfall of over $18 million. Indeed, it would provide for payment out to MCAP and up to $2 million for CMSC as the next charge holder, but would "wipe out all subsequent charge holders and equity in the Lands." On the other hand, the proposed sale to FRS for $64 million would, according to the Debtors, "make all stakeholders whole." The transaction would be carried out under the auspices of BC Builds, which the Response described as follows:

> 14. BC Builds is a new provincially operated program that partners with developers and housing operators to speed-up the delivery of lower cost rental homes in BC. The program encourages non-profit that would own and operate buildings to team up with a developer/builder and submit an application and can provide:
>
> a. low-cost construction financing for buildings owned and operated by both for-profit and non-profit developers;
>
> b. direct access to CMHC construction and financing;
>
> c. low-cost take-out financing; and

d. grants of up to $225,000 per unit for buildings owned and operated by co-operative or non-profit developers and First Nations controlled development corporations.

[17] In his affidavit, Mr. Weber recounted that despite his bringing the potential FRS offer to MNP's attention in early April, the receiver had proceeded to appear in court on April 19, 2024 to obtain the order approving the marketing of the property for sale to Redekop. In his words:

> There was no mention of my various communications with Mr. Kwong of the Application in the Receiver's Second Report to the court. My understanding is this information was not before the Court when it made the Further Amended and Restated Receivership Order, although I was not in attendance when it was made. …
>
> The Application was reviewed by BC Builds, and on or about April 22, 2024, it was moved to Step 02 of the Application Process. …
>
> As a result of discussions I was having with non-profit organizations introduced by my MLA and by others, on or about April 23, 2024, I reached a verbal agreement with Augustino Duminuco ("Mr. Duminuco") who is a director of a non-profit organization called Foundation Residence Society ("FRS") whereby FRS will purchase the Lands for $64 million, which amounted to the cost base of the Project at the proposed closing date to make all stakeholders whole.
>
> The Receiver was kept appraised of this development and it is my understanding from what the Receiver has told me that the marketing of the Lands commenced the following day on or about April 24, 2024. [Emphasis added.]

[18] Mr. Weber went on to depose that on or about May 15, a written "agreement" for the sale of the property to FRS had been "completed". This document appears to have been signed by Mr. Weber on behalf of QRD and by Messrs. Duminuco and Wong on behalf of FRS. (Of course, it is highly doubtful QRD had the authority to enter such a contract once it was in receivership.) It contemplated that the purchase price of $64 million would be paid in part by the vendor's taking back a mortgage of $15 million — i.e., that the sale would realize cash of about $49 million. FRS's obligation to complete was described as subject to review and approval of project documents, state of title, inspection and condition reports, the environmental condition of the property, approval through

the BC Builds program and a feasibility study on or before June 28. A completion date of August 29 was contemplated.

[19] On May 22, a telephone meeting of representatives of QRD, the receiver, MCAP, and CMSC (represented by "Atrium") had been held. The Application Response recounted:

> 26. On or about May 22, 2024, the Owners hosted a … call with the Receiver, MCAP, and Atrium to provide further details and answer questions with respect to the FRS CPS [contract of purchase and sale] and the status of the Application.
>
> 27. On or about May 30, 2024, the Receiver received the Redekop Offer.
>
> 28. On or about June 5, 2024, the Owners hosted a … call with Mr. Kwong and with the Receiver, MCAP, and Atrium with a view to providing not only an update but instilling confidence in the status and viability of the Application.
>
> 29. The Owners continued working with Mr. Kwong and his team at BC Builds and with FRS with respect to the Application and provided substantiation of rental numbers to assist with conditional budget approval as part of Step 02 of the Application Process on or about June 11, 2024, given that when asked for assistance from the Receiver, the Receiver refused assistance, but also advised that it would not oppose or take issue with it.
>
> 30. On or about June 11, 2024, the Receiver accepted the Redekop Offer.
>
> 31. On or about June 25, 2024, an Addendum to the FRS CPS [contract of purchase and sale] was entered into with the following changes: a. subject removal was changed to the later of 60 days after the issuance of a Commitment Letter from BC Builds or July 31, 2024; b. completion was changed to be 60 days following subject removal; c. the VTB mortgage was changed to be a loan from the seller to the buyer in an amount up to $21,500,000.00 repayable over ten years and bearing interest at 0.0%; d. the deposit was changed to $250,000.00 to be paid by certified cheque, bank draft, or wire transfer no later than 5:00 pm on the 5th business day after the Letter of Intent from BC Builds is received and is refundable up until subject removal.
>
> (the "Addendum to the CPS").
>
> 32. The Owners have continued with the Application Process and expect approval imminently and have reached out to BC Builds for confirmation of same. [Emphasis added.]

[20] In terms of certainty of completion, then, Redekop's "no subjects" agreement and the CPS were polar opposites — the latter transaction could collapse if no commitment letter was issued by BC Builds and if BC Builds did not do so for

several months, the subject removal date would be extended indefinitely. Completion would not occur until 60 days after removal of the subjects. Even greater uncertainty revolved around FRS's requirement of funding from BC Builds. This was the subject of a "Letter of Interest" from Mr. Kwong of BC Builds to the Society dated July 5, in which he stated:

> Before moving forward with the application approval process, we still require completion of the following:
>
> 1. A review of any potential conflicts of interest between the vendor/QRD and your organization;
> 2. Confirmation before July 8 court event of amendments to the contract of purchase and sale with the vendor/QRD, including industry-standard representations and warranties for delivery of the construction and improvements on the Project free of defects or deficiencies;
> 3. Proof of your organization's history and capacity in asset management.
>
> The above items, once provided, can be completed by BC Builds within a short timeline. Once these items are addressed, we can proceed with the application approval process through our various approving authorities:
>
> 1) Project Steering Committee; internal committee of BC Housing; meetings occur on a weekly basis.
> 2) Executive Committee; internal committee of BC Housing; meetings occur on a weekly basis unless a quorum is not established.
> 3) Board of Commissioners; external approving committee; meetings occur on a monthly basis unless a quorum is not established.
> 4) Ministry of Housing/ Treasury Board; meeting occurrences are uncertain as the schedules are not dictated by BC Housing.
>
> The above only describes the meeting times and do not describe the timing of getting the recommendations and submission reports to these approving bodies which may require several weeks to be vetted and included onto meeting agendas. We also want to note that because of the Provincial election that is anticipated to occur in Fall 2024, the approvals from the Ministry or Treasury Board may be further delayed due to the election process and government not in session. BC Builds is also prepared to move forward with seeking approvals from our internal committees as well as our Board of Commissioners and will seek Provincial approvals when we are able and when government is in session. [Emphasis added.]

[21] In their Responses to the receiver's application, MCAP and CMSC adopted the receiver's submissions, emphasizing what they referred to as the speculative

nature of the FRS agreement and the significant monthly 'burn' rate. At the hearing, counsel for CMSC acknowledged that his client was concerned primarily with closing certainty and the minimization of delay, even though the FRS transaction might, if realized, result in greater recovery for this creditor. MCAP went further, suggesting that if more delay was encountered, even *it* might not be paid out in full if the Redekop deal were not approved.

[22] Application Responses were also filed by Overland, to which approximately $8 million was owing in July 2024, and by Wubs, to which some $4.5 million was owing. Both would come away empty-handed after the sale to Redekop and both opposed the granting of the order sought by MNP. Overland noted in particular that the receiver had failed to disclose the BC Builds proposal to the Court in its Application and in its Reports to the Court. Wubs contended that the large disparity between the price of $35 million offered by Redekop and the FRS price of $64 million and the "very short window" of marketing by the receiver, militated in favor of rejecting the Application. In its words:

> These facts tend to discolour the process by which the Receiver has proceeded with the result that the Court cannot reasonably have confidence that the offer being brought is the best one, especially given another offer in the wings for nearly 50% more.
>
> Again, without a fulsome explanation backed up with market/appraisal evidence, the Court is left to its own devices to determine if the Redekop offer presents the best path forward. This is unfair not only to the Court, but also to all chargeholders save the Petitioner and the second charge holder, albeit with a shortfall to them as well.

[23] I also note the "Supplemental Report to Receiver's Third Report to Court" dated July 6, which we were told had been accepted for filing, although it is not stamped. In general terms, the Report advanced the receiver's arguments made before the chambers judge on July 9. I will not rehearse those arguments here except to note that the receiver supported the conversion of Redekop's offer to an RVO if ultimately approved by the Court.

[24] Finally, I note that a representative of Steelcrest appeared before the chambers judge to express opposition to the proposed transaction with Redekop. He

told the Court there was mould in the buildings that could be remediated for about $225,000 and thus "eliminate the concern that some people have with regards to the timeliness of coming to a resolution today." He described the mould as "far from untreatable at this time" but offered on behalf of Steelcrest to oversee the remediation. No actual *evidence* regarding mould was provided to the Court, but as will be seen, the chambers judge accepted that a mould problem did exist. (This fact is borne out in an affidavit that the receiver sought to introduce as fresh evidence in this court.)

Chambers Judge's Reasons

[25] The receiver's Application was heard at length on July 9 and the chambers judge was able to give oral reasons the same day. They were brief and to the point. The judge found first that the sale process engaged in by the receiver had been "fair and appropriate". He noted that the receiver had led a process of approximately 2.5 months in which some 5,700 emails had been sent to potential purchasers, of which 30 had responded and asked for access to the data room. Eight had followed up with a tour and the receiver "ended up…with two valid competing bids." (At para. 2). As for the offer from BC Builds, the chambers judge stated:

> The potential for an offer from BC Builds (the provincial government program aimed at building affordable rental housing) is, with respect, speculative. I do not doubt the *bona fides* of their intention to move the matter forward. However, the evidence before me shows that the length of time that it would take to even get a potential offer before the legislature for approval is inordinate (not through any fault of BC Builds). [At para. 3.]

[26] The judge noted that there was urgency to complete a "favourable transaction" because of the economic 'burn' rate and the possible mould contamination in the buildings, which needed to be remediated in the summer months. The cost of doing so, he suggested, could be determined at a later date. Based on the evidence, however, he was satisfied that putting off the application until the end of August was unlikely to generate any greater offers. (At para. 5.) In his view, the "only real competition" to Redekop's offer was the bid from the

numbered company that had declined to provide any information sought by the receiver, including the identity of its principals.

[27] In the result, the chambers judge approved Redekop's offer as commercially reasonable and one that should be approved. The orders sought by MNP were granted.

[28] The Debtors filed a Notice of Appeal in this court on July 18, 2024. In that Notice, the Debtors did not seek leave to appeal. MNP filed an urgent application on July 23 seeking, *inter alia*, an order striking out the notice of appeal as null and void, or alternatively, denying leave if the notice of appeal was converted to an application for leave. In turn, the appellants sought the dismissal of that application or an order converting their notice of appeal to an application for leave and an extension of time. The motions could not be heard until July 30, at which time the chambers judge in this court deferred the question of leave to this division in light of the short time-frames involved.

Leave to Appeal

[29] Before us, MNP continued its preliminary objection to the appeal on the ground that it was not properly brought as an appeal as of right because s. 193 of the *BIA* required that leave be obtained. Section 193 provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[30] In my view, it is highly unlikely that subparagraph (b) has any application in this instance. As Ms. Hannigan submitted, the phrase "the bankruptcy proceedings"

appears to limit the court to considering only "cases" of a similar nature in *this* proceeding, and the Debtors have not identified any other such "cases" in this proceeding. (See *Forjay Management Ltd. v. Peeverconn Properties Inc.* 2018 BCCA 188 at paras. 39–43.) In any event, the parties seem to agree that if this appeal is to proceed as of right, it is most likely by operation of subparagraph (c). This provision was the subject of discussion in *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.* 2022 BCCA 158, a decision of myself in chambers, at paras. 35–56.

[31] Like the applicants in *Crowe Mackay*, the receiver in the case at bar takes the position that s. 193(c) should be applied narrowly. The receiver relies on an Ontario line of cases exemplified by *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* 2016 ONCA 225. There, Mr. Justice Brown in chambers stated that despite its broad language, the provision did not apply to orders that were procedural in nature, orders that did not bring into play the value of the debtor's property, or orders that did not result in a loss to creditors. (At para. 53.) He ruled that the asset vesting order before him simply "marked the final step in the Receiver's monetization of the debtor's assets" and did not "bring into play" the value of the property. (At para. 60.) Thus despite the debtor's submission that the sale had been improvident, the debtor's notice of appeal was set aside as null and void.

[32] In more general terms, Brown J.A. acknowledged that the history of s. 193(c) was "unusual". He continued:

> Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation. However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c) – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings. [At para. 47; emphasis added.]

(See also *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation* 2021 ONCA 581; *Cardillo v. MedCap Real Estate Holdings Inc.* 2023 ONCA 852; *Re Harmon International Industries Inc.* 2020 SKCA 95.)

[33] As against the relatively narrow approach taken in *Bending Lake*, I note first *Fallis and Deacon v. United Fuel Investments Ltd.* [1962] S.C.R. 771. In *Fallis*, the Court was asked to quash an appeal taken from an order granting the winding-up of a company under the *Winding-up Act* of Ontario. Speaking for the Court, Cartwright J., as he then was, reasoned:

> In my opinion the test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen v. Roberts et al.* [[1925] S.C.R. 364], upholding the judgment of the Registrar affirming jurisdiction. The action was for an injunction to restrain the defendant from erecting a building nearer to the street line than 25 feet and to restrain the municipality from granting a permit for the erection of the proposed building. The report at page 367 reads as follows:
>
> > The Court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss—and therefore the amount or value in controversy—exceeds $2,000.
>
> Applying this test to the facts of the case at bar, the evidence shows that if the winding-up proceeds the appellant Fallis will suffer a loss greatly in excess of $2000. [At 774; emphasis added.]

It will be apparent that the Court looked to what the appellant would suffer or gain if the winding-up proceeded. The Court also disapproved an earlier case, *Cushing Sulphite-Fibre Co. v. Cushing* (1906) 37 S.C.R. 427, where it had held that a judgment refusing a winding-up order *did not involve any amount* and therefore no right of appeal lay from it. In the opinion of Cartwright J., *Cushing* had to be reconsidered in light of the enactment of s. 43 of the *Supreme Court Act* in 1913, which stated that where a right of appeal is dependent on the amount in question, the amount may be proven by affidavit. (See R.S.C. 1952, c. 259.)

[34] The *Fallis* reasoning was adopted and followed by Finch J.A., as he then was, in *McNeill v. Roe, Hoops & Wong* (1996) 20 B.C.L.R (3d) 274 (C.A.), in connection

with a debtor's application for an absolute discharge from bankruptcy. Finch J.A. noted at the outset that what is now s. 193(c) had come into force in November 1992. Until then, the provision had authorized appeals if the property involved in the appeal exceeded $500. He reviewed *Fallis* and *Orpen v. Roberts* [1925] S.C.R. 364, and continued:

> The "property involved in the appeal" which the bankrupt wishes to pursue may be determined by comparing the order appealed against with the remedy sought in the notice of appeal. Here, Mr. Justice Thackray's order required the bankrupt to pay $168,750 by monthly instalments. The notice of appeal seeks an order "to discharge the Appellant from bankruptcy on such terms and conditions as the Court may deem just." In his submissions, counsel for the bankrupt suggested that reasonable conditions for discharge might include payment of monthly sums up to a total of about $40,000. Applying the test set out in *Fallis* and adopted by other judges of this Court, it is clear that if the appellant is granted the relief sought on appeal, the loss to the creditors would far exceed the sum of $10,000. I am therefore of the view that the bankrupt had an appeal as of right under s. 193(c). [At para. 13; emphasis granted.]

[35] In a more recent case, *MNP Ltd. v. Wilkes* 2020 SKCA 66, the Court reviewed what it described as two different approaches to the interpretation of s. 193(c) — first, the *Orpen-Fallis* line of authority and cases following it (including *McNeill*, *Galaxy Sports Inc. v. Abakhan & Associates Inc.* 2003 BCCA 322, *Re Kostiuk* 2006 BCCA 371 and *Farm Credit Canada v. Gidda* 2014 BCCA 501, as well as a few cases from other provinces), and the "*Alternative Fuel-Bending Lake* approach". In connection with the first group, Madam Justice Jackson for the Court in *Wilkes* quoted the following passage from an annotation in the *Canadian Bankruptcy Reports* at 4 C.B.R. (n.s.) 209:

> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant

> could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal. [At para. 34; emphasis added.]

[36] The Court in *Wilkes* expressed the view that subparas. 193(c) and (e) should not be interpreted in either a narrow or expansive way, but "according to their terms and within their context." In Jackson J.A.'s analysis:

> In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the Act, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).
>
> On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes that were *in pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite-Fibre Company v. Cushing* (1906), 37 SCR 427, which was expressly overruled by *Fallis*, albeit after the 1949 amendments.
>
> This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). ... [At paras. 50–52; emphasis added.]

[37] Ultimately, the Court concluded that the mere fact that the question on an appeal is procedural should not *by itself* determine whether it falls within s. 193(c). In Jackson J.A.'s words:

> According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction. [At para. 64; emphasis added.]

[38] On this point I note as well the recent decision of *Peakhill Capital Inc. v. 1000093910 Ontario Inc.* 2024 ONCA 59, in which one of the issues before the Court was whether an order approving a sale process was "merely procedural", such that the purported appeal did not (on the authority of *Bending Lake*) fall within s. 193(c). The receiver relied on *Re Harmon*, *supra*, where the Court had ruled that a similar order was "merely an order as to the manner of sale" and that "no value was in jeopardy". The Court in *Peakhill*, however, found that in the particular circumstances of the case, the decision of the court below not to entertain the debtor's cross motion (for the approval of an agreement of sale entered into by it before the receivership began), although procedural in nature, also had the effect of putting into play, and jeopardizing, the value of property by an amount exceeding $10,000. In the words of Madam Justice Simmons in chambers:

> ... Although no loss was crystallized by the refusal decision or the Order, given the circumstances of a receivership sale and the terms of the Stalking Horse APS, which established a floor price of $24,455,000 and required payment of up to $250,00 to 255 if a superior bid was obtained, the likelihood of loss in excess of $10,000, as compared to completion or enforcement of the unconditional original APS at a sale price of $31,000,000 appears inevitable.
>
> The refusal decision deprived the Debtor of any right it may have had to enforce the unconditional original APS at a price of $31,000,000 and instead required that the Property be sold, subject to the uncertainties of the market, based on a floor price of almost $7,000,000 less and a guarantee to the

> stalking horse purchaser of a payment of up to $250,000 in the event of a superior bid. The Debtor asserts that, because the original APS has not been terminated, either it or the Receiver can still enforce it. Whether that is so remains to be seen. In the circumstances, I conclude that the property involved on the appeal exceeds $10,000 as required under s. 193(c) of the *BIA*. [At paras. 37–8; emphasis added.]

[39] Returning to the case at bar, the receiver submits that s. 193(c) is not engaged given that the Debtors are opposing not only the sale to Redekop but any and all other offers tabled in the court below. Thus it is said they are effectively seeking an adjournment of the application brought below. MNP characterizes this as a purely procedural matter and submits there is no "property involved in the appeal" valued over $10,000 when the effect of the orders appealed (i.e., the liquidation of the property) is compared to the remedy sought (i.e., additional time to pursue that objective.)

[40] With respect, this argument not only runs contrary to *Fallis*, but seems to put form over substance. In my view, the purported appeal does put the value of the property 'in play', and by an amount exceeding $10,000. The substance of the parties' dispute is whether it was fair and appropriate in the circumstances of this case for the receiver to sell the subject property for $34 million or to delay further in hopes of receiving a final and binding commitment to purchase from FRS for $64 million less the amount taken back by the mortgage in favour of the vendor, or any other offer that might arise. Looked at in this way, several millions of dollars are "in jeopardy" in this appeal.

[41] This interpretation also seems to me to be consistent with the plain and ordinary grammatical meaning of the words "property involved in the appeal" in s. 193(c). Certainly if one were describing in normal conversation the appeal sought to be brought by QRD, one would say that it "involves" more than $10,000.

[42] Finally, I note that the role of evidence must be emphasized in this analysis. While the appellant does not bear the burden to show a certain or automatic change in value should the appeal be allowed, courts should remain wary of granting leave on overly speculative grounds. As Jackson J.A. put it, "the claim must be sufficiently

grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal." (*Wilkes*, at para. 64.) In the case at bar, the appellants have provided affidavit and documentary evidence to support the details of the potential FRS bid. While the chambers judge concluded that the bid itself was "speculative" given the various hurdles to its closing, this is not a case where the appellant brings only a bald assertion of an improvident sale. The evidence supports a conclusion that FRS was a serious suitor, and that should the appeal be allowed, a change in value of over $10,000 would be squarely in play.

[43] In the result, I conclude that QRD's purported appeal comes within s. 193(c) and that it was not necessary to obtain leave.

[44] I would have granted leave, moreover, had I not been satisfied that s. 193(c) applies. It seems clear that the "usual" factors applicable to leave applications in civil cases are to be considered in this context: see *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005) 10 C.B.R. (5th) 201 (Ont. C.A.); *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.* 2021 ABCA 66; *Menzies Lawyers Professional Corporation v. Morton* 2015 ONCA 553. The issues raised by this appeal, involving as they do the proper management of stalking horse bids or arrangements akin thereto and questions of fairness to all parties involved in the proceeding, are of interest to practitioners in the area of receivership and commercial law generally. It would not in my opinion be consistent with the interests of justice to withhold leave had s.193(c) not applied.

[45] I turn next to the substantive appeal.

The Main Appeal

Grounds of Appeal

[46] The appellants — namely the Debtors and Messrs. Lawson and Weber — advanced four rather lengthy grounds of appeal in their factum, which may be summarized as follows:

i) the chambers judge erred in "not applying, misapplying, and/or departing from" the test for the approval of asset sales by receivers set forth in *Soundair*;

ii) the judge erred in making certain findings of fact despite the lack of an evidentiary basis for doing so and/or misapplying the evidence presented;

iii) the judge erred in granting the orders it did despite a dearth of evidence regarding fair market value of the property and various other matters;

iv) the judge erred in disregarding and/or not giving sufficient weight to the "potential" that BC Builds would provide approval of the FRS Agreement, the request of one other possible bidder for more time, and the possibility that other bidders "if given sufficient opportunity, would submit competing bids on the basis of an RVO structure."

The appellants seek an order that the appeal be allowed, the orders made July 9 be set aside in their entirety, and that the receiver's application be remitted to the chambers judge to "start again from square one."

Standard of Review

[47] The appellants acknowledge in their factum that in order to succeed on an appeal from a discretionary decision such as that of the chambers judge below, an appellant must show that the Court materially misconstrued the law or gave no, or

insufficient, weight to relevant considerations. In support, the appellants referred to *Perrier v. Canada (Revenue Agency)* 2021 BCCA 269, where this court stated:

> Discretionary decisions may, of course, be overturned if a judge has materially misconstrued the law or made a palpable and overriding error in respect of the facts underlying the exercise of discretion. Discretionary decisions may also be overturned, however, where the judge has made no manifest error of law or fact, but has failed to apply the discretion in a principled and reasonable manner. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, the Court described the standard as follows:
>
> > [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
>
> [At para. 45.]

General Principles

[48] It may be worthwhile at the outset to restate some of the general principles applicable to receivers, court orders of sale, and the particular process followed in this case. As Madam Justice Fitzpatrick observed in *Forjay Management Ltd. v. 0981478 B.C. Ltd.* 2018 BCSC 527, "it is trite law that a court-appointed receiver is an officer of the court and not beholden to the secured creditor or creditors who caused its appointment". (At para. 21.) As such, a receiver owes fiduciary duties to all parties, including the debtor and all classes of creditors. (See *Parsons v. Sovereign Bank of Canada* [1913] A.C. 160 (U.K. J.C.P.C.) at 167; *Ostrander v. Niagara Helicopters Ltd.* (1973) 1 O.R. (2d) 280 (H.C.J.); and Frank Bennett, *Bennett on Receiverships* (3rd ed., 2011) at 38–40.) Bennett adds that the receiver has a duty to exercise reasonable care and control of the debtor's property as an ordinary person would give to his or her own, failing which it may be liable in negligence. (At 39, citing *Plisson v. Duncan* [1905] 36 S.C.R. 647.)

[49] Where the sale of the debtor's property is to be authorized by the court, the receiver must consider possible methods of sale, make its recommendation to the

court and proceed with the method chosen by the court. According to the well-known case of *Re Nortel Networks Corporation* (2009) 55 C.B.R. (5th) 229 (Ont. S.C.J.), the court generally considers:

> (a) is a sale transaction warranted at this time?
>
> (b) will the sale benefit the whole "economic community"?
>
> (c) do any of the debtors' creditors have a bona fide reason to object to a sale of the business?
>
> (d) is there a better viable alternative? [At para. 49]

[50] Bennett notes that where the debtor's equity is not enough to satisfy the security holder's debt, the court must favour the security holder. However, he continues:

> … if there is a possibility that the debtor' s equity may be sufficient to retire the debt to the security holder and other security holders, then the court must protect the debtor's real equity for other security holders. The court must rely on qualified and reputable appraisals as well as the receiver's recommendations in making these decisions. This is an area ripe for litigation. [At vii.]

He goes on to observe that where the receiver does not obtain an valuation or appraisal of the asset(s) being sold, the court might not approve the sale as it will have no indication of market value. (At 316, citing *Canrock Ventures LLC v. Ambercore Software, Inc.* 2011 ONSC 1138.)

[51] All counsel in the case at bar referred in their submissions to the much-quoted description of the duties of court-appointed receivers formulated by Galligan J.A. in *Soundair*:

> As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986) 60 O.R. (2d) 87 …, of the duties which a court must perform when deciding whether a receiver who has sold the property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I.
>
> 1. It should consider whether the receiver has made a sufficient effort to get the best price and is not acted improvidently
> 2. It should consider the interests of all parties.
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.

> 4. It should consider whether there has been unfairness in the working out of the process. [At 6.]

[52] In *Soundair* itself, the assets in question constituted the entire business of a small airline as a going concern — an unusual asset to be selling. The receiver had rejected an offer from Air Canada and another to purchase the assets and then entered into negotiations with two other airlines, subsidiaries of Canadian Airlines, who made an offer. The Air Canada group then made another offer, which the receiver declined because it contained an unacceptable condition. Instead the receiver accepted the offer it had negotiated with the Canadian Airlines group. The Air Canada group then made a second offer that was "virtually identical" to its first one, except that the unacceptable condition had been removed. The Court nevertheless approved the sale to the Canadian Airlines consortium and dismissed the offer of the Air Canada group, which then appealed.

[53] In the course of his reasons dismissing the appeal, Gallagher J.A. (speaking for himself) noted that during the hearing of the appeal, counsel had gone on at some length comparing the prices contained in the two offers and had "put forth various hypotheses supporting their contentions that one offer was better than the other." He described the limited circumstances in which an appellate court should intervene in a contest between competing offers:

> It is my opinion that the price contained in the 922 offer [by Air Canada and another party] is relevant only if it shows that the price obtained by the Receiver in the OEL offer [i.e. the subsidiaries of Canadian Airlines] was not a reasonable one. In *Crown Trust v. Rosenberg*, *supra*, Anderson J. ... discussed the comparison of offers in the following way:
>
> > No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.
>
> In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:
>
> > If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly

> carried out his function of endeavouring to obtain the best price for the property.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. ...

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court. [At 8–10; emphasis added.]

Stalking Horse Bids

[54] The foregoing principles — and others — apply where the ‘stalking horse’ bid process is followed. Stalking horse bids have been used in Canada since around 2004, when Mr. Justice Farley approved one in connection with an arrangement under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”) proposed by Stelco Inc.: see *Re Stelco Inc.* [2004] O.J. No. 4899 (Sup. Ct.), 135

A.C.W.S. (3d) 372. J.L. Cameron, A. Mersich and K. Wong, authors of "Saddle Up: The Rise of Stalking Horse Credit Bids in Canadian Insolvency Proceedings", in J. Corraini & D.B. Dixon, eds., *Annual Review of Insolvency Law*, vol. 21 (2023), describe stalking horse bids as follows:

> A stalking horse process occurs where an offer to purchase the debtor's assets or business is negotiated with a potential purchaser in advance of the sales process. This offer is known as the "stalking horse bid". If approved by the court, the stalking horse bid is used as a baseline offer against which all other bids submitted in the sales process are compared. If no superior bids are received during the sales process, the stalking horse bid will be accepted and submitted to the court for approval of the sale. However, in certain situations, acceptance and approval of the stalking horse transaction is done simultaneously with approval of the stalking horse sales process. [Citing *Eastwinds Caribbean Limited Partnership et al v. Octopus Holdings Ltd. et al* (13 June 2019), Calgary 1901-07681 (Alta. Q.B.).] In such cases, the transaction contemplated by the stalking horse bid is approved, subject to the debtor receiving any superior offers during the sales process.
>
> More frequently, if the sales process produces an offer that is superior to the stalking horse offer, the sales process will contemplate a run-off auction between the stalking horse bidder and the party, or parties, that submitted the superior offer. For another bid to be considered "superior" to the stalking horse bid, it must typically exceed the stalking horse bid by a minimum amount prescribed in the stalking horse bid agreement and sales process. This amount is known as an "overbid increment". [At 369; emphasis added.]

Stalking horse agreements are commonly used in insolvency proceedings to "establish a baseline price and transactional structure for any superior bids from interested parties" and that they may in the right circumstances maximize value for the benefit of the stakeholders.

[55] Reference may also be made to Janis Sarra, *Rescue! The Companies Creditors Arrangement Act* (2007) at 118–123, who writes that the premise underlying such bids is that the stalking horse bidder has undertaken a fair amount of due diligence in determining the value of the assets in question, such that other potential bidders can rely "to some extent" on the value attached to the asset by the stalking horse bidder.

[56] Professor Sarra observes that certain "concerns" have arisen about stalking horse bids, one being that "the stalking horse can exert considerable control over

timelines, making them very tight such that other bidders do not have a meaningful opportunity to undertake their due diligence." If such concerns arise, she suggests, the court should approve the bid only *as a stalking horse bid* and not as a final agreement, "hence creating incentive on the parties to ensure a complete and fair process in order for any bid to be viewed as a final bid." (At 123; see also Daniel R. Dowdall and Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?" in Janis Sarra, ed., *Annual Review of Insolvency Law*, vol. 3 (2005) at 11.)

[57] Stalking horse bids were recently discussed at some length by Madam Justice Fitzpatrick in *Re Freshlocal Solutions Inc.* 2022 BCSC 1616 at paras. 15–33, a case decided under the *CCAA*. She reviewed various cases, including *Re Boutique Euphoria Inc.* 2007 QCCS 7129, *Re Brainhunter Inc.* [2009] O.J. No. 5578, *CCM Master Qualified Fund, Ltd. v. Blutip Power Technologies Ltd.* 2012 ONSC 1750, *Re Danier Leather Inc.* 2016 ONSC 1044 and *Re Quest University Canada* 2020 BCSC 1845, all of which set out the various factors that should be considered by a court in assessing a stalking horse bid. In *Freshlocal*, Fitzpatrick J. observed:

> In *Quest University Canada (Re)*, 2020 BCSC 1845 at paras. 53–58, I addressed authorities that have discussed the question as to whether the financial incentives in a stalking horse offer are appropriate. At para. 59, I set out certain factors that can be considered in determining whether a given break fee is fair and reasonable in all of the circumstances in the sense that it provides a corresponding or greater benefit to the estate:
>
> a) Was the agreement reached as a result of arm's length negotiations?;
>
> b) Has the agreement been approved by the debtor company's board or specifically constituted committees who are conducting the sales process?;
>
> c) Is the relief supported by the major creditors?;
>
> d) What may be the effect of such a fee/charge? Will it have a chilling effect on the market, or will it facilitate the sales process?;
>
> e) Is the amount of the fee reasonable? In relation to expenses anticipated to be covered, is the amount reasonable given the bidder's time, resources and risk in the process?;
>
> f) Will the fee and charge enhance the realization of the debtor's assets?;

> g) Will the fee and charge enhance the prospects of a viable compromise or arrangement being made in respect of the company?; and
>
> h) Does the monitor support the relief?
>
> At the most basic level, the benefits of entering into a stalking horse bid that can be potentially achieved in these proceedings must be justified by the costs in doing so. That cost/benefit analysis requires a rigorous review of all the relevant circumstances toward answering the question—is a stalking horse offer appropriate at this time in these *CCAA* proceedings? [At paras. 32–3; emphasis added.]

[58] It is not always the case that courts are satisfied that stalking horse bids will "optimize the chances … of securing the best possible price for the assets up for sale." (*CCM* at para. 6.) *Freshlocal* provides a good example. In that instance, the proposed agreement had not "come about through a competitive process" and the inference could be drawn that it "arose less from Freshlocal's objective enthusiasm for the transaction and more from [the interim lender's] not so veiled threats of litigation." (At para. 37.) Again in Fitzpatrick J.'s analysis:

> I accept here that Freshlocal was under substantial time pressures to move this proceeding forward to a sale. However, it is anything but transparent as to how the purchase price in the SH Agreement came about.
>
> In that vein, Freshlocal's reference, supported by the Monitor, that the SH Agreement establishes a minimum or "floor price" is concerning. This is more akin to a "reserve bid" at auction. I acknowledge that this phrase has been used in the past to describe stalking horse bids, but it is an unfortunate one in the sense that it gives the sense that higher bids are being sought and fully expected. A more appropriate description might be "value price", where the stalking horse is put forward as an appropriate pricing of the debtor's assets, in the event that no higher offer is received.
>
> It is not the underlying rationale of a stalking horse offer to allow a bidder to get a bargain basement price, save as might be (or likely will be) exceeded in the true marketplace, while securing substantial financial benefits for that bidder (see my discussion below).
>
> Freshlocal refers to the SH Agreement guaranteeing an outcome. I accept that the SH Agreement achieves that goal, but at what cost to the stakeholders?
>
> As was noted in *Boutique Euphoria*, an important consideration is to ensure you are riding the right "horse" in the sales process by having the right "benchmark" to hopefully attract other—and higher—bids. A failure to test the market toward picking your "horse" might very well mean that the debtor has "baked in" a result with a stalking horse offer which is not necessarily reflective of the value of the assets. [At paras. 40–4; emphasis added.]

[59] The Court went on to scrutinize the amount of the termination or 'break' fee and how it had been arrived at, the existence of any support by other stakeholders for the stalking horse arrangement, the fact that the insolvent company had agreed that it would engage in negotiations only with the interim lender, whether the stalking horse bidder had done due diligence on which other potential buyers could rely, whether other creditors objected to the arrangement, how the break fee affected the likely return, and whether the fee was "related to the stalking horse bid process itself and the efforts undertaken towards that end." (At para. 71, quoting *Boutique Euphoria*.) In the end, Fitzpatrick J. dismissed the application for approval of the stalking horse agreement, expressing confidence that the number of other bidders who had come forward expressing interest in the assets for sale made the proposed arrangement not only inappropriate but unnecessary.

[60] The Court also disapproved proposed stalking horse arrangements in *Farm Credit Canada v. Gidda* 2015 BCSC 2188 and in *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.* 2014 BCSC 1855. In *P218*, Mr. Justice G.C. Weatherill observed:

> The accuracy of the stalking horse bid is key to the integrity of the stalking horse bid process because it establishes the benchmark against which other potential bidders will decide whether or not to submit a bit. One of the few tools available to the court for assessing the reasonableness of the stalking horse bid is a comparison of the bid to a valuation of the asset in question. Accordingly, an accurate valuation is also key to the integrity of the process. [At para. 34; emphasis added.]

He was critical of the absence of evidence as to whether the break fee of $1.5 million was reasonable, evidence as to the value of the assets, and evidence as to whether other sale processes had been considered. (At para. 39.)

[61] In *Gidda*, the Court quoted paras. 20–21 of *PT218* and continued:

> However, the Receiver, in this case, completely ignored the fact that approval of a stalking-horse bid must be granted by the court prior to undertaking such a process. In this case, the Receiver did not apply to approve the Haakon bid as a stalking-horse bid. By failing to apply to the court, the Receiver completely avoided having to justify whether such a stalking-horse bid was appropriate in the circumstances. [At para. 37; emphasis added.]

The Court also queried whether market exposure of about *three months* was sufficient, especially given that one agreement of sale for part of the assets had been tentatively accepted by the receiver even before the property was listed for sale. (See para. 35.)

Analysis

[62] With the foregoing principles in mind, I return to the four grounds of appeal stated at para. 46 above. None of these raises a clear point of law that by itself would justify allowing the appeal. This is not a criticism of counsel, but a reflection of the nuanced way in which the usual *Soundair* factors line up in this case. Nor is there in my view any palpable and overriding error of fact on which the appeal can be decided. Indeed, many of the "findings" to which the appellants object — e.g., that the FRS offer was "speculative" or that the length of time it would take for FRS to obtain funding from BC Builds was "inordinate" — were actually expressions of opinion or characterizations by the chambers judge. All of them were open to him on the evidence. Other so-called "findings" were inferences the judge drew concerning what was likely to happen in future — for example, his observation that further offers were unlikely to arise by the end of August. Again, predictions like this are the kind that courts in bankruptcy or receivership cases are frequently required to make, and usually cannot be said to be clearly right or wrong.

[63] Rather than attempting to analyze the remaining grounds of appeal one by one, I propose to restate what emerged from counsels' submissions before us as the crux of the appellants' argument. I do so bearing in mind Mr. Moseley's suggestion that this court's guidance might be useful to the practice regardless of the outcome of this appeal. In my opinion, the real issue for this court involves the sale process considered *as a whole*: did the chambers judge err *in the circumstances of this case* in approving the Redekop offer without ordering at least a short adjournment to determine whether the BC Builds proposal or any other bid with sufficient certainty to compete with Redekop's bid might be elicited? Put another way, did the court below 'balance' the *Soundair* factors in a manner that was appropriate and fair to all the parties, and that could be seen as such?

[64] These questions engage all four *Soundair* factors, which I set out again here for convenience and will address below:

1. It [the court] should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

2. It should consider the interests of all parties;

3. It should consider the efficacy and integrity of the process by which offers are obtained; and

4. It should consider whether there has been unfairness in the working out of the process.

Sufficient Efforts?

[65] While it would appear that Colliers took the usual steps beginning in April 2024 to solicit offers locally for the Langley property, the period of time over which the property was on the market was at most 2.5 months — a period that is markedly short compared to those approved in similar cases. In *Farm Credit Canada*, for example, the Court was critical of the fact that the property in question had been listed only "a little over three months" and noted the absence of any international advertising that might have been done to attract overseas buyers. (See paras. 33–4.) In the case at bar, Colliers advertised the property in the *Western Investor* and sent out emails to almost 5,700 potential purchasers. MNP also stated in its Third Report that "direct communication through phone, email and in-person meetings with over 100 prospective purchasers" took place, but without elaboration as to MNP's own efforts. It stated that in its opinion, *Colliers' marketing program* had "adequately" exposed the property to the market.

[66] Even at the time MNP's Second Report was filed, however, the receiver was aware of Mr. Weber's discussions with BC Builds and FRS in which a price of almost double Redekop's bid had been suggested, although not accompanied by a binding offer. Yet the receiver was apparently unwilling to contact or negotiate with

BC Builds directly (as it had done with Redekop), leaving Mr. Weber to do so on his own. He expressed a sense of unfairness when he deposed at the end of his affidavit of July 3:

> I do not understand why the Receiver would accept the Redekop offer after only approximately a month and a half of marketing and for an amount that would leave over $18 million dollars, plus interest owing, while being apprised of the CPS and the imminent approval from BC Builds. Furthermore, it would wipe out over $8.25 million of original equity, years of work, and short [sic] the Province of affordable homes it desperately needs.

[67] Weighing against further delay, of course, was the high "burn rate" consisting of interest of approximately $235,000 per month and maintenance costs of approximately $165,000 per month. In my respectful view, these factors and the wide disparity between the bids may have led the receiver to focus its attention too quickly on the Redekop offer and fail to take any other bids or potential bids seriously. The potential of a bid being made at $64 million should have led the receiver — and ultimately the Court — to consider whether a longer marketing period was necessary to allow all the parties to have confidence that the process had likely elicited as good an offer as could be realistically expected.

Efficacy and Integrity of the Process

[68] In the case at bar, counsel were in agreement that Redekop's offer had arisen in the course of, and presumably as a result of, Colliers' marketing efforts; the receiver had not approached Redekop *before* undertaking the marketing program. Technically, then, Redekop's bid was not a "stalking horse" bid as the term is normally used. At the same time, and as all counsel also seemed to acknowledge, it was "*akin* to" a stalking horse bid: because *Practice Direction 62* required that Redekop's offer, as the "Original Bid", be disclosed prior to the court hearing, it effectively established a "floor" or "baseline" for subsequent bids. One might infer that this occurred because of the absence of an appraisal of the subject property — a deficiency that was not explained. MNP argued, however, that in this instance, given that the three (ultimately two) "offers" put before the chambers judge by the receiver on July 9 were clustered between $34 and $37 million, a fair market value

close to the price offered by Redekop could be inferred. This may or may not be so. In fact, while the *raison d'être* of stalking horse bids is to create a price floor, a floor set below market value can have the effect of artificially depressing later bids. This is so because subsequent bidders will lack incentive to *significantly* outbid the stalking horse and because, as suggested by Professor Sarra, subsequent bidders come to the table relying on the due diligence of the stalking horse. In any event, an appraisal would have allowed the chambers judge to be sure.

[69] As we have seen, where an actual stalking horse process is proposed, the receiver is bound to obtain the court's prior approval so that the court can be satisfied the necessary safeguards — usually the availability of a fair market appraisal — exist. I agree with the Court in *Gidda* that where a break fee is proposed, the fee itself must also be specifically approved (and therefore brought to the Court's attention.) As stated in *P218*:

> ... the mere fact that the proposed Termination Fee is within the range of reasonableness as determined in other cases does not mean that it is reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable …. The court is not simply a rubber stamp for the agreement that was made. [At para. 36.]

Interests of all Parties

[70] The receiver was bound, of course, to protect the interests of the creditors and to obtain the highest price it could for their benefit. Indeed, the interests of the creditors (which would include in this case those who were unlikely to be paid out under the Redekop arrangement) has been said to be the *primary* concern of a court-appointed receiver: see Galligan J.A. in *Soundair* at 12 and Goodman J.A., dissenting, at 23. But the interests of "*all*" parties, including the Debtors and the personal guarantors of MCAP's mortgage, are also required to be considered. As stated in the seminal case of *Cameron v. Bank of Nova Scotia* (1981) 45 N.S.R. (2d) 303 (C.A.):

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or where the circumstances indicate that insufficient time was allowed for the making of

> bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply be a consideration of the interests of the creditors. [At 307; emphasis added.]

Both Galligan J.A. and Goodman J.A. in *Soundair* also referred to the importance of protecting the "integrity of the court process": at 12, 23, citing *Cameron*.

[71] Looked at from the Debtors' point of view, the receiver's insistence that its process and the Redekop bid were "adequate" might well have seemed unfair. The possibility of a bid equal to almost double that of the Redekop bid merited some efforts *on the receiver's part* to direct some energy to negotiating a firm offer from BC Builds/FRS or other possible bidders.

Unfairness in Working out the Process?

[72] In all the circumstances, it seems to me that the 'balancing' process carried out by the court below was not done in a manner that was fair and could be seen to be fair by all parties. Respectfully, I conclude that the chambers judge erred in proceeding to grant the Asset Vesting Order without giving additional time — say two to four weeks — so that all parties could be satisfied either that the BC Builds offer could not be firmed up appropriately, that it was simply not worthwhile to wait any longer, or that the fair market value of the property was in the vicinity of $34 million.

[73] In terms of the standard of review, I conclude that the chambers judge gave "no, or insufficient, weight to relevant considerations" in the exercise of his discretion. (See *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27.)

No Fresh Evidence

[74] The period between the July 9 order and the hearing of this appeal on August 14 provided the appellants with another few weeks in which to firm up the BC Builds/FRS offer or find another offer, if humanly possible. But no application to

adduce fresh evidence was brought by the Debtors in this court; nor did FSR or BC Builds appear at the hearing or attempt to provide us with any new information. Mr. Moseley had to concede that his client's appeal would be difficult to sustain, although he suggested it provided us with an opportunity to clarify the law. *Had fresh evidence of a firmer offer been adduced*, I would have been inclined to admit it as meeting the *Palmer* criteria, allow the appeal and specify a short period (two to four weeks) during which the bidding process could be reopened.

[75] I acknowledge that an order of this kind should of course be made only in unusual circumstances: see *Re Selkirk* (1987) 64 C.B.R. (n.s.) 140, quoted from at para. 53 of these reasons; *MNP Ltd. v. Mustard Capital Inc.* 2012 SKQB 325. In this instance, however, the circumstances *were* unusual — the absence of any appraisal, the large disparity between Redekop's price and the price purportedly offered by BC Builds/FRS, and the relatively short marketing period of two months (until the Redekop agreement was signed) at most. This case seems similar to *Re 1587930 Ontario Ltd. v. 2031903 Ontario Ltd.* (2006) 25 C.B.R. (5th) 260 (Ont. Sup. Ct). In that instance, two competing groups were bidding for property being sold under the *CCAA.* On the eve of the court hearing, one of the bidders was permitted to apply to introduce new evidence. The chambers judge described the options available to the Court:

> Counsel for the Monitor advised that in his view, the Court would have before it three options. The first option would be to accept the Sagecrest offer, either on the basis that the time was past for the introduction of further evidence or even with consideration of fresh evidence, the Sagecrest offer represented the most realistic return for all creditors under the Proposed Plan.
>
> The second option would be to accept the new evidence and accept, as urged by Messrs. Soorty and Cocov, their offer on the basis that it represents a firm agreement to close by no later than November 3, 2006, with a certain return to Sagecrest of its outstanding debt and an enhanced recovery to the unsecured creditors.
>
> The third option would be to in effect re-open the opportunity to any party to put in a further offer on the understanding that the timeframe should be such that there would be a closing within 30 days to reduce the "burn" estimated to now exceed $500,000 per month. [At paras. 11–13.]

[76] The judge concluded that the third option was the most appropriate, reasoning that:

> It is with some reluctance that I have concluded that in the circumstances, option 3 is the most appropriate at this time. I am mindful that this is a *CCAA* proceeding, not an auction process. Both sides have pointed to the decision of the Court of Appeal in *Soundair* as setting out the guiding principles. The factual distinction between this case and the facts in *Soundair* is that here there is at least the potential for a much-improved return for unsecured creditors.
>
> The improved return is a factor, which while not necessarily the only consideration, it is a significant one. While I am concerned with the risk to the estate of the company of the cost of the further time involved, I have concluded that it is a risk worth taking, since the unsecured creditors who will bear that risk are prepared to do so.
>
> ...
>
> A *CCAA* proceeding is different from an ordinary civil action and trial. The process itself anticipates dynamic and "real time" process that should only be stifled when to do otherwise would operate as a significant prejudice to a creditor or group of creditors. There is no need to apply the criteria of introduction of new evidence to this proceeding in my view.
>
> What is of greater significance is whether the offer process should be allowed to continue. I have concluded that in these somewhat unique circumstances that it should.
>
> I do think that it would operate unfairly to Sagecrest to accept they Soorty/Cocov offer outright at this stage. Among other matters, there is an outstanding appeal by Sagecrest of disallowance of part of its claim, which is waived only if its offer is accepted. In addition, Sagecrest has become in effect a "stalking horse" with its firm offer and should not be prejudiced by what is both a last minute and still somewhat uncertain position.
>
> In addition, the unsecured creditors should not be deprived of the possibility of Court consideration of an improved Sagecrest offer. [At paras. 19–25; emphasis added.]

In the result, the judge ordered that the bidding process should be "re-opened" for a short time.

[77] *Re 1587930 Ontario Ltd.* was of course not an appeal, but in my respectful opinion, fairness in *this* case also required the chambers judge to grant a two-to-four week period for all offers to be finalized and reconsidered by the receiver. Alternatively, MNP should either have had an appraisal done or taken steps to

satisfy itself as to the fair market value of the property without reference to Redekop's bid.

[78] Again, on the other side of the scales was the fact that interest and site management costs were accruing every month, such that even the first mortgagee might not ultimately have received full payment of its loan. It is because of this "burn rate" that only a short period of delay as opposed to, say, six to ten months would have been appropriate.

In the Absence of Fresh Evidence

[79] In the absence, however, of new or fresh evidence from the Debtors of the kind I have described, it is my opinion that this court should not now delay the sale any further. In effect, the Debtors have had the benefit of the sort of adjournment the chambers ought to have ordered, with nothing to show for it. This is indeed unfortunate, especially for the personal guarantors, but the realities of the case must now be recognized as leading to the sale to Redekop.

[80] It is unnecessary to consider the fresh evidence application of the receiver, given that the proferred affidavits merely support the dismissal of the appeal.

Disposition

[81] In the result, we concluded that the appeal must be dismissed. We thank all counsel for their helpful submissions.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Grauer"

I agree:

"The Honourable Justice Winteringham"

Noevir Canada Ltd. v. 149129 Canada Ltd.

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Saunders J.

Oral judgment: February 27, 1986.

No. 31-217871

[1986] O.J. No. 2639 | 58 C.B.R. (N.S.) 237 | *35 A.C.W.S. (2d) 310*

Between Noevir Canada Limited, (appellant), and 149129 Canada Limited, (respondent)

Counsel

D.E. Baird, Q.C., and M. Rotsztain, for Noevir Canada Ltd. M.D. O'Reilly, Q.C., for 149129 Canada Ltd. J.A. Carfagnini, for the trustee.

SAUNDERS J. (orally)

1 This is an appeal from a decision of the registrar approving the sale of the business assets of a bankrupt by a trustee to a corporate purchaser. The appellant is a competing purchaser.

2 The background facts are as follows:

1. The bankrupt, Beauty Counsellors of Canada Ltd., carried on business as a wholesale distributor of cosmetics. It distributed through a sales force of approximately 4,000 persons.
2. In 1985 a proposal under the Bankruptcy Act by Beauty Counsellors was approved. The proposal was subsequently annulled by order of the court made on 10th February 1986. Beauty Counsellors was declared a bankrupt and a trustee was appointed.
3. Based on material filed with the court on previous matters, the indebtedness of the bankrupt in round figures would appear to be as follows:

secured creditors	$303,000
preferred creditors	$521,000
unsecured creditors	$3,850,000

4. Upon taking possession of the undertaking the trustee determined that it would be best if the assets could be sold on an ongoing basis. There was little prospect of there being any moneys available for distribution to the unsecured creditors. It appears from the evidence that the trustee was concerned about the recovery of its fees and disbursements.

5. The trustee immediately embarked on a course designed to dispose of the assets as soon as possible. It obtained bids from two liquidators. It also negotiated with two prospective purchasers.

6. The first prospective purchaser was 149129 Canada Ltd. (the "numbered company"). It is not clear when negotiations began with it. The numbered company submitted an offer on Friday, 14th February 1986. The trustee discussed that offer with representatives of the numbered company. The numbered company submitted a further offer on Monday, 17th February. That offer provided for the purchase of all the assets of the bankrupt with a specified exception. The price was the assumption by the numbered company of certain existing liabilities including the secured indebtedness of the bankrupt together with some cash and a limited indemnity of the trustee's fees.

7. The second prospective purchaser was Noevir Canada Ltd. ("Noevir"). It had been considering a possible purchase for some time and as early as December 1985 had discussed the matter with the trustee who was also the trustee under the proposal. Noevir also submitted an offer on 14th February 1986 and, after discussion, a further offer on Monday, 17th February. The Noevir offer provided for payment to the trustee based on the sale of inventory and also provided a limited guarantee for the trustee's fees and disbursements.

8. The trustee was able to place a minimum monetary value on the obligations being assumed by the numbered company under its offer which included an undertaking by the numbered company to retire the secured debt on closing. The trustee was concerned that the Noevir offer contained no minimum guarantee on the sale of the inventory. The parent company of Noevir, Groupmark Canada Limited ("Groupmark") held an option to acquire some of the secured debt. The trustee felt that it needed an assurance from Noevir or its parent that cash, which it had on hand, would not be subject to a secured claim by Groupmark.

9. At the end of the day on 17th February the trustee preferred the offer it had received from the numbered company to that received from Noevir, principally because of the absence of the minimum guarantee in the Noevir offer as opposed to the minimum valuation at which it assessed the offer from the numbered company. It communicated its concern to the solicitor for Noevir and advised him that:

    i. It would require a minimum guarantee;

    ii. It would need assurance that the cash it held onhand would not be exposed to a secured claim from Groupmark (in a sense that assurance was related to the requirement for the minimum guarantee); and

iii. It wanted to hear from Noevir by 10:00 a.m. the following day, 18th February.

The trustee also advised the solicitor for Noevir that it was considering an offer from another party. In view of that advice it is a reasonable inference that the offer that it was considering would have contained the assurances which the trustee was requesting from Noevir.

Later on that day, that is 17th February, the solicitor for Noevir communicated the information he received from the trustee to Mr. Cathcart, who was the principal of Noevir from whom he was taking instructions. The solicitor had assessed the Noevir offer as providing in effect a minimum guaranteed amount and had communicated his opinion to the trustee. The amount as assessed by the solicitor was less than the value attached by the trustee to the then current Noevir offer.

10. The following morning, 18th February, Mr. Cathcart instructed his solicitor that he was not prepared to give a minimum guarantee. The solicitor attempted to communicate those instructions to the solicitor for the trustee before 10:00 a.m., but as the solicitor for the trustee was not available, he had to leave a message for a call back before leaving his office to attend another meeting.

11. At some time in the morning of 18th February the solicitor for the trustee telephoned the offices of the solicitor for Noevir. He was told that the solicitor in charge was not available. A lawyer in that office who had been assisting the solicitor in charge did not take the call as he felt that he would not have been able, from his knowledge of the matter, to deal with it. The solicitor for the trustee left a message with the office of the solicitors for Noevir that said "we are proceeding". That message was passed on to Mr. Cathcart.

12. At about 11:25 a.m. Mr. Cathcart spoke on the telephone with Mr. Holmes and Mr. Clark from the offices of the trustee who were in charge of the estate. The conversation concerned the minimum guarantee and the possibility of a Groupmark claim against the cash on hand. Mr. Cathcart said he could not respond to the trustee without speaking to his solicitor, who was not then available. In his affidavit, which he filed in these proceedings, it is clear that he refused the suggestion of a minimum guarantee but requested time to consider the matter of the secured claim of Groupmark. In his testimony he was not as clear and the testimony of Mr. Holmes does not, in my recollection, clearly establish a division between the two items. However, in all the circumstances, I would prefer to accept what Mr. Cathcart said in his affidavit that he communicated to the trustee that he was not prepared to agree to a minimum purchase price. It is agreed that Mr. Holmes told Mr. Cathcart that the trustee was under pressure and that he had an appointment with the court for the approval of a transaction that afternoon and that he intended to close the sale on the following day. Mr. Holmes said he asked Mr. Cathcart how long he needed to come back to him and Mr. Cathcart said he needed half an hour. Mr. Holmes says, and I accept his evidence, that he told Mr. Cathcart that even if he did come back to him, he could not assure him that he would consider a new offer at that time. Mr. Cathcart said that he told Mr. Holmes he would try and contact his solicitor within half an hour.

13. Sometime in the afternoon of 18th February the trustee accepted the offer of the numbered company. Around 1:00 p.m. that day the solicitor for Noevir was advised by the solicitor for the trustee that the trustee valued the numbered company offer at a minimum of $175,000.

14. The parties attended before the registrar on the application by the trustee for approval of the sale to the numbered company. Before the commencement of the hearing Noevir agreed to provide a minimum guarantee of $200,000 and to increase its indemnity of the protective expenses guaranteed to the trustee. In the course of the hearing before the registrar, Noevir further agreed to assume the liability for the vacation pay of the employees.

15. The registrar approved the sale to the numbered company and gave written reasons. Noevir appealed from that decision and that is the matter that is before me.

3 On the appeal hearing there were further affidavits filed and viva voce evidence was given by five witnesses. All parties agreed that in this appeal I should consider the matter de novo and that my jurisdiction was not confined to reviewing the decision of the registrar. It was also agreed that the bringing of the matter before the court was a proper course of action by the trustee as there had been no meeting of creditors and no inspectors appointed because it was urgent that the assets be disposed of as soon as possible.

4 I do not consider it necessary to analyze or compare the competing offers. The trustee considered that at the time it accepted the offer of the numbered company, it was a better offer than any offer that had been presented by Noevir and there was no argument before me to the contrary. On the other hand, the trustee assessed the amended offer of Noevir made just before the hearing and supplemented in the course of the hearing. The trustee considered the final Noevir offer, if I may call it that, as better than the agreement with the numbered company by about $35,000. Counsel for Noevir submitted that in assessing the two offers, the trustee was taking a conservative view of the Noevir offer and perhaps an optimistic view of the numbered company offer. He submitted that the difference between the two offers might be in excess of $60,000. While a difference of $35,000 or even $75,000 might not be of great importance when compared to the total indebtedness of the bankrupt, the difference may be significant when looked at against the preferred claims.

5 As counsel for Noevir pointed out, one or more preferred creditors would benefit to the extent of at least $35,000 and perhaps as much as over $100,000 if the final Noevir offer were to be accepted and the most optimistic view of the realization of the inventory occurred.

6 I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:

1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or

2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

7 I had occasion recently to consider the first issue in relation to the matter of the estate of George Selkirk, a former bankrupt now deceased. In that case I adopted the remarks of Macdonald J.A. of the Appeal Division of the Nova Scotia Supreme Court in Cameron v. Bank of N.S. *(1981), 38 C.B.R. (N.S.) 1*. Macdonald J.A. said at p. 11 of the report as follows:

8 In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. Once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.

9 While Macdonald J.A. may have been referring to a bidding situation, in my opinion the principles expressed by him are equally applicable to the negotiation of a private contract. In my opinion, they are certainly applicable to the situation before me where the trustee negotiated separately with two purchasers and did not disclose the terms of the negotiation other than to broadly state the requirements of the trustee.

10 Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

11 This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration. If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

12 In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

13 I have considered whether it would be appropriate to ask each competitor to put in a final

bid. If they were willing to do so, and that is a known factor as far as the numbered company is concerned, there would probably be a further benefit to the creditors. If Noevir were left alone in the field the creditors, on the other hand, might suffer. Assuming that both submitted final bids, I consider that any marginal benefit to the creditors that would result from a final bid would be outweighed by the unfairness of such a process in the circumstances of this case to the numbered company. While the interest of creditors is the prime consideration, it is not the only or overriding consideration. I therefore conclude that I would not allow this appeal simply because the trustee has received a significantly better offer after the accepted offer of the numbered company.

14 I turn now to the question of the process and its alleged unfairness to Noevir. All parties and their advisors in this matter acted in good faith and there was no suggestion otherwise. Mr. Cathcart and his advisors were experienced in property acquisitions. There is no requirement, in my opinion, on a vendor (including a trustee in bankruptcy) to lay down precise rules as to how he proposes to dispose of a property. He must not make misrepresentations and I am prepared to assume that in selling a property which requires court approval he must be fair. Here the trustee made abundantly clear to Noevir that a minimum guarantee was required and Mr. Cathcart was consistent up to and including the conference at 11:25 that he would not give such a guarantee. As I have said, I prefer his evidence on this point contained in his affidavit to the evidence that he gave at the hearing. He had been told that there was another offer under consideration and that he was to contact the trustee by 10:00 a.m. Even if his solicitor had managed to reach the trustee before that time, he was instructed to say that the guarantee was refused.

15 In my opinion Noevir was given a fair opportunity to put in the offer it eventually made and did not do so. The appeal therefore ought not to be allowed on that ground. It then follows that the appeal must be dismissed.

16 This is a somewhat unusual situation. There is remarkably little authority on this type of problem. The parties all acted in good faith and the unsuccessful party, Noevir, did submit before the court an offer which was higher than that submitted by its competing purchaser. In all the circumstances I have endorsed the record as follows: "With costs to all parties out of the estate; those of the trustee and the numbered company in priority to Noevir."

SAUNDERS J.

Selkirk (Re)

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Saunders J.

Oral judgment: February 21, 1986.

No. 844-60

[1986] O.J. No. 2638 | 58 C.B.R. (N.S.) 245 | 38 A.C.W.S. (2d) 138

IN THE MATTER OF the Bankruptcy of Selkirk

Counsel

R. Shour, for the sheriff of Judicial District of York. R.J. Morris, for 266741 Ontario Limited. M. Templeton, for the Attorney General of Canada. E. Olkovich, for Dennis Leung Enterprises Inc. Sydney Morayniss appearing in person.

SAUNDERS J. (orally)

1 This is an application for court approval of a sale of real property in the town of Markham. It is vacant land with development potential. Pursuant to an order the property has been held by the sheriff of the Judicial District of York as a receiver, and on 9th October 1985 Trainor J. ordered that the sheriff list the property for sale and provided that any agreement should be subject to the approval of this court.

2 The issue involves the determination of the criteria that the court should employ in determining whether or not to grant the approval.

3 The sheriff had the property appraised by a recognized real estate firm. He then entered into an exclusive listing agreement with that firm under which the property was listed for six months at a listing price of $340,000. It was decided to use the more common method of negotiating a private sale rather than inviting tenders. At least ten offers were received, some of which were in excess of the listing price. The sheriff accepted, subject to court approval, an offer from 266741 Ontario Limited for the price of $360,000 in cash. There were two offers at that price and none were higher. The offer that was not accepted contained additional conditions.

4 Subsequent to the acceptance, an offer from Dennis Leung Enterprises Inc. ("Leung") was submitted for $381,800 in cash.

5 In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

6 In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. *(1981), 38 C.B.R. (N.S.) 1*, where he said at p. 11:

> my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation.

7 While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

8 The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

9 In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver. The only suggested defect in the process is that Leung was denied an opportunity to submit an offer and its position is set out in an affidavit filed by Mr. Leung. He was well aware that the property was offered for sale and was even provided with a form of offer by the real estate agent. For reasons that are indicated in his affidavit, he did not submit the offer until after the sheriff had accepted the offer of 266741 Ontario Limited.

10 On reading the affidavit, I respectfully agree with the submissions by Mr. Morris that it does not indicate that Mr. Leung was misled or that the sale process was in any way defective. In my opinion the sheriff has properly conducted and carried out his function as contemplated by the order of Trainor J. in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale; he considered the offers that were made and

accepted the highest unconditional offer of which he had any knowledge. On that basis there is no reason why the sale in my view ought not to be approved and, accordingly, I will approve it on behalf of the court.

11 With respect to the other items in the notice of motion, an order can go in accordance with para. 2 and in accordance with para. 5, which permits the receiver to hold back the sum of $40,000.

12 Paragraph 6 will be varied to provide for interim fees and disbursements of the receiver subject to assessment.

13 Paragraph 7 is modified to provide simply for the payment of the proceeds of any sale into an interest-bearing account preserving the rights of the Attorney General of Canada and the other execution creditors as to its ultimate distribution, which will probably have to be dealt with by further court application.

14 With respect to para. 10, an order will go in terms of that paragraph, subject to the approval of the purchaser of any contractual extensions and with a time limit of 30th June 1986.

15 There will be an order in the terms of para. 11 so far as they affect the property to be sold under the contract which has been approved.

16 There will be an order in accordance with para. 4 for legal fees and disbursements subject to assessment.

17 If there is any difficulty in preparing the order to give effect to these reasons, then counsel will have to attend. I will simply endorse the record: "Order to go in accordance with reasons dictated. Costs to purchaser and to sheriff out of the estate, those of the sheriff on a solicitor-and-client basis."

SAUNDERS J.

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely

distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation

engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a

sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to

show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that

the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced

that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a

bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways

in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated

purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it

contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline

which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as

to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by

the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in

no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

> is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are

they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a

deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be

noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however,

contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to

negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of

its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the

law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and

procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to

court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Walker v. John Doe,*
2014 BCSC 294

Date: 20140225
Docket: M085239
Registry: Vancouver

Between:

Jason Walker

Plaintiff

And

John Doe and
Insurance Corporation of British Columbia

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	S.R. Coval J. Cabott
Counsel for the Defendant Insurance Corporation of British Columbia:	I.D. Aikenhead, Q.C.
Counsel for Thomas Harding	M. Kazimirski
Place and Date of Hearing:	Vancouver, B.C. January 24, 2014
Place and Date of Judgment:	Vancouver, B.C. February 25, 2014

[1] The defendant, Insurance Corporation of British Columbia (ICBC), seeks an order that counsel for the plaintiff, Mr. T. Harding, pay the special costs that arise out of a mistrial.

[2] The facts that underlie this application are straightforward and not in dispute. The central issue raised by the defendant ICBC is further simplified by the various concessions that were made by counsel, at various points, during the course of submissions.

Facts, Procedural Background and Status

[3] This action arises out of a claim for personal injuries by the plaintiff, Mr. Walker. He claims that on August 7, 2007, while riding his motorcycle on Highway 1 in Chilliwack, he was struck by a tire from a motor vehicle driven by an unknown motorist and that he was thereby injured.

[4] The trial, which proceeded before a jury, commenced on April 10, 2012 and ended on the 14th day of the trial. At that time, I declared a mistrial based on the conduct of counsel for the plaintiff in his closing address. I adjourned the issue of costs arising from the mistrial.

[5] The defendant ICBC acknowledged throughout the trial that the plaintiff was seriously injured and that, absent the various defences that ICBC had advanced, the plaintiff's losses likely exceeded the $200,000 coverage limit established by s. 24 of the *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231 through the operation of s. 105(1) and s. 9(1) of Schedule 3 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83. The central issue raised by the defence was whether the accident and the plaintiff's injuries had occurred in the manner that the plaintiff described. A further issue arose with respect to whether the plaintiff had mitigated his losses and, more specifically, had genuinely sought employment subsequent to his accident.

[6] My oral reasons for judgment granting the mistrial (the "Mistrial Ruling") were delivered on April 30, 2012. The plaintiff appealed the Mistrial Ruling on May 24, 2012.

[7] Counsel for the plaintiff and for Mr. Harding subsequently argued before me that the issue of costs arising from the mistrial should be dealt with by the trial judge who ultimately hears the trial, rather than by myself. I concluded, in reasons for judgment indexed at 2013 BCSC 2005, that it was more appropriate for me to hear the present application.

[8] The trial of the action is now scheduled to commence June 9, 2014. I understand that the trial is to take place before a jury for a period of 20 days.

Analysis

1) Party and Party Costs

[9] Counsel for Mr. Harding accepts that an order that Mr. Harding pay the defendant ICBC's party and party costs arising from the mistrial is appropriate. That acknowledgment is important and fitting. I say important because it obviates the need to address the circumstances in which an order for party and party costs can or should be made against a lawyer. It further obviates the need to address the various cautions that normally attend any such order.

[10] I say fitting because the mistrial arose solely as a result of the closing address of Mr. Harding. Such circumstances do not engage any question of solicitor-client privilege, nor do they call into question where responsibility, as between client and lawyer, should lie. Instead, as Wilson J. in *Gemmell v. Reddicopp et al,* 2003 BCSC 21, the mistrial ruling being aff'd at 2005 BCCA 628, said:

> [14] The closing address is singularly a product of counsel's mind. In the ordinary course of events, the client does not direct counsel on the form or substance of that address. A wayward address is the act of counsel alone. There is no reason for the client to bear the responsibility for the adverse consequences of such an address.

[11] Having said this, it is worth emphasizing certain aspects of party and party cost awards that are made against a lawyer and, in particular, those aspects that are different from cost awards that are made against a lawyer on a special cost basis.

[12] Rule 14–1(33) of the *Supreme Court Civil Rules*, formerly Rule 57(37), provides:

> (33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:
>
> (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
>
> (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
>
> (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
>
> (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

[13] In *Nazmdeh v. Spraggs,* 2010 BCCA 131, a five person panel of the Court of Appeal considered the object and application of the former Rule 57(37), the language of which is substantively equivalent to the current Rule 14-1(33). The case addressed a number of earlier appellate decisions that had stated or intimated that some form of reprehensible conduct was necessary before an award could be made against a lawyer under Rule 57(37) or its predecessor provisions; see for example *Kent v. Waldock,* 2000 BCCA 357 and *Young v. Young* (1990), 75 D.L.R. (4th) 46 (B.C.C.A.), aff'd [1993] 4 S.C.R. 3. These earlier decisions were thereafter relied on in a number of decisions of this court that were included in the authorities provided to me; see for example, *Cunningham v. Slubowski*, 2004 BCSC 1204; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724; *Billows v. Canarc Forest Products Ltd. et al,* 2005 BCSC 623.

[14] Each of *Cunningham, International Hi-Tech Industries* and *Billows* deal with cost awards against lawyers under Rule 57(37) and with applications for special costs against lawyers. In some instances, respectfully, the analysis between these two categories of cost awards overlap. To the extent these cases suggest that some form of serious misconduct is required before an order for costs could have been

made against a lawyer under the former Rule 57(37) they appear to have been overtaken by *Nazmdeh*.

[15] Finch C.J., for the court in *Nazmdeh*, expressed the following conclusions:

1) The court has the power to award costs against a lawyer under its inherent jurisdiction (paras. 35 and 36). The question of whether a cost award is made against a lawyer under the Rules or under the court's inherent jurisdiction is important and can influence the nature of the lawyer's conduct that is required before a cost award can be made (paras. 49, 90 and 101). Thus, a cost award made under the court's inherent jurisdiction may require a higher degree of fault or culpability on the part of the lawyer than an award made pursuant to the Rules (para. 102).

2) Both the plain meaning of Rule 57(37) (para. 44) and the jurisprudence relevant to the Rule canvassed by the court confirm that "mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer" (para. 102).

3) The standard of conduct relevant to a cost order against a lawyer under Rule 57(37) and an order for special costs is different:

> [102] Under Rule 57(37), mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer. Under the Rule there is no requirement for "serious misconduct", the standard required under the court's inherent jurisdiction. The requirement in *Young* and in *Kent* of "reprehensible" conduct applies only in cases of orders against a lawyer for *special costs. Young* and *Kent* are not authority for requiring such a standard when making an order for party and party costs against a lawyer. In such circumstances, the lower standard mandated by the Rule is sufficient.

4) The objects of an order for party and party costs and of special costs are also different:

> [41] Further, the scheme and object of the Rule is consistent with the lower threshold. Rule 57 (1) and (3) provide two levels of costs – party and party costs, and special costs. These two levels of costs serve different functions. Party and party costs serve to partially

> indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation: *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 (C.A.) at para. 37. Special costs (formerly solicitor and client costs), also have a compensatory function, but they carry a punitive or deterrent element. They are reserved for cases where the conduct is scandalous, outrageous or reprehensible, and are deserving of punishment or rebuke: *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 (C.A.).

5) The power to make a cost order against a lawyer under Rule 57(37) is discretionary but it is "a power to be exercised with restraint" and "only in rare or exceptional cases" (para. 103). Thus, though Rule 57(37) expanded the basis for cost awards against a lawyer, it is important that judges should continue to be cautious when exercising their discretion to make such cost orders (para. 87).

2) Special Costs

[16] The concession by counsel for Mr. Harding that an award of party and party costs against Mr. Harding is appropriate recognizes that ICBC should be partially indemnified for its legal expenses arising from the mistrial. Such an award would not, however, carry a "punitive or deterrent" component nor would it signal the court's rebuke as an award of special costs would.

[17] Rule 14–1(1)(b) provides:

> (1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:
>
> …
>
> (b) the court orders that
>
> (i) the costs of the proceeding be assessed as special costs, or
>
> (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

[18] There was no suggestion before me that Mr. Harding's conduct, *qua* barrister, enjoyed any immunity from an award of special costs. Furthermore, counsel for each of the three parties agreed, in response to a question I posed to them, that the same standard of conduct determined whether special costs should be awarded against a party or against their lawyer.

[19] In *Nazmdeh*, at para. 61, Finch C.J. said:

> [61] This reasoning implies that because there must be "reprehensible" behaviour for an order of special costs against a party, there must also be "reprehensible" conduct by a lawyer if he is to be responsible for those special costs. This is, with respect, a reasonable conclusion. "Special costs" are meant to chastise reprehensible conduct, and there is no apparent reason why, if a lawyer is to be ordered to pay special costs personally, the lawyer should be held to a different standard than a party.

[20] Once again I recognize that though the standard of conduct relevant to an award of special costs as against a party or their counsel may be the same, such awards will only be made against counsel sparingly and in exceptional circumstances.

[21] Accordingly, this application for special costs turns not on any contest of legal principle but rather on the application of relatively straightforward principles to the present circumstances.

[22] The leading case on when an award of special costs is appropriate and what such cost awards are intended to achieve is *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). In that case Lambert J.A., for the court, said:

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

> encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[23] Various additional formulations or descriptions further define what conduct, on the part of a lawyer, can warrant rebuke or reproof and accordingly an award of special costs.

[24] In *Fraser River Contracting Ltd. v. F.W.P. Construction Ltd.*, [1978] 2 W.W.R. 355 (B.C.S.C.), an award of special (at the time solicitor and client) costs was made against a lawyer who had failed to comply with a court order. McDonald L.J.S.C. relied on *Myers v. Elman*, [1939] 4 All E.R. 484, and the various judgments therein and at 360 he quoted from the judgment of Lord Wright at 506 - 507:

> The cases of the exercise of this jurisdiction to be found in the reports are numerous, and show how the courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by LORD ABINGER, C.B., in *Stephens v. Hill* (1842), 10 M. & W. 28, 152 E.R. 368. The matter complained of need not be criminal. It need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice.

[25] In *Nazmdeh*, Finch C.J. at para. 46, referred to *Myers* as the "leading English authority on the inherent jurisdiction of the courts to make orders for costs against solicitors". *Myers* does not then expressly address the threshold conduct required before an order of special costs can be made against a lawyer. Nevertheless, I think it is clear that "mere mistake or error of judgment" on the part of a lawyer would not justify such an award.

[26] In *Bank of Credit and Commerce International (Overseas) Ltd. v. Akbar et al*, 2001 BCCA 204, the court upheld an award of special costs where the parties' conduct was described as "careless" but not "reckless or wilful" (paras. 16 and 19). It was accepted that "reckless or wilful" conduct would support an order for special costs. Notwithstanding this decision, I have not, for the purposes of the present

application, considered that "careless" conduct on the part of Mr. Harding would justify an award of special costs.

[27] It is clear that "excessive zeal" on the part of counsel would also not warrant an award of special costs; *Young* at 112, aff'd [1993] 4 S.C.R. 3 at 135-136. So too, in *Billows*, MacKenzie J., as she then was, concluded that though the conduct of plaintiff's counsel "was characterized by mistakes, errors in judgment and ill-conceived opinions" (para. 78), she declined to make an award of special costs. Such conduct was held not to be "reprehensible" and did not warrant any rebuke, reproof or punitive sanction.

[28] Two issues arise on this application. The first is factual. The second is legal.

a) The Factual Question: Were Those Portions of Mr. Harding's Closing Address that Gave Rise to the Mistrial the Product of Excessive Zeal, Mistake or Negligence?

[29] The Mistrial Ruling describes at some length the concerns that I had with Mr. Harding's closing address. Those concerns were many and varied. They included, *inter alia*, disparaging comments about opposing counsel, unsupported allegations that an expert, Dr. Toor, had misrepresented or falsified evidence, misrepresenting the position of the defendants, misstating various legal propositions and appealing to the emotions of the jury. There were multiple examples within several of these categories of wrong.

[30] I do not believe that these various improprieties were the product of zeal or of some mistake. Mr. Harding's conduct was deliberate and wrongful and reflects an obdurate belief that his conduct was, or ought to be, acceptable.

[31] I have come to this conclusion for several reasons. First, this is not the first time that Mr. Harding has engaged in conduct that has given rise to concern. In the relatively recent case of *Jamopolsky v. Shattler*, 2010 BCSC 408, Mr. Harding filed an application seeking a declaration of contempt against the lawyers for the defendants. The submissions filed by Mr. Harding asserted that the named lawyers had committed "a dishonest or dishonourable act" (para. 18).

[32] Mr. Justice Greyell concluded that the application constituted an abuse of process (para. 19) and was deserving of rebuke (para. 20). However, he further concluded that he could not intrude on solicitor client privilege and therefore ordered special costs against Mr. Harding's client rather than against Mr. Harding personally (para. 23). Nevertheless, he said:

> [21] While I accept that counsel often has to take difficult and hard positions in pursuing the interests of a client, counsel had an overriding duty to the court which was well expressed in the oft-cited passage of Lord Wright in *Rondel v. Worsfley* (1968), 1 A.C. 191 were [*sic*] he stated:
>
> > Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to the casting aspersions on the other party or witnesses for which there are no sufficient basis in the information in his possession.

[33] More recently, and more importantly, in *Blackley v. Newland* (February 2, 2012) New Westminster M121592 (S.C.), Williams J. addressed a mistrial application brought by the defendant following Mr. Harding's closing address to the jury. In relation to Mr. Harding's conduct in that case, Williams J. said:

> [2] The issue for me is this: I must ask whether that conduct is such as to have inflicted meaningful damage upon the integrity of this jury trial process. Is it reasonable to believe that the jury's ability to fairly try this case has been damaged and cannot be retrieved by way of appropriate directions from the Court? If the answer to that is yes, then the application will succeed. If not, the trial should continue with whatever rectifying directions will be appropriate.
>
> [3] Many of the concerns raised by defence counsel are indeed distressing. Some may believe that this is simply part of the rough and tumble way that personal injury trial practice is conducted. That may be so for some of what has been complained of, although it is by no means commendable. Other parts of the conduct to which objection is made are more disconcerting; they are not acceptable. I refer specifically to the very pointed allegation that two medical professionals called as defence witnesses are persons who have been prepared to sell their opinion. In my view, the comments that were made are excessive and improper.
>
> [4] As well, the notion articulated by the plaintiff's counsel that the defendants somehow consider the plaintiff a worthless individual and have

> accordingly treated him shabbily because of that, are also troublesome and, in my view, entirely unwarranted in the context of the case. It seems to be a naked attempt to cause the jury to decide this case on an emotional basis.
>
> [5] As an observation, plaintiff's counsel's style sometimes seems to reflect a view that litigation is to be practised in a war-like, win-at-any-cost way. Over the past number of days, there have been occasions where my inclination to that view has found support.
>
> [6] Nevertheless, I have to ask myself whether I believe that I can set right those concerns by way of appropriate directions to the jury. Not without some trepidation, I conclude that I can.
>
> [7] In part, I base that upon an expectation that the jury address of defence counsel will to some significant degree set matters on a more even keel. That said, I obviously have to take considerable care in the course of the jury instruction to deal with the concerns which have been raised.
>
> [8] In all the circumstances, the application is dismissed.

[34] The foregoing reasons for judgment of Williams J. are significant for several reasons. They pertain to events that occurred a few months before the Mistrial Ruling. They address several issues and several forms of improper conduct that mirror the concerns I identified in the Mistrial Ruling. They further make perfectly clear that Mr. Harding's conduct in that case was "unacceptable" and that he had crossed the line beyond what might be considered by some as an acceptable "rough-and-tumble" approach to certain forms of trial practice.

[35] Before me counsel for ICBC argued that these forms of conduct on the part of Mr. Harding were strategic and part of his "playbook". I need not decide that issue nor go that far. However, the fact that Mr. Harding, who is an experienced trial lawyer, would engage in the very forms of conduct that he had recently been told by another judge of this court, in unequivocal terms, were unacceptable, militates against the conclusion that his repeated conduct constituted over-exuberance, or a mistake or even negligence. Instead, following the stern admonishment of Mr. Justice Williams, and recognizing that his conduct had nearly caused a mistrial, one would have thought that Mr. Harding would have been assiduously careful to avoid engaging in any like form of conduct in subsequent trials.

[36] Each of *Ahmed v. Vancouver (City)*, 2011 BCSC 717, at para. 19 and *Jayetileke v. Blake*, 2010 BCSC 1478, at para. 40 are instances of where a court

has looked to and relied upon events prior to the proceeding in question to assist with its assessment of a party's conduct in an application for special costs.

[37] Second, Mr. Harding's conduct prior to and during the trial is relevant. Prior to the commencement of the trial I spent several hours with both sets of counsel reviewing, vetting and effectively redrafting significant portions of Mr. Harding's opening address. Aspects of that opening, in its original form, were manifestly inappropriate and would have given rise to difficulty. Near the end of the trial, Mr. Harding told me he wished to make use of two documents in his closing address as demonstrative evidence. I permitted their use, but required him to first provide those documents to counsel for the defendant ICBC so that the documents might be reviewed. I then learned that Mr. Harding prepared a third document that he intended to use that was not in keeping with his earlier submissions to me, which I decided was wholly inappropriate and that I would not allow him to use it in his closing address.

[38] The breadth and nature of the comments that I considered to be inappropriate within Mr. Harding's closing address are also relevant. This is not a case of a few isolated errors, however extreme. In *Gemmell*, Wilson J. directed that a lawyer pay the opposing party's costs on a party and party basis and said:

> [12] Whatever else counsel views a jury trial as, he cannot avoid the view that whatever else it is, a jury trial aspires to be a rational decision-making process. In that process, a juror cannot be corrected for an error in reasoning after the verdict. Therefore, the law strives to eliminate, so far as humanly possible, the bases for erroneous reasoning, by eliminating irrelevant factors from the process before verdict.
>
> [13] Counsel's drama, theatrics and rhetoric, must yield to that principle. Before counsel incorporates the act of throwing documents out of the courtroom window, as part of an address, it is incumbent upon counsel to be sure that manoeuvre does not introduce an irrelevant factor into that particular trial.

[39] In this case the difficulties with Mr. Harding's closing address went well beyond the introduction of inappropriate theatrics. Still further, the nature of some of these difficulties are not consonant with either excessive zeal or a lack of care. Thus, Mr. Harding, on more than one occasion and in more than one way, significantly

mischaracterized the nature of the issues facing the jury. He stated that ICBC was arguing that Mr. Walker was feigning his injuries. This was not so. It was crystal clear from multiple sources, including the defendant's opening, that ICBC accepted that Mr. Walker had suffered a relatively serious injury. The fact that such misstatements were captured in a written address, presumably carefully prepared, is also inconsistent with the conclusion that they were made inadvertently or through a lack of care.

[40] Still further, no part of Mr. Harding's demeanor during his response to the defendant's application for a mistrial was congruent with his having simply been either overly zealous or insufficiently careful during his closing address. There was no real recognition of wrong. It was not apparent, in any way, that the "penny had dropped". There was, instead, an insistence that, in the main, his address had been appropriate. He argued that at most some corrective instruction to the jury might be necessary.

[41] Finally Mr. Harding's post-trial conduct is relevant in assessing whether the excesses in his closing address were either willful and intentional on the one hand, or were the product of carelessness or mere error on the other. I wish to make clear that I do not rely, as counsel for ICBC urged, on such post-trial conduct as an independent basis on which to impose special costs. Rather, I have looked to such conduct solely as an additional form of evidence that informs my assessment of Mr. Harding's conduct.

[42] The appeal of this matter, as I have said, was filed on May 24, 2012. On July 3, 2012 Mr. Harding gave an interview that was published in the Vancouver Sun. In it he was critical of the court, which is one thing, but more importantly he continued to assert that his conduct had been proper and appropriate. He continued, for example, to attack Dr. Toor.

[43] Shortly thereafter Mr. Harding, apparently in response to a threatened or actual defamation suit by Dr. Toor, prepared an unequivocal apology to the doctor, acknowledging that his allegations about Dr. Toor had been misleading. He

accepted that Dr. Toor had both given his evidence in a professional manner and that he had complied with his obligations to the court as an expert.

[44] I was advised that for the purposes of the appeal from the Mistrial Ruling Mr. Harding had renewed his attack on Dr. Toor. Whether this is open to him, following his written statements to Dr. Toor, is not relevant for present purposes. What is relevant is that Mr. Harding, some two to four months after the Mistrial Ruling, continued to advance the correctness of his position. Such conduct is not, again, consonant with the conclusion that his conduct during his closing address was the product of zeal or error.

[45] Thus, none of Mr. Harding's pre-trial conduct or history, his conduct during the trial nor his conduct post-trial are consistent, on an objective basis, with his having made some mistake, with some lapse in judgment, with overzealousness or even with negligence. Instead this pattern of conduct is consistent with either an indifference to what, on a principled basis, is permissible and appropriate conduct for counsel or with an ongoing obdurance about what should be permissible.

[46] I wish to make clear that I am acutely aware of how cautiously and rarely the court should arrive at such findings. There are many reasons for this. Counsel should be able to vigorously advance difficult cases without being deterred by the inappropriate use of cost awards or judicial censure. Furthermore, counsel's conduct in some instances is protected by solicitor-client privilege. It is further protected through the recognition that counsel can make mistakes or can even be negligent. Such conduct in those circumstances is not deserving of rebuke or sanction.

[47] At the same time, these concerns should be put into context. Competent counsel forcefully advance the interests of their clients in difficult cases on a daily basis. They do so in a manner that comports with both their professional obligations and the dictates of the relevant case law. Describing a trial, and in particular a jury trial, as "a fight" may be colourful and have some superficial appeal, but it is simplistic and misleading. Courts have, over many decades, consistently and repeatedly explained the boundaries of what is proper and appropriate in the context

of such a "fight": *Stewart and Stewart v. Speer*, [1953] O.R. 502 (C.A.) at 508-09; *R. v. Felderhof* (2003), 235 D.L.R. (4th) 131 (Ont. C.A.) at paras. 84, 94-96; and *Landolfi v. Fargione* (2006), 265 D.L.R. (4th) 426 (Ont. C.A.) at 76-80, 88, 91 and 97-99.

[48] The care or caution that a court must exercise prior to making an award of special costs against a lawyer should not serve to immunize a lawyer who, the court is satisfied, has acted willfully. The very reason that such conduct is not acceptable, in the context of a jury trial, is because it has a real prospect of impacting adversely on trial fairness. Still further, a mistrial is, for self-evident reasons, exceedingly unfortunate. It is unfortunate for the parties, for the court and for the administration of justice.

2) The Legal Question – Is the Fact that the Positions of the Parties at Trial were "Polarized" Relevant?

[49] Counsel for Mr. Harding argued that the conduct of counsel for ICBC during trial made any award of special costs against Mr. Harding unjust. He further argued that the position of ICBC in submitting, for example, that Mr. Walker had not been forthright in describing how this accident had occurred, caused the position of the parties to be "polarized" and that this was somehow relevant to the question of costs.

[50] These issues revisit, at least indirectly, some of the matters raised by Mr. Harding during the mistrial application. Because the Mistrial Ruling is being appealed, it is inappropriate to develop these matters more fully than necessary. Nevertheless the submissions made to me warrant some consideration and comment.

[51] In the circumstances it is sufficient to say:

i) The position of the parties at trial was not uniquely or unusually "polarized". ICBC a) did not accept the plaintiff's evidence of how he was injured and b) questioned whether Mr. Walker truly sought to find employment

> after his injury. These propositions were put to the plaintiff and, where appropriate, to other witnesses. This theory of ICBC's case was also advanced through its experts. Inherent in these questions or this evidence was the proposition that Mr. Walker was not being honest in his evidence. There is nothing unusual about this.
>
> ii) The Mistrial Ruling conveys my views of the specific concerns that Mr. Harding raised, at the time, about the conduct of counsel for ICBC.

[52] I also accept that context can be important in an application for special costs. In *Young,* Cumming J.A. was satisfied that the lawyer in question's conduct was the product of "excessive zeal" as he was faced "with a determined attack upon the religious beliefs and practices of the client for whom he was acting" (at 112).

[53] Thus, such context can be helpful in deciding whether, in a hard fought case, counsel lost perspective and acted rashly. In this application, in analytical terms, we are no longer at the point where such context is relevant. I have considered context and, context notwithstanding, I have expressed my conclusions about Mr. Harding's conduct and about what underlay or motivated that conduct.

[54] Once again, the underpinning of a mistrial ruling, arising from the closing address of plaintiff's counsel, is that the address has imperiled the trial fairness rights of the defendant in a way that cannot be rectified. The submission that counsel can deliberately or willfully engage in conduct that gives rise to a mistrial, and then seek refuge from sanction because the matter was hard-fought or "polarized" is without basis.

[55] The suggestion that counsel can engage in such conduct because he or she perceives that opposing counsel has acted aggressively or inappropriately during the course of the trial is similarly misconceived. It suggests that some sort of notional set-off is appropriate. Even if the conduct of counsel for ICBC had been unusual or aggressive to some unusual degree, and I do not say that it was, that conduct did not give rise to the mistrial. Instead, the conduct of counsel for both parties was

addressed, in the usual way, throughout the course of the trial. The mistrial, the event which underlies this application, was the product of Mr. Harding's conduct alone.

Conclusion: Is an Award of Special Costs Appropriate?

[56] I have said that Mr. Harding's conduct was willful and obdurate. That conduct is "reprehensible" and is deserving of rebuke and sanction. The question is what sanction?

[57] An award of special costs is discretionary and it does not follow as a matter of right from the conclusion that counsel's conduct deserves rebuke. Mr. Harding is a relatively senior member of the bar. His reputation will be important to him. The Supreme Court of Canada recognized a good reputation to be "the cornerstone of a lawyer's professional life" (*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 118). The explicit findings that I have made about his conduct already constitute a very serious reprimand. They constitute, for counsel who regularly appears before this court, a significant admonishment and significant reproach. They unequivocally signal the court's disapproval.

[58] I do not consider that such reproach need be supplemented or reinforced by an award of special costs. At the same time I consider that some cost award, in addition to the conceded award for party and party costs, is appropriate.

[59] Sections 2(5) and 2(6) of Appendix B of the Rules respectively provide:

> (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).

[60] Though the foregoing provisions no longer expressly speak of "increased costs" this court has continued to look to earlier provisions, either in the current Rules or in the former Rules, for guidance; see for example *Luu v. Wang*, 2012 BCSC 626, at paras. 65-67.

[61] In *National Hockey League v. Pepsi-Cola Canada Ltd.* (1995), 122 D.L.R. (4th) 421, 2 B.C.L.R. (3d) 13 (C.A.) the court explained some of the differences between special costs and increased costs:

> 32 Misconduct may lead either to an award of increased costs or, where increased costs would in any event be appropriate, to an award amounting to a higher proportion of special costs than would otherwise have been the case. In neither case is the result intended to punish the offending party. Punishment is a primary function of the discretion to award special costs, a discretion which may only be exercised when the conduct in question can properly be regarded as at least reprehensible. Increased party and party costs are intended as an indemnity: *Bradshaw Construction Ltd. v. Bank of Nova Scotia*, supra.
>
> 33 But where one party to an action is guilty of misconduct in the litigation, and the innocent party is required to spend time and effort responding to such conduct, in most cases it would be unjust if the latter was not adequately indemnified for the costs associated with defending against that which should never have happened. It is in that sense that, whether reprehensible or not, the misconduct of one party is relevant when a court is considering or exercising the discretion to award increased costs to the other.

[62] It seems clear that misconduct can constitute "unusual circumstances" causing ordinary costs to be "grossly inadequate or unjust" thereby justifying an award under s. 2(5) of Appendix B; see *380876 British Columbia Ltd.. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 at para. 37; *Luu* at para. 65.

[63] In some cases where costs have been awarded under section 2(5) of Appendix B the court has awarded such costs in circumstances where an award of special costs is not warranted, but some response to inappropriate conduct was considered appropriate; see *On Call Internet Services Ltd. v. TELUS Communications Company,* 2010 BCSC 1031 at paras. 8-11.

[64] I do not understand such cases to preclude reliance on section 2(5) of Appendix B where a court considers that conduct warranting an award of special

costs is made out but nevertheless declines to make that award. Instead, I consider that in such cases s. 2(5) of Appendix B remains available, not to punish, but rather to indemnify a party for the misconduct of another party or, in this case, of counsel.

[65] The material before me indicates that the legal fees that the defendant ICBC paid for work done between April 2 (the week preceding trial) and April 27, 2012 is approximately $81,167.50 plus disbursements of $749.70 and further disbursements in the amount of $43,116.53 that the defendant ICBC paid directly to various expert witnesses. The units of legal costs at Scale B, on the other hand, would likely amount to costs thrown away of approximately $21,160 plus HST of 12%.

[66] I consider such a cost award to be grossly inadequate in the unusual circumstances of Mr. Harding's misconduct that gave rise to the mistrial. It is therefore appropriate that Mr. Harding pay the increased costs or the "uplift" provided for in Section 2(5) of Appendix B of 1.5 times the value that would otherwise apply under Scale B.

[67] Counsel for the defendant ICBC agreed that any assessment relevant to an award of either party and party costs or costs under section 2(5) of Appendix B should be deferred until after the conclusion of Mr. Walker's upcoming trial.

"Voith J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Van Holdings Ltd. v. Economical Mutual Insurance Company,* 2019 BCCA 110

Date: 20190405
Dockets: CA45020; CA45036

Between:

West Van Holdings Ltd. and West Van Lions Gate Dry Cleaners Ltd.

Respondents (Plaintiffs)

And

Economical Mutual Insurance Company

Appellant (Defendant)

And

Intact Insurance Company

Appellant (Defendant)

Before: The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated December 29, 2017 (*West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397, Vancouver Docket S161179).

Counsel for the Appellant, Economical Mutual Insurance Company:	C. Rhone
Counsel for the Appellant, Intact Insurance Company:	J.M. Moshonas B.A. Meadow
Counsel for the Respondent:	N.J. Tuytel C.M. Tribe
Place and Date of Hearing:	Vancouver, British Columbia November 6, 2018

Place and Date of Judgment: Vancouver, British Columbia
April 5, 2019

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Dickson

Summary:

The appellant insurers appeal the chambers judge's order holding that they have a duty to defend the respondents in an underlying action claiming damages for migration of pollutants, and awarding the respondents costs on a full indemnity basis. Held: appeal allowed. The chambers judge erred in finding that the claims against the respondents fell within the initial grant of coverage on the basis that the pleadings in the underlying action alleged liability arising from a previous owner's conduct under s. 45(2) of the Environmental Management Act, S.B.C. 2003, c. 53. The pleadings contain no such allegation, and the policies do not include coverage for liability arising before the policy periods. The chambers judge further erred in finding that the exclusion clauses were ambiguous and did not oust coverage for the remainder of the claims in the underlying action. The cost award was an error in principle, as judges can only award costs as authorized by the Supreme Court Civil Rules. Further, there is no principled basis for awarding special or full indemnity costs to insureds who litigate to enforce an insurer's duty to defend where there is no reprehensible conduct.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal raises two questions for determination. The first is whether the appellant insurers have a duty to defend the respondents in an underlying action for damages arising from the migration of pollutants. The insurers submit that the claims are excluded from coverage.

[2] The second concerns costs. The issue is whether an insured who successfully brings an application to compel an insurer to defend an underlying claim is entitled to recover their legal costs on a special costs or full indemnity basis notwithstanding an absence of reprehensible conduct on the part of the insurer. This issue arises as a matter of first instance in this Court.

[3] The chambers judge decided both issues in favour of the insured. The insurers now appeal. They ask this Court to find that because of the pleadings and the relevant exclusion clauses there is no duty to defend. In regard to the cost issue, they submit that absent a finding of reprehensible conduct, only party and party costs should be awarded.

BACKGROUND

[4] The respondent West Van Lions Gate Cleaners Ltd. has since March 1976 operated a dry cleaning business on a parcel of land in West Vancouver (the "West Van Lands"). The respondent West Van Holdings Ltd. has since October 1987 been the registered owner of the West Van Lands. The companies are related and will be referred to collectively as West Van.

[5] Between June 1998 and June 2002, the appellant Intact Insurance Company ("Intact") insured West Van under a commercial general liability insurance policy ("CGL"). The policy included coverage for property damage liability, but also contained a clause limiting coverage for property damage liability arising from pollutants.

[6] Between June 2002 and June 2012, the appellant Economical Mutual Insurance company ("Economical") insured West Van under a CGL. The policy included coverage for property damage liability, but similarly contained a clause limiting coverage for property damage liability arising from pollutants.

[7] While the wording of the CGL policies changed slightly from year to year, at all times they included a pollution or environmental exclusion clause ("Exclusion Clauses").

[8] On February 4, 2014, 8549737 Canada Inc. and 8428450 Canada Inc. filed a notice of civil claim ("NOCC") against West Van (the "Underlying Action"). The plaintiffs in the Underlying Action are the registered and beneficial owners of lands and premises situated at 1583 Marine Drive in West Vancouver (the "Lands"). The Lands are adjacent to the West Van Lands.

[9] The plaintiffs in the Underlying Action allege that since West Van's ownership of or operation on the West Van Lands, dry-cleaning chemicals and petroleum products (the "Contaminants") have been used, kept, disposed of, or treated on the West Van Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or escape and enter the soils and groundwater of the

Lands, thereby damaging and contaminating the Lands. The action was pleaded in strict liability (*Rylands v. Fletcher*), negligence, nuisance, and a statutory cause of action under the *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*].

[10] Intact and Economical refused to defend West Van on the basis that the Underlying Action was outside the scope of their policy coverage based on the Exclusion Clauses. In February 2016, West Van filed a notice of civil claim seeking declarations that Intact and Economical were required to defend them.

[11] There is no suggestion in this case that the insurers' decision to deny coverage breached their duty of good faith. There is no allegation that the insurers' conduct in the litigation was reprehensible or otherwise worthy of rebuke.

THE REASONS

[12] The matter was heard summarily. The chambers judge commenced her analysis by reviewing the principles applicable to the interpretation of insurance contracts and the duty to defend, as summarized at paras. 19–20 of *Co-operators General Insurance Company v. Kane*, 2017 BCSC 1720 [*Kane*].

[13] The chambers judge agreed with West Van that the Underlying Action raised four distinct sources of potential liability against them. In that regard, she said:

> [121] In light of s. 47(1) of the [*EMA*], as pled, the plaintiffs are correct that the Action raises four distinct sources of potential liability against them as described in paras. 73–74 of these *Reasons*:
>
> > … the plaintiffs say the Action will put them at risk of liability for remediation costs arising out of "occurrences" and "property damage" that may be found solely attributable to them; brought about by concurrent acts or omissions committed by them; contributory acts or omissions; and, "occurrences" and "property damage" that has resulted exclusively from the conduct of predecessor third parties, for which the plaintiffs are retroactively liable by virtue of their status as subsequent owners of, and/or operators on, the West Van lands.

[14] The chambers judge held that West Van had met its onus of showing that the claims in the Underlying Action fell within the initial grant of coverage. She reasoned

that the pleadings alleged “property damage” arising from an “occurrence”, which brought the claim within the scope of coverage.

[15] On whether the Exclusion Clauses applied to oust coverage, the chambers judge cited *Progressive Homes Ltd. v. Lombard General Insurance Company*, 2010 SCC 33, for the proposition that Intact and Economical had to show that “coverage under the initial grant [was] ‘clearly and unambiguously’ precluded by the exclusion clauses” (at para. 131).

[16] The chambers judge held that the Exclusion Clauses did not clearly and unambiguously oust coverage for the property damage claim in the Underlying Action, because it was unclear whether they ousted coverage for property damage liability arising from pollutants that were used before West Van operated a business on and owned the West Van Lands. She reasoned:

> [135] In particular, it is not clear to me that the exclusions oust coverage for compensation, including remediation costs, arising from pollutants that may have been used *before* West Van and Lions Gate owned and/or operated on the West Van lands, but for which the plaintiffs are liable in some form because of deemed responsibility under the *Act.*
>
> [136] At the very least, there is a “mere possibility” that coverage for one or more claims made on this basis has not been carved out of the initial grant.

[17] In the result, she found the Exclusion Clauses to be ambiguous, and that they did not oust coverage for statutory retroactive property damage liability arising from migration of pollutants which may have been caused by previous landowners or operators.

[18] Intact and Economical relied on three cases involving insurance policies with similarly worded exclusion clauses. In those cases, the courts did not find the similar wording to be ambiguous, and as a result held that there was no duty to defend in those instances of property damage liability arising from pollutants. The trial judge found all of them to be distinguishable. The cases are *699982 Ontario Ltd. et al. v. Intact Insurance Company* (2011), 9 C.C.L.I. (5th) 325 (Ont. S.C.J.), aff’d 2012 ONCA 286; *Dave’s K. & K. Sandblasting (1988) Ltd. v. Aviva Insurance Company of*

Canada, 2007 BCSC 791; and *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2015 BCCA 277, leave to appeal ref'd [2015] S.C.C.A. No. 317.

[19] The trial judge distinguished *699982 Ontario Ltd*. and *Dave's K. & K. Sandblasting* on the basis that the courts in those cases were not required to consider the potential of concurrent, contributory or retroactive liability based on contamination caused by a predecessor third party, but which "lay at the feet of the insured through a statutory cause of action" under the *EMA*, as alleged in the Underlying Action (at paras. 174, 186).

[20] The trial judge distinguished *Precision Plating* on the basis that the insured's alleged liability in that case did not rest on their "mere status as occupant or user of the leased premises, with statutorily deemed responsibility (and therefore liability) for the costs of remediation" (at para. 201).

[21] On the question of costs, the trial judge followed the decision in *Kane* and awarded West Van costs on a solicitor-and-own-client basis. In that regard, she said:

> [217] In *Kane*, Justice Fitzpatrick noted:
>
> > [88] There is British Columbia authority for the proposition that where an insured is required to litigate the issue as to whether his insurer is required to defend him, solicitor and own client costs may follow: *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.); *Williams v. Canales*, 2016 BCSC 1811. Both of these cases, and other authorities across Canada, were recently and extensively discussed and applied by Justice N. Brown in *Tanious v. Empire Life insurance Co.,* 2017 BCSC 85 at paras. 33-43.
> >
> > [89] The results in these cases were based on the unique nature of the insurance contract and in terms of fulfilling the objective under that policy. Simply put, where the policy intended full indemnity in relation to defence costs, it follows that any expenditure by the insured in enforcing that objective would, if successful, be followed by a costs award that similarly achieved that objective …
> >
> > [90] There is no need to find reprehensible conduct on the part of the insurer before such a costs award can be made, since such conduct is usually addressed by a special costs award: *Williams* at para. 27. [Emphasis added in 2017 BCSC 2397.]

> [218] Although Intact and Economical question the correctness of the *Kane* approach to costs (as well as the cases referenced therein), they both accept, for the purpose of this case, that I am bound to follow this line of authority on the basis of judicial comity.
>
> [219] Accordingly, in light of the findings I have made, the plaintiffs are entitled to recover their legal costs in enforcing the defendants' duty to defend on a solicitor and own client basis.

ON APPEAL

[22] On appeal, Intact and Economical challenge the chambers judge's analysis. They submit that she erred in finding the Exclusion Clauses were ambiguous and could not be relied on to avoid coverage. They further submit the chambers judge did not correctly analyze the pleadings in the Underlying Action. In that regard, they submit she erred in finding that in the Underlying Action a claim arose against West Van arising from pollutants that may have been used before West Van operated on or owned the West Van Lands. They further submit that even if such a claim could be found in the pleadings, it was not covered under the subject insurance policies because the policies only cover events that occurred during the term of the policy. They submit that the true nature and substance of the allegations contained in the Underlying Action is liability for the escape of pollutants, and those claims are clearly excluded from coverage. In their submission, the duty to defend was not triggered.

[23] The insurers also challenge the cost award. While they concede that the chambers judge was bound to follow Supreme Court precedent, they submit that there is no principled basis to award solicitor-and-own-client costs against the insurers. They submit as a matter of contractual interpretation that the court cannot imply a term into the insurance contract obliging the insurer to fully indemnify an insured for expenditures arising from a proceeding enforcing coverage. Further, they submit liability insurance policies are just like any other contracts. Courts do not order special costs against parties who unsuccessfully defend a breach of contract claim unless a defendant engages in reprehensible conduct deserving of judicial censure.

[24] West Van seeks to uphold the chambers judge's decision. They submit the chambers judge accurately stated and correctly applied settled principles which govern the interpretation of standard form policies drafted by insurers and their duty to defend insureds. They submit that under the policies, coverage extends to acts of third parties that occurred prior to the insurance coming into force.

[25] On the cost issue, West Van submits this Court should follow appellate authority in Ontario and Newfoundland, and decisions in the British Columbia Supreme Court that have held that when an insured successfully enforces a duty to defend, it is entitled to be fully indemnified for its legal costs. West Van says that the chambers judge did not err in following that authority.

DISCUSSION

A. Duty to Defend

i) Standard of Review

[26] The duty to defend issue concerns the interpretation of standard form insurance contracts. The interpretation at issue has precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process. The interpretation is properly characterized as a question of law subject to a correctness review: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37 at para. 24.

ii) General Insurance Principles

[27] In *Sabean v. Portage La Prairie Mutual Insurance Co*., 2017 SCC 7, the Court summarized the general principles of insurance policy interpretation:

> [12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC

> 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.
>
> [13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[28] The legal principles governing the insurers' duty to defend are summarized in *Progressive Homes*:

> [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).
>
> [20] In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810).

[29] Against this background I turn to the terms of the insurance policies and the claims raised against West Van in the Underlying Action.

iii) The Insurance Policies

[30] While the Intact and Economical policies were not identical, the basic features of the policies were the same. Each policy covered West Van for property damage which occurred during the policy period.

[31] Between June 1998 and June 2002, Intact insured West Van under a CGL.

[32] The June 1998 to June 1999 policy covered "Property Damage Liability" as follows:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensatory damages because of property damage caused by an occurrence.

[33] "Occurrence" was defined as "an accident, happening or event, including continuous or repeated exposure to conditions neither expected nor intended from the standpoint of the Insured".

[34] "Property damage" was defined as:

> 1) Physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom, or
>
> 2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss is caused by an accident occurring during the policy period.

[35] For 1999 through to 2002, the Intact policies provided coverage for:

> ... sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" ... which occurs during the Policy Period ... [and was] caused by an "occurrence" ...

[36] "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

[37] "Property damage" was defined as:

> (a) Physical injury to tangible property, including all resulting loss or use of that property; or

> (b) Loss of use of tangible property that is not physically injured.

[38] Between June 2002 and June 2012, Economical was the insurer. Economical's successive policies committed to pay:

> ... those sums that the Insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies ... This insurance applies only to "bodily injury" and "property damage" which occurs during the form period. The "bodily injury" or "property damage" must be caused by an "occurrence" ...

[39] "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions".

[40] "Property damage" was defined as:

> (a) Physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) Loss of use of tangible property that is not physically injured.

[41] Both the Intact and Economical policies contained Exclusion Clauses, which limited the scope of coverage for property damage related to pollutants. Attached as Appendix A is a chart identifying the policy in place at the material time; its period of coverage; and relevant portions of the impugned exclusions.

iv) Pleadings in the Underlying Action

[42] The pleadings in the Underlying Action are crucial in determining whether a duty to defend arises. The NOCC in the Underlying Action commences by setting out particulars of the parties. It then identifies the plaintiffs as the registered and beneficial owners of the Lands and West Van Holdings Ltd. as the registered owner of the West Van Lands which are identified in the NOCC as the "Adjacent Lands". The NOCC continues:

> 7. The Adjacent Lands have been owned by West Van Holdings since on or about October 21, 1987 and have been used for, among other things, a dry cleaning business and an automotive repair business. The dry cleaning business continues to be operated from the Adjacent Lands. The automotive repair business was operated from the Adjacent Lands until in or about 1999.

8. The dry cleaning business has, since in or about 1976, been operated by Lions Gate Cleaners.

D. Contamination

9. At all material times, dry cleaning chemicals and petroleum products (the "**Contaminants**") have been used, kept, disposed of, handled or treated on the Adjacent Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or to escape and enter the soils and groundwater of the Adjacent Lands and Lands, thereby damaging and contaminating the Lands, including, without limitation, causing contamination of the groundwater of the Lands (the "**Contamination**").

10. Further, or in the alternative:

    (a) the use, handling, treatment, keeping and disposal of the Contaminants constituted non-natural use of the Adjacent Lands;

    (b) the Contaminants are a dangerous thing likely to cause harm; and

    (c) the Defendants failed to prevent the escape of the Contaminants from the Adjacent Lands to the Lands.

11. At all material times, West Van Holdings:

    (a) voluntarily leased premises on the Adjacent Lands to the operators of the dry cleaning and automotive repair businesses; and

    (b) knew or had a reasonable basis for knowing that the operators of those businesses planned or intended to, or did, use, keep and dispose of, handle, or treat the Contaminants in a manner that, in whole or in part, would cause the Contamination.

12. At all material times, groundwater has run or flowed under and within the soils of the Adjacent Lands and the Lands, and continues to do so.

13. During the course of the ownership, operation, maintenance, and control of the Adjacent Lands by West Van Holdings, Contaminants have migrated from the area in or about the Adjacent Lands to the soils and groundwater of the Lands.

14. During the course of the ownership, operation, maintenance, and control of the Dry Cleaner by Lions Gate Cleaners, Contaminants have migrated from the area in or about the Adjacent Lands to the soils and groundwater of the Lands.

15. As a result, some or all the Contaminants are present in the groundwater or other constituents of the Lands in excess of standards under the *Contaminated Sites Regulation*, B.C. Reg. 376/96 (the ***"CSR").***

16. Remediation is required to remove the Contamination in the groundwater of the Lands.

[43] Based on those facts, the plaintiffs in the Underlying Action sought the following relief:

> **Part 2: RELIEF SOUGHT**
>
> 1. The Plaintiffs claim against each of the Defendants as follows:
>
> (a) An Interlocutory or final Order directing each of the Defendants to forthwith stop the continuation of the Contamination and, in particular, the migration of the Contaminants to the Lands, by remediating the Adjacent Lands or otherwise taking steps to prevent further, ongoing damage to the Lands;
>
> (b) a Declaration and Order that the Defendants, and each of them, are persons responsible for remediation of the Lands within the meaning of the *Environmental Management Act,* S,B,C. 2003, 0. 53 *("EMA")*
>
> (c) judgment for the costs of the remediation of the Lands, pursuant to the *EMA*;
>
> (d) an Order allocating the costs of the remediation between and among the Defendants;
>
> (e) damages;
>
> (f) interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
>
> (g) costs; and
>
> (h) such further and other relief as this court may deem appropriate.

[44] Under the heading Legal Basis, the NOCC indicated that the claims were brought under the *EMA*, in negligence, nuisance and *Rylands v. Fletcher*. The pleading was as follows:

> **Part 3: LEGAL BASIS**
>
> **A. Environmental Management Act and Contaminated Site Regulation**
>
> 1. The Lands are a "contaminated site" within the meaning of *EMA* and the *CSR.*
>
> 2. Each of Lions Gate Cleaners and West Van Holdings is a "person responsible" for remediation of the Lands under s. 45(2)(a) of *EMA* and the *CSR.*
>
> 3. The Plaintiffs have incurred costs, and will continue to incur costs, in respect of the remediation of the Lands.

4. Each of the Defendants is absolutely, retroactively and jointly and severally liable to the Plaintiffs for the reasonably incurred costs of remediation of the Contamination under s. 47(1) of *EMA.*

B. Negligence

5. At all material times, Lions Gate Cleaners owed a duty of care to the Plaintiffs to ensure that its operations did not result in contamination to the Lands.

6. Lions Gate Cleaners failed to fulfill its duty of care to the Plaintiffs and its negligent acts or omissions cause or contributed to the Contamination on the Lands.

7. At all material times, West Van Holdings owed a duty of care to the Plaintiffs to ensure that the use of the Adjacent Lands did not result In contamination of the Lands.

8. West Van Holdings failed to fulfill its duty of care to the Plaintiffs and its negligent acts or omissions caused or contributed to the Contamination on the Lands.

9. As a consequence of the conduct of the Defendants, the Plaintiffs have suffered, and continue to suffer, loss and damage.

C. Nuisance

10. Further, or in the alternative, the conduct of the Defendants constitutes a private, or alternatively, a public nuisance, and the nuisance is continuing.

D. *Rylands v. Fletcher*

11. Further, or in the alternative, each of the Defendants is liable to the Plaintiffs for the escape of the Contaminants onto the Adjacent Lands.

v) Analysis

[45] In this case each insurance policy covers property damage which occurs during an individual policy period. The onus is on West Van to show that the pleadings fall within the initial grant of coverage: *Progressive Homes* at para. 29.

[46] West Van submits that the Underlying Action includes a claim under the *EMA*, which makes them absolutely, retroactively and jointly and separately liable for the costs to remediate the Lands, regardless of when the contamination took place. West Van submits that this claim clearly contemplates the possibility of contaminants being discharged and migrating to the Lands before West Van acquired the West Van Lands in 1987, or Lions Gate took over an existing dry cleaning operation in 1976. This liability would result from the conduct of predecessor third parties, for

which West Van is retroactively liable by virtue of their status as the subsequent owner of and/or operator on the West Van Lands.

[47] In support of its submission, West Van relies on ss. 45(2)(a) and 47(1) of the *EMA*. Those sections read:

> **Persons responsible for remediation of contaminated sites**
>
> **45** (2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation of a contaminated site that was contaminated by migration of a substance to the contaminated site:
>
> (a) a current owner or operator of the site from which the substance migrated;
>
> …
>
> **General principles of liability for remediation**
>
> **47** (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

[48] The foundation of the submission is that West Van is exposed in the Underlying Action to a claim based on contamination caused by a predecessor third party. The difficulty with this submission is, however, that such a claim is not found in the NOCC. Paragraphs 7 and 8 of the NOCC reference West Van Holdings as owning the West Van Lands since October 1987 and Lions Gate operating a dry cleaning business on the West Van Lands since 1976. The NOCC makes no mention of a predecessor owner or operator.

[49] Paragraph 9 of the NOCC states “that at all material times” dry cleaning chemicals and petroleum products have been used and allowed to escape, thereby damaging and contaminating the Lands. Reading the pleadings as a whole, “at all material times” must refer to the time that West Van has owned or operated on the West Van Lands. There is no suggestion in the NOCC that a third party predecessor owner or operator contaminated the Lands. Absent such an allegation, there is no possibility that West Van is exposed to liability because of the actions of a third party. To the extent that this was the foundation of the chambers judge’s

determination that there was a duty to defend, the decision, with respect, cannot stand.

[50] Further, and in any event, even assuming that the pleadings could be read to contain such a claim, I find that such a claim does not fall within the grant of coverage. The exercise of interpretation should "avoid an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59 at para. 20, citing *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R 888 at 901 (*per* Estey J.).

[51] The CGL is an occurrence policy. The grant of coverage is for property damage which occurs during the policy period. The policy was not intended to provide coverage for events which took place long before it came into effect. It does not extend or cover property damage which arose at a prior point in time. Assuming without deciding that West Van could be liable under the *EMA* for such damage, it is not a risk that Intact and Economical insured under their policies. In the result, therefore, even assuming the NOCC could be read to include a claim based upon acts of a third party which took place prior to West Van commencing operations, such a claim is not covered under the policies and does not give rise to a duty to defend.

[52] The remaining claims under the *EMA*, in negligence, nuisance and *Rylands v. Fletcher* all allege property damage which occurred during the policy periods and fall within the initial grant of coverage. The issue is whether or not they are captured by the Exclusion Clauses.

[53] At the hearing of the appeal, counsel for West Van conceded that the remaining claims under the *EMA* and the claims in negligence, nuisance, and *Rylands v. Fletcher*, were all caught by the Exclusion Clauses. In correspondence written to the division following the hearing of the appeal, he resiled from that concession and advised that his position was that West Van was owed a defence

against those claims under those of the appellant's policies which did not expressly exclude "migration of pollutants".

[54] As set out in Appendix A, the language of the Exclusion Clauses is not identical. The Intact June 1998 – June 1999 policy and the Economical policies from June 18, 2002 to June 18, 2006 contain the following language:

> This insurance does not apply to:
>
> [**1. Pollution Liability**]
>
> a. "Bodily Injury" or "Property Damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> 1) At or from premises owned, rented or occupied by an Insured;
>
> ("Exclusion #1")

[55] The balance of the Intact policies from June 18, 1999 to June 18, 2002 and the Economical policies from June 18, 2006 to June 18, 2012 use somewhat expanded language. The exclusion in those policies reads:

> This insurance does not apply to:
>
> **1. Pollution Liability**
>
> a. "Bodily injury" or "property damage" or "personal injury" [or "advertising liability"] arising out of the actual, alleged[, potential] or threatened spill, discharge, emission, [dispersal,] seepage, leakage, migration, release or escape of pollutants:
>
> (1) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any… Insured;
>
> ("Exclusion #2")

[56] Exclusion #1 does not specifically refer to the migration of pollutants. West Van submits that in the circumstances of this case, the damage to the Lands was caused by the "migration" of pollutants from the West Van Lands to the Lands, and accordingly a duty to defend arises under those policies which are governed by Exclusion #1. In support of this submission they point to s. 45(2) of the *EMA*, which holds that liability for an adjoining owner arises because of the migration of the substance to the contaminated site. They submit that the absence of the word

migration in Exclusion #1 means that in those years the exclusion does not capture the claims made in the NOCC.

[57] With respect, I cannot agree. The policies that contain Exclusion #1 must be interpreted without reference to other policies that contain Exclusion #2. Exclusion #1 excludes all claims "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants." The phrase "arising out of" is broader than "caused by": *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para. 21.

[58] In this case, the NOCC in the Underlying Action alleges that contaminants "have been used, kept, disposed of, handled or treated on the Adjacent Lands in a manner that caused or allowed the Contaminants to be discharged or deposited into, or to escape and enter the soils and groundwater of the Adjacent Lands and Lands". It is further alleged that the defendants failed to prevent the escape of the Contaminants. In my view, Exclusion #1 captures the allegations in the NOCC and clearly and unambiguously excludes those claims from coverage.

[59] To succeed, West Van must show the mere possibility that a claim falls within the insurance policies. I find that it is clear that the claims in the Underlying Action fall outside the policy, either because they do not come within the initial grant of coverage or are excluded by the Exclusion Clauses. Accordingly, there is no duty to defend.

[60] In the result, therefore, I find that the chambers judge erred in finding a duty to defend.

B. COSTS

i) Overview

[61] Given the above finding, it is not strictly necessary to deal with the cost issue, which has been raised on this appeal. However, given that the matter was fully

argued, and the importance of the issue for other cases, I think it is appropriate to determine the correctness of the cost ruling.

[62] I will begin with an overview of the guiding principles governing costs in British Columbia. I will then review and consider the authorities relied on by West Van in support of the cost ruling and other authorities which suggest a different result. I will then consider whether the cost award of the chambers judge is consistent with the guiding cost principles.

ii) General Principles

[63] The rules governing costs are set out in R. 14-1 of the *Supreme Court Civil Rules* (the "*Rules*"). The *Rules* recognize two categories of costs: party and party costs and special costs. Prior to the 1990 rule amendments, special costs were known as solicitor-and-client costs.

[64] Costs awards should be predictable and consistent across similar cases: *MacKenzie v. Rogalasky*, 2014 BCCA 446 at para. 82, leave to appeal ref'd [2015] S.C.C.A. No. 24. A trial judge cannot impose costs sanctions that are not authorized by the *Rules*: *Kurtakis v. Canadian Northern Shield Insurance Co*. (1995), 17 B.C.L.R. (3d) 197 (C.A.); *A.E. v. D.W.J*., 2009 BCSC 505 at paras. 48–50, aff'd 2011 BCCA 279 at paras. 12, 39; *Gichuru v. Smith*, 2014 BCCA 414 at para. 84, leave to appeal ref'd [2014] S.C.C.A. No. 547.

[65] Costs play an important role in civil litigation. They have a purpose beyond indemnification of the successful party in the litigation: *Catalyst Paper Corporation v. Companhia de Navegaçao Norsul*, 2009 BCCA 16 at para. 13.

[66] Party and party costs are the default option. They serve several functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation: *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 37 (C.A.).

[67] Party and party costs are assessed in accordance with Appendix B of the *Rules*. An award of party and party costs provides only a partial indemnity to a successful party. One purpose of a fixed tariff is to allow parties to forecast with some degree of precision what penalty they face should they be unsuccessful: *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave to appeal ref'd [1988] S.C.C.A. No. 200.

[68] Special costs are usually awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 at 134–135. While a special cost award, by its very nature, will provide a litigant with a greater degree of indemnity against its actual legal expenses, in the ordinary course "special costs are not compensatory; they are punitive": *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177 at para. 56. They are typically awarded to address conduct in the course of the litigation that is deserving of censure and rebuke: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106, leave to appeal ref'd [2012] S.C.C.A. No. 120. Pre-litigation conduct is not to be considered in determining whether special costs should be ordered: *Smithies Holdings* at para. 134.

[69] There are limited circumstances when special costs may be ordered where there has been no wrongdoing: *Gichuru* at para. 90. These situations include when the parties have made provision in a contract for special costs.

[70] Special costs are not a substitute for damages. They are not a remedy for breach of contract and should not be conflated with punitive damages. In *Marchen v. Dams Ford Lincoln Sales Ltd*., 2010 BCCA 29, this Court explained:

> [69] The judge conflated the analysis of punitive damages and costs. Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.

[71] On an assessment of special costs, a party is entitled to those fees that were proper or reasonably necessary to conduct the proceeding. While there may be a

close relationship between actual legal fees and special costs, they are not necessarily identical. In *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.), aff'd 73 B.C.L.R. (2d) 212 (C.A.), Mr. Justice Bouck explained the distinction at 319:

> As I understand the notion of special costs under R. 57(3), they are meant to provide a much higher indemnity than ordinary costs where the circumstances warrant. They are assessed under paras. *(a)* to *(g)* of R. 57 with a view to the relationship between the successful party and his or her own solicitor. But they are not necessarily the fees that the successful solicitor would recover from his or her client. Those fees arise from a review of a solicitor's bill under the *Legal Profession Act*, S.B.C. 1987, c. 25, Pt. 10, as amended by the *Justice Reform Statutes Amendment Act*, 1989, c. 30, in force September 1, 1990, B.C. Reg. 267/90. Instead, special costs are the fees that a reasonable client would pay a reasonably competent solicitor for performing the work described in the bill. On the other hand, fees payable by the client to the solicitor pursuant to a bill taxed under the *Legal Profession Act* represent fees for work done by that solicitor for that client. In the usual course of events, a bill taxed as special costs will be less than a bill taxed under the Legal Profession Act. This is because special costs still fall under the category of party and party costs, whereas fees due under the *Legal Profession Act* are assessed in a similar way to the old method of solicitor-and-own-client costs.
>
> A taxation of special costs is objective in nature while a taxation under the *Legal Profession Act* is subjective. Put another way, a losing party should not have to pay for the cost of the most experienced and qualified lawyer if that kind of service was not necessary. However, in most instances, a bill for special costs will usually be about 80 to 90 per cent of a similar bill assessed under the *Legal Profession Act*.
>
> [Emphasis added.]

[72] The award of costs, including the appropriate scale of costs, is a matter of judicial discretion. This Court should not interfere with that discretion unless the trial judge made an error in principle or the cost award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27.

[73] In exercising that discretion, a judge must act judicially. A judge cannot fix costs arbitrarily or capriciously. The judge must act in a manner consistent with the *Rules* and the principles that have long governed such awards. In *Stiles v. B.C. (W.C.B.)* (1989), 38 B.C.L.R. (2d) 307 at 310 (C.A.), Lambert J.A. articulated the limits on the judge's power to award costs:

> ... Generally, the decisions on costs, including both whether to award costs, and, if awarded, how to calculate them, are decisions governed by a wide measure of discretion. See *Oasis Hotel Ltd. v. Zurich Ins. Co.*, 28 B.C.L.R. 230, [1981] 5 W.W.R. 24, 21 C.P.C. 260, [1982] I.L.R. 1-1459, 124 D.L.R. (3d) 455 (C.A.). The discretion must be exercised judicially, i.e., not arbitrarily or capriciously. And, as I have said, it must be exercised consistently with the *Rules of Court*. But it would be a sorry result if like cases were not decided in like ways with respect to costs. So, by judicial comity, principles have developed which guide the exercise of the discretion of a judge with respect to costs. Those principles should be consistently applied; if a judge declines to apply them, without a reason for doing so, he may be considered to have acted arbitrarily or capriciously and not judicially.

[74] Many of the cases upon which West Van relies were decided in Ontario. The law of costs in British Columbia is similar but not identical to that in Ontario. In Ontario, the authority for awarding costs against a party originates in s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 and is further governed by R. 57 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Ontario Rules").

[75] The Ontario Rules provide for three levels of costs: partial indemnity, substantial indemnity and full indemnity. Full indemnity costs are sometimes referred to as solicitor-and-own-client costs. In Ontario, the default rule is that the successful party is entitled to costs on a partial indemnity scale: *Sarnia (City) v. River City Vineyard Christian Fellowship of Sarnia*, 2015 ONCA 732 at para. 12. This is similar to the situation in British Columbia.

[76] The Ontario Rules do not define full indemnity costs, but they are "generally considered to be a complete reimbursement of all amounts the client has had to pay his or her lawyer in relation to the litigation": *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at para. 15. In this regard, the Ontario regime is different than British Columbia's, as special costs awards in this province do not necessarily lead to a full indemnity.

iii) West Van Case Authorities

[77] West Van cites numerous authorities to support the cost award. *Godonoaga (Litigation Guardian Of) v. Khatambakhsh* (2000), 50 O.R. (3d) 417 (C.A.), appears

to be the first Canadian decision that awarded full indemnity costs in the context of a duty to defend. The court said:

> [4] The appellants were entitled to a defence by their insurer without expense to them. Accordingly, that matter now having been determined in their favour, they should have their costs on a solicitor and his own client scale for the defence of the main action and cross-claims until such time as the respondent insurer serves and files a notice of change of solicitors and takes over the insurers' defence. Such costs would include the conduct of the third party proceedings and the motion before Pitt J. and this appeal. It would, of course, obviate the necessity of determining their party and party costs of this appeal as ordered by the court.

[78] The matter again came before the Ontario Court of Appeal in *E.M. v. Reed* (2003), 49 C.C.L.I. (3d) 57 (Ont. C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 334 [*Reed*]. *Reed* concerned a cost order in a proceeding in which an insured had refused to defend the claim. The court ordered costs on a solicitor-and-client basis. It held that the entitlement to solicitor-and-client costs arose directly from the unique nature of the insurance contract which entailed a duty to defend at no expense to the insured. The court explained at para. 22:

> [22] Entitlement to solicitor-and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract which entails a duty to defend at no expense to the insured. The obligation to save harmless the insured from the costs of defending the action is sufficiently broad to encompass the third party proceedings. It is the contractual basis for the claim to solicitor-and-client costs that justifies the award and therefore constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded except in unusual circumstances.

[79] In *Markham General insurance Co. (Liquidator of) v. Bennett*, 23 C.B.R. (5th) 203 (Ont. S.C.J.), two insurers unsuccessfully applied for a declaration that they did not have to defend a claim brought against former directors and officers of a company. The insureds relied on *Reed* in seeking costs on a full indemnity basis. The insurers argued that the case was distinguishable because their conduct demonstrated good faith. They relied on *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd.* (2004), 29 C.C.L.I. (4th) 126 (Ont. S.C.J.), in which Karakatsanis J. (as she then was) awarded only partial indemnity costs to the insured where the insurer had not acted capriciously or in bad faith in bringing an application to clarify whether

an excluded driver endorsement was valid. Cumming J. rejected the insurers' submission and awarded costs on a full indemnity basis. He reasoned:

> [15] The conduct of the insurers in the case at hand is exemplary, like that seen in *Gore Mutual Insurance Co. v. 1443249 Ontario Ltd*.. There was no breach of the contract by the insurers. I agree that the Application involved a relatively novel issue of importance in respect of the so-called "insured v. insured" exclusion. It was reasonable for the insurers to bring the Application for a determination as to how the policies were to be interpreted as a matter of law. Nevertheless, given the finding that the exclusion was inapplicable, and that the coverage applied to the respondent directors/officers, in my view, costs of the Application relating to the preliminary coverage issue are properly payable on a full indemnity basis. While the policies themselves (apart from the asserted exclusion provision) are not in the evidentiary record, it is not disputed that the insurers contractually agreed to indemnify the respondent director/officers from the cost of their defences up to the policy limits. For this reason, in my view, the insurers are contractually obliged to reimburse Goodman and Hicks on a full indemnity basis.

[80] *Reed* was followed by the Newfoundland Court of Appeal in *Lombard General Insurance Co. of Canada v. Crosbie Industrial Services Ltd*., 2006 NLCA 55 [*Crosbie*]. This case also involved a duty to defend. Considering this question, the court noted that the insurance contract was silent on the questions of costs where the duty to defend is disputed. In awarding solicitor-and-client costs, it said:

> [73] This language is specific regarding the costs of defending an action covered by the insurance contract, with particular attention to the fact that these costs are in addition to, and will not reduce, the monies available to indemnify the insured for a property damage claim under the policy. There is, however, no mention of costs where the duty to defend is disputed by the insurer. I have not been directed by either party to, nor have I identified, a provision in the insurance contract dealing with this issue.
>
> [74] While I was directed by counsel to very little relevant judicial authority, I am satisfied that, in the absence of a clear indication to the contrary in the insurance contract, the insured is entitled to full indemnity of its costs related to enforcing the insurer's duty to defend. The insurer's obligation with respect to costs in this context is broadly stated in the Reed decision (paragraphs 22 to 24 quoted above). A review of the insurance contract in that case (attached as an appendix to the decision of the lower court at (2000), 24 C.C.L.I. (3d) 229) reveals no provision in the contract that directly relates, or could be construed as indirectly relating, to costs incurred by the insured enforcing the duty to defend. In other words, the court's imposition of the requirement to pay solicitor and client costs for the third party proceedings does not arise from a specific provision in the insurance contract. Rather, it arises from the unique nature of that contract. As stated by the Ontario Court of Appeal in Reed, an order for solicitor and client costs in this context "constitutes an exception to the usual rule that solicitor-and-client costs will not be awarded

> except in unusual circumstances" (paragraph 22). (See also: Soloway v. Lloyd's Underwriters, [2005] O.J. No. 5465 (Ont. S.C.J.), at paragraph 8.)
>
> [75] I have not been directed to any authority that would lead me to a conclusion in this case different from that reached by the Ontario Court of Appeal in Reed. It follows that Crosbie Industrial is entitled to full indemnity for expenses it incurred in enforcing Lombard Insurance's duty to defend it against Ultramar's claim. Accordingly, Crosbie Industrial is entitled to its costs in respect of the summary trial, the costs application and this appeal on a solicitor and client basis.

[81] In *Hoang v. The Personal Insurance Co*., 2017 ONSC 4193, the trial judge relied on *Reed* in a case that did not concern a duty to defend. The judge held that when an insurance company denies coverage, and is then found to have done so wrongfully, even in circumstances where the insurers had in no way acted improperly, a plaintiff should be compensated on a full indemnity basis for the cost of enforcing its right to coverage. He reasoned as follows:

> [4] It is probably fair to say that every successful claimant in a civil action feels that he or she should not have had to sue to get what they deserved in the first place, and yet the courts do not routinely award full indemnity costs. The general policy is to award partial indemnity costs to successful parties: *Foulis v. Robinson* (1978), 21 OR (2d) 769, at para 16 (Ont CA). This typically applies unless there is an offer to settle that was rejected by the unsuccessful party, or some special circumstance or egregious conduct or unreasonable position taken by the unsuccessful party in the course of the litigation that prompts costs on a higher scale. Since none of those factors are present here, it is crucial to Plaintiffs' counsel's submissions that insured parties and insurance companies be considered in a different light than other litigants.
>
> [5] There is some authority for such special consideration. In *E.M. v. Father Francis Reed et al.*, 2003 CanLII 52150, at para 22, the Court of Appeal stated that, "Entitlement to solicitor-and-client costs in the third party proceeding flows directly from the unique nature of the insurance contract..." This court indicated in *Deloitte & Touche Inc. v. American Home Assurance Co*., 2006 CanLII 23263, at para 15, that once there is a finding that "coverage applied to the respondent [insured parties]...costs of the Application relating to the preliminary coverage issue are properly payable on a full indemnity basis". In *E.M*., *supra*, at para 23, Gillese J.A. drew some comfort from the observation that "English jurisprudence also appears to support the award of solicitor-and-client costs in such situations". She quoted approvingly from R. Merkin, *Colinvaux's Law of Insurance*, 7th ed. (London: Sweet & Maxwell, 1997) at 405, for the proposition that,
>
> > The assured is entitled to any costs reasonably incurred by him in resisting a claim, by way of damages, where the insurers wrongfully repudiate liability on the policy, and the insurers will face liability for

> any costs incurred by the assured in forcing the insurers to admit liability under the policy.
>
> [6] This view is both authoritative and logical. One purchases an insurance policy for coverage in the event of liability, and it is the premium payable under the policy that is the cost of that coverage. Insurance companies are by their nature constantly involved in litigation, and it would be unfair and burdensome to make their customers pay a premium plus legal fees in order to obtain the coverage they bought. The premium is presumed to reflect the insurance company's risk. If it chooses to attempt to reduce that risk by engaging in litigation over its obligation to provide coverage it should be made to fully compensate the successful party if it loses.

[82] The first British Columbia case that appears to have considered the issue is *Gore Mutual Insurance Company v. Paterson* (30 September 2011), Vancouver S110676 (B.C.S.C.) [*Paterson*], where Justice Leask awarded special costs. His brief reasons are as follows:

> [16] On the questions of cost, counsel for the insured referred me to several authorities, two cases from Ontario and one from Newfoundland, on somewhat analogous circumstances the courts have ruled that insured persons entitled to solicitor-client costs. Based on Mr. Hilliker's submission and the very fair reply made by Mr. McKnight, I am awarding Mr. Paterson what are now called special costs.

[83] In *Williams v. Canales*, 2016 BCSC 1811, Mr. Justice Blok reviewed the Ontario and Newfoundland authorities. He concluded the issue had not been dealt with in a binding manner in British Columbia and considered it a matter of first impression. He noted that in British Columbia, special costs were not limited to cases involving reprehensible conduct by an unsuccessful party that is deserving of reproof or rebuke. He stated he was persuaded by the reasoning in *Reed* and awarded the insured special costs.

[84] The question was again considered in *Tanious v. The Empire Life Insurance Company*, 2017 BCSC 85. The facts in *Tanious* were somewhat different. *Tanious* was not a claim arising out of a duty to defend, but rather under a claim for payment under a disability policy. There were no allegations of bad faith. In the trial reasons (2016 BCSC 110), Mr. Justice N. Brown awarded the plaintiff $15,000 in aggravated damages for mental distress, loss of peace of mind and of dignity as a person caused by the insurers' refusal to pay benefits to which the plaintiff was entitled.

[85] In his subsequent cost decision the judge reviewed the various authorities in detail. He held that in the particular circumstances of the case, it was fitting that he exercise his discretion by making an award for full indemnification in order to put the plaintiff in the position she would have been had she not been forced to retain counsel to enforce the contract through litigation. His reasons for making the award were based on the following considerations:

> [155] I am satisfied that in the particular circumstances of this case it is fitting that I exercise my discretion in making an award for full indemnification in order to put the plaintiff in the position she would have been in had she not been forced to retain counsel and enforce the contract through litigation. I come to this conclusion based on the following considerations:
>
> a) The plaintiff had a disability insurance contract with the defendant, the purpose of which was to provide her, in the event of a disability that rendered her unable to work, with a subsistence level amount of income with which to feed, clothe, and house herself while unable to work; and to provide her with the peace of mind that flows from the coverage.
>
> b) The plaintiff did in fact suffer a disability which rendered her unable to work and triggered the defendant's obligation to pay those subsistence level benefits, which it did not do.
>
> c) The plaintiff was required to commence litigation against the defendant or else forfeit the benefits to which she was entitled under the contract. The significant challenges caused by the plaintiff's disability also necessitated (and complicated) the assistance of counsel for virtually every aspect of that litigation.
>
> d) The legal costs the plaintiff reasonably incurred in obtaining her contractual benefits in this case substantially deprived her of the full benefit of the contract, leaving her with less than the necessary amount of income on which to obtain the basic necessities of food, clothing, and shelter.
>
> e) The coverage issue in the case at bar is not fundamentally different in principle than the coverage issues in third party proceedings cases where courts have awarded special or solicitor and client costs in addition to the insurance benefits payable under the terms of the policy. In both situations, fulfilment of the intention of the insurance coverage is the driving consideration. There is also case law to support the proposition that full indemnification is appropriate where a plaintiff has been forced to enforce a disability or other type of insurance contract through litigation, and ought to be put in the position they otherwise would have been in had the litigation not been required.

I note that *Tanious* is presently on reserve in this Court.

[86] In *Kane*, Justice Fitzpatrick followed the decisions in *Paterson*, *Williams* and *Tanious*. She awarded costs on a solicitor-and-own-client basis. The chambers judge in this case followed *Kane*.

[87] In *Blue Mountain Log Sales Ltd. v. Lloyd's Underwriters*, 2017 BCSC 1872, Justice Walker cited the decisions in *Tanious*, *Williams* and *Kane* and held that he was bound to follow those decisions. He ordered special costs in favour of the insured. I note that the *Blue Mountain* decision is presently on reserve in this Court. I am advised that the cost aspect of the decision was not subject to appeal.

[88] West Van submits that based on these authorities, it should be taken as settled law that it is entitled to be fully indemnified for the costs it has incurred in enforcing the duty to defend.

iv) Additional Authorities

[89] In *Hwang v. Axa Pacific Insurance Co*. (1998), 53 B.C.L.R. (3d) 119 (S.C.), rev'd on other grounds, 2001 BCCA 410, the judge, having held that the defendant had a duty to defend the plaintiff, refused to award special costs, noting that such costs require egregious conduct.

[90] In *Axa Pacific Insurance Co. v. Gilford Marquis Towers Ltd*., 2000 BCSC 197, *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2014 BCSC 602, rev'd on other grounds, 2015 BCCA 277, leave to appeal ref'd [2015] S.C.C.A. No. 317, *Gill v. Ivanhoe Cambridge I Inc./Ivanhoe Cambridge I Inc.*, 2016 BCSC 252, rev'd on other grounds, 2017 BCCA 351, and *Economical Mutual Insurance Company v. Optimum West Insurance Company Inc.*, 2018 BCSC 1116, judges awarded party and party costs after finding an insurer had a duty to defend. Similarly, in *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, and *C.P. v. RBC Life Insurance Company*, 2015 BCCA 30, leave to appeal ref'd [2015] S.C.C.A. No. 136, both of which like *Tanious* concerned a claim under a disability policy, the court awarded

party and party costs. All of the above cases post-date *Reed*. In none of the cases did the successful insureds seek special costs. The fact that the insureds did not even seek special costs strongly suggests that the law is not as settled as West Van would maintain.

[91] In *Coventree Inc. v. Lloyd's Syndicate 1211 (Millenium Syndicate) (Costs)*, 2011 ONSC 6660, varied on other grounds, 2012 ONCA 341, leave to appeal ref'd [2012] S.C.C.A. No. 276, an insured was successful in an application for a declaration as to rights under an insurance contract. The insured, relying on *Reed* and *Godonoaga*, then sought costs on a full indemnity scale. It submitted that only a full indemnity would put the insured in the same position it would have been in had the contract of insurance been performed. The judge rejected the submission. He reasoned that there "was a legitimate question with respect to the interpretation of the policy that the insurer should be able [to] raise without incurring an exposure to substantial indemnity costs" (at para. 4). On appeal the court found no reason to interfere with the application judge's findings on costs (at para. 49).

[92] The Ontario Court of Appeal in *Hector v. Piazza*, 2012 ONCA 26, dismissed an appeal in which the insurer had been ordered to defend a claim. It awarded costs on a partial indemnity basis.

[93] In *Godwin v. Desjardins Financial Security Investments Inc.,* 2018 BCSC 690, leave to appeal ref'd 2018 BCCA 278, the successful plaintiff in a disability claim sought an award of special costs on the basis of the decision in *Tanious*. Mr. Justice Saunders refused. He noted an order of special costs normally requires a finding of reprehensible conduct, of which there was none in *Tanious*, but that parties can contractually agree to special costs. He said absent a specific or implied contractual term such an award could not be made. He reasoned:

> [15] Given these governing authorities, in my respectful view a finding that special costs are necessary in order to fulfill the intentions of the parties to a contract of insurance that the assured be fully indemnified against loss, could only have a juridical basis in a finding of an implied contractual term to that effect. Such a finding would require not simply a determination of what contractual terms would be agreed upon by reasonable parties, but an inquiry

> into the actual intentions of the parties themselves: *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 SCR 619, at paras. 27-29. No such implied term analysis was undertaken in *Tanious*.

v) Analysis

[94] The question for determination is whether an award of special costs in the absence of conduct deserving of rebuke *in* a duty to defend claim is consistent with the guiding principles upon which costs awards are made. Most of the cases that have made such awards have spent little time considering this question.

[95] I would at the outset note that in the British Columbia cases the judges in *Paterson*, *Williams* and *Blue Mountain* awarded special costs. The judges in the case at bar, *Tanious* and *Kane* awarded either a full indemnity or costs on a solicitor-and-own-client basis. As noted in para. 64 above, a judge cannot impose costs sanctions that are not authorized by the *Rules.* Full indemnity or solicitor-and-own-client costs awards are not authorized by the *Rules* and accordingly the costs awards in this case, *Kane* and *Tanious* are, at least to that extent, wrong in principle, as is West Van's submission that it is entitled to receive a full indemnity. The matter for determination is whether the insureds are entitled to an award of special costs.

[96] It is difficult from the authorities to understand the principled basis upon which the full indemnity or cost awards have been made against insurers. In *Reed*, the court suggests that an award of solicitor-and-client costs is justified on a contractual basis. What is troubling about that analysis is that the insurance contract in the case at bar is silent in regard to the cost of enforcing coverage. The contract is limited to the cost of defending an underlying action against an insured. The Economical policies contain the following provisions:

> **1. Insuring Agreement**
>
> We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damages" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS – COVERAGES A, B and D …We will have

> the right and duty to defend any "action" seeking those compensatory damages but:
>
> 3) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements...
>
> [Emphasis added.]

[97] Under the heading SUPPLEMENTARY PAYMENTS – COVERAGES A, B and D, is found the following:

> We will pay, with respect to any claim or "action" we defend:
>
> a. All expenses we incur.
>
> b. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
>
> c. All reasonable expenses incurred by the Insured at our request to assist us in the investigation or defence of the claim or "action", including actual loss of earnings up to $100 a day because of time off from work.
>
> d. All costs taxed against the Insured in the "action" and any interest accruing after entry of judgment upon that part of the judgment which is within the applicable limit of insurance.
>
> [Emphasis added.]

[98] The Intact policies contain similar but not identical wording. Similar language is also found in the policy considered in *Crosbie*.

[99] The amounts that the insurer has agreed to pay are clearly set out in the policy. The insurer agrees to pay the costs to defend until the limits of the policy are exhausted. The language in the policy cannot be extended to cover legal fees and expenses the insured may incur in attempting to enforce its contractual right to coverage.

[100] There is in the context of the insuring agreement no basis to imply a term that the insurer will pay special costs if it unsuccessfully resists a claim under the policy. In *M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619, the Supreme Court of Canada set out the principles governing implied terms:

> [27] The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general

> principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at para. 137, *per* McLachlin J., and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1008, *per* McLachlin J.
>
> …
>
> [29] As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476:
>
> > In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.
>
> [Emphasis in original.]

[101] There is no custom in the insurance industry by which insurers are expected to pay the full indemnity costs of a claimant enforcing coverage. An implied term is not necessary to give business efficacy to the contract. The terms of the contract are meticulously drafted. The contract sets out in precise detail what is and what is not covered. If the parties intended that the insurer would pay the costs of enforcing the insurance contract, the contract surely would have said so.

[102] The Newfoundland Court of Appeal in *Crosbie* did recognize the requirement to pay solicitor-and-client costs did not arise from a specific provision in the insurance contract. It held, rather, that the duty arose from the unique nature of that contract. Other cases have also suggested that different rules should apply to insurance contracts because of the special nature of such contracts.

[103] The law clearly recognizes the special nature of insurance contracts. A contract of insurance is one of *uberrimae fidei* — utmost or overriding good faith. An implied term of good faith and fair dealing is imported into every insurance contract: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18.

[104] The obligation of good faith is separate from the obligation to compensate the insured for a loss under the policy, and a breach of the contractual duty of good faith constitutes an independent actionable wrong which can lead to an award of damages. If an insurer's failure to defend an insured or otherwise honour the terms of the insurance contract constitutes a breach of the duty of good faith, remedies are available to compensate the insured for any loss that may be forthcoming. Breach of an insurance agreement may also give rise to aggravated damages. This was the outcome in *Fidler* and *C.P*. Such an award was also made in *Tanious* and *Godwin*.

[105] The special nature of insurance contracts however does not justify the creation of a different costs regime governing all insurance claimants. This question was canvassed at some length in a recent article in the Canadian Journal of Insurance Law: James Steele, "Deterrence not Damages: the Punitive Rationale for Solicitor-Client Costs" (2018) 36 Can J Ins L 1. As detailed by Mr. Steele, there is no principled reason why a different scale of costs should apply to insureds who successfully enforce a contractual obligation than any other litigant who is forced to bring an action in order to obtain relief. Many such plaintiffs are surely as sympathetic. Why, for example, should an insured receive a full or near indemnity while the plaintiff in a personal injury lawsuit finds the award eroded because he or she is only entitled to a partial indemnity.

[106] In this regard, it is also important to recall the caution in *Marchen* that costs are not a remedy for breach of contract.

[107] Party and party costs are designed to only partially indemnify a litigant. While party and party costs offer some compensation to the successful party, they avoid unduly discouraging the bringing of legitimate proceedings out of fear of the potential costs consequences. An insurer faced with a difficult question as to whether a duty

to defend arises should be able to raise that defence without automatically incurring an exposure to special costs.

[108] The main purpose of special costs is to deter misconduct. If special costs are to be awarded regardless of conduct, there is no way to punish those unsuccessful parties who subject a successful party to an abusive proceeding. If a losing party faces full indemnity costs irrespective of their litigation conduct, the incentive for good conduct is correspondingly diminished.

[109] There is, in my respectful opinion, no principled reason to award costs in a duty to defend case in a manner different than other litigation. There already exist other suitable mechanisms to censure an insurer's wrongful conduct: *Smithies Holdings* at para. 134. If the insurer has breached its duty of good faith, or conducts itself in a manner that is worthy of rebuke, it will be sanctioned. If not, an insurer facing a duty to defend claim should be treated no differently than any other litigant who may breach a contract.

[110] With respect, the Supreme Court decisions in *Paterson*, *Williams*, *Kane* and *Blue Mountain* were all wrongly decided on the cost issue and should not be followed. They are not consistent with the *Rules* and the principles that have long governed cost awards. I say nothing further about the decision in *Tanious,* which is presently on reserve in this Court.

CONCLUSION

[111] In the result therefore, I would allow the appeal, set aside the order of the chambers judge and dismiss the action.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Dickson"

APPENDIX A

Intact and Economical Insurance Policies

Insurance Provider	**Coverage Period**	**Wording of Exclusionary Clause**
Intact Insurance Company	June 18, 1998 – June 18, 1999	**ENVIRONMENTAL LIABILITY EXCLUSION** It is agreed that this policy does not apply to: (i) "Bodily Injury" or "Property Damage" arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants. 1) At or from premises owned, rented or occupied by an Insured; … 4) At or from any site or location on which an Insured or any contractors or subcontractors working directly or indirectly on behalf of an Insured are performing operations: A) If the pollutants are brought on or to the site or location in connection with such operations; … (ii) Any loss, cost or expense arising out of any governmental direction or request that an insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. (iii) Fines, penalties, punitive or exemplary damages arising directly or indirectly out of the discharge, dispersal, release or escape of any pollutants. "POLLUTANTS" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste ….
Intact Insurance Company	June 18, 1999 – June 18, 2000	**COMMON EXCLUSIONS–COVERAGES A, B, C, D and E** This insurance does not apply to: **1. Pollution Liability** a. "Bodily injury" or "property damage" or "personal injury" or "advertising liability" arising out of the actual, alleged, potential or threatened spill, discharge, emission, seepage, leakage, migration, release or escape of pollutants: (1) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or

		loaned to any, Insured; … (4) At or from any premises, site, or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations; (a) if the pollutants are brought on or to the premises, site or location in connection with such operations by such Insured, contractor, or subcontractor; or … b. Any loss, cost or expense arising out of any request, demand or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or assess the effect of pollutants unless such loss, cost or expense is consequent upon "bodily injury" or "property damage' covered by this policy. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odour, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned, or reclaimed.
Intact Insurance Company	June 18, 2000 – June 18, 2001	Same as 1999–2000 policy.
Intact Insurance Company	June 18, 2001 – June 18, 2002	Same as 2000–2001 policy.
Economical Mutual Insurance Company	June 18, 2002 – June 18, 2003	**COMMON EXCLUSIONS - COVERAGES A, B, C AND D** This insurance does not apply to: **1. Pollution Liability** a. "Bodily Injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants: 1) At or from premises owned, rented or occupied by an Insured; … 4) At or from any site or location on which an Insured or any contractors or subcontractors working directly or indirectly on behalf of an Insured are performing operations:

		(a) If the pollutants are brought on or to the site or location in connection with such operations; … b. Any loss, cost or expense arising out of any governmental direction or request that an Insured test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
Economical Mutual Insurance Company	June 18, 2003 – June 18, 2004	Same as 2002–2003 policy.
Economical Mutual Insurance Company	June 18, 2004 – June 18, 2005	Same as 2003–2004 policy.
Economical Mutual Insurance Company	June 18, 2005 – June 18, 2006	Same as 2004–2005 policy.
Economical Mutual Insurance Company	June 18, 2006 – June 18, 2007	**COMMON EXCLUSIONS–COVERAGES A, B, C AND D** This insurance does not apply to: **1. Pollution liability** A. "Bodily injury", "property damage" or "personal Injury" arising out of the actual, alleged or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants": (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured; … (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such Insured, contractor or subcontractor … …

		B. Any loss, cost or expense arising out of any: (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up. remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or (b) Claim or "action" by or on behalf of a governmental authority for "compensatory damages" because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants". However, this Section … does not apply to liability for "compensatory damages" because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "action" by or on behalf of a governmental authority. … "Pollutant" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odour, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
Economical Mutual Insurance Company	June 18, 2007 – June 18, 2008	Same as 2006–2007 policy.
Economical Mutual Insurance Company	June 18, 2008 – June 18, 2009	Same as 2007–2008 policy.
Economical Mutual Insurance Company	June 18, 2009 – June 18, 2010	Same as 2008–2009 policy.
Economical Mutual Insurance Company	June 18, 2010 – June 18, 2011	Same as 2009–2010 policy.
Economical Mutual Insurance Company	June 18, 2011 – June 18, 2012	Same as 2010–2011 policy.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Westsea Construction Ltd. v. 0759553 B.C. Ltd.,* 2013 BCSC 1352

Date: 20130729
Docket: S116261
Registry: Vancouver

Between:

Westsea Construction Ltd., Capital Construction Supplies Ltd. and Sussex Square Apartments Ltd.

Plaintiffs

And

0759553 B.C. Ltd. and Others

Defendants

Before: The Honourable Madam Justice Gropper

Supplementary Reasons for Judgment On Costs

Counsel for the plaintiffs:	M. C. Stacey S.W. Lesiuk
Counsel for the Defendants:	T. S. Galbraith
Place and Date of Trial/Hearing:	Vancouver, B.C. January 23-25, February 28, March 1 and 7, 2013
Place and Date of Judgment:	Vancouver, B.C. July 29, 2013

Table of Contents

Introduction

[1] Both the plaintiffs and the defendants bring applications on costs in regard to my reasons for judgment, indexed at 2012 BCSC 1799. These costs applications are a continuation of the lengthy and hard fought litigation over reparations to a residential apartment complex.

[2] The plaintiffs seek an order for special costs against a majority of the defendants represented by Jenkins Marzban Logan LLP (majority defendants) on the basis of their alleged reprehensible conduct which, the plaintiffs submit, is deserving of reproof or rebuke.

[3] Alternatively, the plaintiffs submit that the appropriate scale of costs with regard to the majority defendants is scale C due to the complexity and the importance of the issues raised in this matter.

[4] As a further alternative, the plaintiffs seek leave to make further submissions on the issue of their entitlement to "costs with the uplift" pursuant to s. 5 of Appendix B of the Supreme Court Civil Rules at a later date.

[5] The plaintiffs also take the position that it is appropriate for the Court to order joint liability for costs with respect to the majority defendants.

[6] With respect to the remainder of the defendants (the so-called "non-majority defendants"), the plaintiffs seek costs at scale B. Those defendants are:

(a) Ada Montesena

(b) Dan Na Zhu

(c) Daniel Montesena

(d) Jie Ping Li

(e) Jing Qin Lin

(f) Kwong Cheung Lam

(g) Maria Veres

(h) Ming Wei Tam

(i) Qi Hui Li

(j) Van Ly Huynh

(k) Xiang Gao

(l) Ying Xu

[7] The majority defendants' primary position is that the plaintiffs should be disentitled to all or a portion of their costs on the bases that:

(a) they brought unnecessary applications, which increased costs in this proceeding, Action No. S116261, Vancouver Registry (Action #2);

(b) they engaged in obstructive conduct, causing delay and increased costs;

(c) they engaged in obstructive conduct in the related proceeding, Action No. S105741, Vancouver Registry (Action #1); and

(d) they brought over 30 petitions (collectively, the Petitions) in relation to this matter, causing delay and increased costs.

[8] The argument on costs occupied three and a half days of hearings. Voluminous submissions were made and multiple binders of evidence in support of the applications were filed. I sought further guidance with respect to Court of Appeal authority on special costs and the parties both aided me in this request.

[9] For the sake of clarity and simplicity, in these reasons for judgment (except where otherwise noted) "plaintiffs" refers to those parties who are plaintiffs in Action #2, and "majority defendants" refers to those parties who are defendants

represented by Jenkins Marzban Logan LLP in Action #2 and plaintiffs represented by Jenkins Marzban Logan LLP in Action #1.

Background

[10] In my reasons for judgment, I outlined the background to this litigation as follows:

> [28] From January 2009 to March 2010, repairs were undertaken in Sussex Square, forming the phase 1 repairs. The phase 2 repairs commenced in fall 2010.
>
> [29] The first water leak was reported in January 2009. Westsea then contracted JDP to investigate the issue. Repairs were undertaken.
>
> [30] Another report of a water leak was soon after brought to the attention of Mr. Tartaglia, the plaintiffs' property manager of Sussex Square from 2005 to the present. JDP was again contracted to undertake repairs.
>
> [31] Mr. Tolzmann, President of JDP, informed Mr. Tartaglia that wood joists supporting the exterior stairway landings required replacement. He also informed Mr. Tartaglia that these joists may have impacted the buildings' walls.
>
> [32] On February 4, 2009, Mr. Tartaglia spoke with Roger Steers, an employee of Read Jones Christoffersen Consultant Engineers (RJC) who had previously worked for Westsea, about the process for repairing exterior stairway landings.
>
> [33] Mr. Tartaglia determined that all of the upper stairway landings should be inspected. JDP undertook this inspection, removing the fascia boards to inspect the landings.
>
> [34] While landing repairs were undertaken, a number of other reports of water leaks were made. Each report was investigated and JDP undertook the necessary repairs.
>
> [35] On April 16, 2009, the plaintiffs sent a letter to all leaseholders informing them that repairs had been completed to a number of exterior stairways and landings, at a cost of $12,265 to $30,890 per landing. This letter notified the leaseholders that a special assessment was forthcoming.
>
> [36] In August 2009, JDP contacted Mr. Rashid, a professional engineer and employee of Levelton Consultants Ltd. (Levelton), to provide engineering services for Sussex Square. He was specifically asked to perform a field inspection review of the work that JDP had completed for Westsea and to provide building envelope repair instructions.
>
> [37] JDP passed the field review inspections conducted by Levelton.
>
> [38] In October 2009, Mr. Tartaglia asked Mr. Rashid to conduct a field review of repairs that had already been undertaken, a structure review and window

> testing. He also asked for a building envelope assessment. At this point, Mr. Tartaglia was concerned that the water ingress problems were systemic.
>
> [39] A building envelope inspection was completed in December 2009 by Mr. Rashid and Alexander Olaru of Levelton. A report was prepared and it was submitted to the plaintiffs on December 15 (Levelton report).
>
> [40] The Levelton report was provided to the leaseholders of Sussex Square on January 21, 2010. Three days later, a meeting was held by the plaintiffs with the leaseholders attending to discuss ongoing and future repairs to Sussex Square. Mr. Tartaglia and Mr. Rashid were also present.
>
> [41] In February 2010, the repairs were estimated at $2,404,748.80, and the leaseholders were assessed a portion of this cost (the special assessment) in accordance with their share of "operating expenses," which are maintenance and repair costs of the buildings pursuant to the lease. Leaseholders were provided notice by letter of the special assessment and their respective share they owed on February 17, 2010. The letter also provided for a payment plan to spread the amount owed over a ten month period from March to December 2010.
>
> [42] Levelton and the City of Richmond conducted inspections of the repairs through phase 1. Follow-up was required for some caulking and cosmetic work.
>
> [43] The total costs for phase 1 repairs amounted to $2,481,136.36. It has been paid for by the plaintiffs.

[11] Two actions were commenced in relation to this matter. Action #1 was commenced on August 19, 2010. The defendants sought the following relief:

a) injunctive relief;

b) a declaration that no debt was owed for phase 1 of the repair work;

c) damages for breach of the terms of the sub-leases;

d) damages for negligent misrepresentation;

e) damages for negligent design and construction of the buildings;

f) damages for breach of duty to warn;

g) damages for breach of fiduciary duty;

h) an audit and accounting of phase 1 repairs;

i) a declaration that any sublease terminated was wrongfully terminated;

j) alternatively, relief from forfeiture if any sublease was properly terminated; and

k) costs.

[12] Action #2 was commenced on September 20, 2011. The plaintiffs filed a notice of civil claim against the leaseholders. They sought damages for breach of contract, negligence and negligent misrepresentation. Alternatively, they alleged for unjust enrichment and sought recovery for:

a) actual costs of the repairs; and

b) *quantum meruit*, or in the alternative, an increase in the property value of the defendants' leaseholders' interests;

[13] The plaintiffs also claimed for:

a) special damages;

b) contractual interest or, alternatively, the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;

c) an order for termination of the leases;

d) mesne profits for the wrongful possession of the apartment units at issue from June 30, 2010 onward; and

e) costs.

[14] I set out in further detail the procedural history of this matter up to the hearing of the summary trial for Action #2 in my reasons for judgment:

> [44] The history of this case involves two separate proceedings that have spanned the past two years. The initial action was actually brought by the defendants to this matter.

[45] On August 19, 2010, the leaseholders filed a notice of civil claim against the owners [Action #1]. …

[47] Over the course of late 2010 and early 2011, letters were exchanged between the parties on the issues of their availability for a hearing and the adequacy of the particulars pled.

[48] On April 27, 2011, the owners filed a notice of application to strike or dismiss this action. The hearing of this application took place from May 11 - 13, 2011. In this hearing, the leaseholders relied on an unfiled proposed further amended notice of civil claim.

[49] Mr. Justice Harris (as he then was) delivered his reasons for judgment on June 15, 2011 (2011 BCSC 778). The action as a whole was stayed, pending further court order and resolution of the best procedure to adjudicate the issues. He struck the claims for breach of fiduciary duty, negligent misrepresentation and breach of duty to warn in the amended notice of civil claim, but they were not dismissed.

[50] Harris J. was not satisfied that there was no genuine issue for trial in respect of the allegation of negligent design and construction. The claims for breach of contract and negligent maintenance were stayed in the context of this action. He determined that it was wrong to reach conclusions on the remainder of the issues in this interlocutory context.

[51] On September 13, 2011, Harris J. granted leave to the owners to commence a new action. On September 20, 2011, the owners filed a notice of civil claim against the leaseholders [Action #2]. …

[53] The so-called majority defendants responded on October 19, 2011. They claimed that they did not owe any amount to the plaintiffs, either for the repairs, the special assessment or the operating expenses. This position was taken on the basis of allegations regarding the improper design and construction of the buildings, maintenance failures, imprudent and unreasonable operating expenses and failure to maintain an adequate contingency reserve fund.

[54] Even if it was determined the defendants owed the plaintiffs either for the repairs, the special assessment or the operating expenses, the defendants claimed they were entitled to set off damages as a result of contractual, tortious and fiduciary duty breaches. They were also entitled to relief from forfeiture to their interests in Sussex Square pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (*Law and Equity Act*) as well as a declaration that their leases has not yet expired.

[55] On December 8, 2011, the plaintiffs advised the defendants of their intention to proceed by way of summary trial.

[56] On December 20, 2011, the defendants filed an amended response to civil claim.

[57] The plaintiffs filed a notice of application on January 16, 2012 for the amended response to civil claim to be dismissed or, in the alternative, struck, including the claims for breach of fiduciary duty, negligence, breach of contract and failure to comply with regulatory requirements. They also requested an order that if the defendants sought to amend their pleadings

> again, that they would require consent of the parties or leave of the Court. In the alternative, the plaintiffs sought particulars for the nature and dates of the alleged breaches of duty and contract. They also sought summary judgment against several defendants.
>
> [58] On February 13, 2012, the owners applied for an order and a declaration that each of the defendants was liable for breach of contract and that the owners were entitled to general damages and special damages.
>
> [59] On April 18, 2012, Harris J. delivered his reasons (2012 BCSC 564) on the application for summary judgment brought by the plaintiffs for an order striking and dismissing the claims by the defendants.
>
> [60] The defendants had consented to striking and dismissing breach of fiduciary duty, negligent design and failure to comply with regulatory requirements.
>
> [61] In his reasons, Harris J. was of the view that a summary judgment was not an appropriate forum to resolve the difficult questions regarding the legal relationships between the parties and their effect on the claims. The matter was more appropriately resolved at the summary trial.
>
> [62] Harris J. dismissed the plaintiff's application that the claim for breach of contract be struck or dismissed. He also declined to strike alleged implied terms in the contract, in view of past warnings from the Court of Appeal against summary determination in the context of inherently complex litigation (citing as an example *Mayer v. Mayer*, 2012 BCCA 77). Nor could he conclude that no genuine issue for trial arose out of whether a tortious duty existed to maintain the building. He was also of the view that it was too early to particularize the specifics of the alleged breaches given the potential length of time over which they had occurred.
>
> [63] Based on these findings, Harris J. concluded it was also premature and unjust to grant judgment.
>
> [64] The application to strike the affidavits of Mr. Mazur, Mr. Veale and Mr. McArthur was brought by the plaintiffs on April 24, 2012. On that same day, the plaintiffs applied for the claims of set off in property damage, loss of rental income and relief from forfeiture be dismissed.
>
> [65] The majority defendants applied for Mr. Gallant and Ms. Williams to attend cross-examination and disclose all documents relating to their reports on April 30, 2012. They also requested that portions of the affidavits of Mr. Tolzmann, Mr. Rashid and Mr. Tartaglia be struck. On that same date, they withdrew their set off claim defences for loss of rental income, damages to personal property and loss in the value of their suites.
>
> [66] Finally, on May 28, 2012, the majority defendants sought to re-open their case and amend their response to civil claim.

[15] The summary trial proceeded in May and June 2012.

[16] I found for the plaintiffs and concluded the plaintiffs did not breach any express or implied duty to maintain or repair the buildings at Sussex Square. I was

not convinced that there was a duty on a reasonable owner of a wood framed building with face-sealed or concealed barrier design constructed in the 1970s with no evidence of damage caused by water ingress to retain a building envelope specialist to perform an assessment. Nor was it proved that the plaintiffs breached this standard of care.

[17] The defendants failed to prove that the plaintiffs did not follow standard practice in maintaining the contingency reserve fund or that they breached any duty (express or implied) to maintain an adequate contingency reserve fund.

[18] The evidence upon which the defendants relied to prove that phase 1 costs were too high was based upon an estimate, as the majority defendants' expert Mr. McArthur acknowledged. That evidence could not support a conclusion that a significant amount should reasonably be deducted from the plaintiffs' claim for debt owed.

[19] In respect of the claim that some of the phase 1 work was being redone in phase 2, the evidence in support of that allegation was anecdotal and insufficient.

[20] I addressed the plaintiffs' debt claim in respect of phase 1 only and did not consider the set off claim for phase 1 costs against phase 2.

Special Costs

Legal Framework

The Traditional Approach to Costs Awards

[21] The traditional rule for the award of costs is that costs should follow the event: *Catalyst Paper Corp. v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 19. The policies that underpin this approach were discussed by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 at para. 26:

> Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation

> expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

[22] The *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] set out an overarching principle for the assessment of costs: what is considered proper and reasonably necessary to conduct the proceedings: R. 14-1(2)(a), and (3)(a).

[23] The assessment of costs is not a mathematical exercise: *Davies v. Clarington (Municipality)*, 2009 ONCA 722 at para. 52.

[24] Together, these principles ensure predictability in the award of costs, reasonableness in their assessment and efficiency in their disposition. Furthermore, it can be inferred from these principles that the disposition of costs was never intended to be the focus of litigation; costs are a secondary matter to the primary issues put before the court for consideration.

The Court's Inherent Jurisdiction to Award Costs

[25] The award of costs falls within the court's inherent jurisdiction to control its process. This rule extends to special costs as well. The Court of Appeal held in *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 14 B.C.L.R. (3d) 201 (C.A.) at para. 218 that this jurisdiction is also found under what is now R. 14-1(1) of the *Rules*.

[26] The trial judge further retains inherent jurisdiction to assess special costs, although it is to be exercised sparingly since it falls under the purview of the Registrar pursuant to the *Rules*: *Buchan v. Moss Management Inc.*, 2010 BCCA 393 at paras. 29 - 30.

The Threshold for a Special Costs Award

[27] The award of special costs departs from the traditional approach to the award and assessment of costs.

[28] The leading authority for special costs in British Columbia is the Court of Appeal's decision *Garcia v. Crestbrook Forest Industries Ltd*. (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the court, determined that the threshold for awarding special costs is "reprehensible" conduct.

[29] *Garcia* was a wrongful dismissal case. The issues before the trial judge were the reasonable length of notice and whether exemplary or punitive damages should be awarded to Mr. Garcia on the basis that Crestbrook failed to pay the minimum statutory severance payment required. The trial judge held the reasonable notice period was eleven months, which Crestbrook appealed. The appeal was dismissed and the Court of Appeal invited the parties to make submissions on whether special costs ought to be awarded to Mr. Garcia.

[30] In the decision on special costs, Lambert J.A. noted that different terms had been used to describe the appropriate circumstances for awarding special costs. In particular, he drew attention to the finding of Madam Justice McLachlin (as she then was) in the Supreme Court of Canada decision *Young v. Young*, [1993] 4 S.C.R. 3 in regard to costs (with which the majority concurred) at 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[31] Lambert J.A. reviewed other decisions as well. He noted the discussion in *Leung v. Leung* (1993), 77 B.C.L.R. (2d) 314 (S.C.) at para. 5, where Chief Justice Esson (as he then was) observed that the term "reprehensible" was of wide meaning, capturing both scandalous and outrageous conduct as well as milder forms of misconduct deserving of rebuke. He also considered *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 305 (C.A.) at 309, which applied the standard of

"misbehaviour in the conduct of this litigation" that made the award of special costs a "desirable ... form of chastisement".

[32] Lambert J.A. decided to introduce clarity into the law of special costs by synthesizing the different variations on the standard for a special costs award into a single standard, that of reprehensible conduct. He held at para. 17:

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

[33] Lambert J.A. recognized that the meaning of "reprehensible" conduct was still quite broad. In order for a special costs award to be justified, the circumstances had to be exceptional. He continued at paras. 23 and 25:

> However, the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. ... Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.
>
> ...
>
> 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 in my opinion a combination which may well amount to reprehensible conduct sufficient to require an award of special costs.
>
> [Emphasis added.]

[34] Lambert J.A. identified a number of factors that together gave rise to the conclusion that Crestbrook had acted reprehensibly. The appeal had no prospect of success, yet the appellant had pursued it anyway. The appellant knew the litigation was a financial drain for the respondent. The appellant had also failed to promptly pay Mr. Garcia's termination payment and provide him with his record of employment, as required by law. The appellant also stalled in paying compensation to Mr. Garcia for his lost wages.

[35] Mr. Garcia was awarded special costs.

[36] In light of the factors considered in justifying the award of special costs in *Garcia*, both pre-litigation conduct and conduct in the course of litigation will be considered when determining whether to award special costs. Nevertheless, awarding special costs for pre-litigation conduct has proved to be a somewhat unsettled issue in the case law post-*Garcia*. *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2009 BCCA 275 confirmed the general rule that special costs are awarded only with respect to misbehaviour in the conduct of litigation, although there may be circumstances where special costs will be awarded for reprehensible conduct giving rise to the litigation. In that latter circumstance, the conduct must be capable of founding a cause of action (para. 30).

[37] More importantly, *Garcia* emphasizes that the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

Application of the Reprehensible Standard

[38] Despite Lambert J.A.'s effort to clearly articulate the threshold for awarding special costs in *Garcia*, it is at times difficult to apply this standard. As the legal concept of "reprehensibility" captures such a wide range of misconduct, and special costs awards are determined on a case by case basis, it is sometimes challenging to pinpoint the outer limits of what is reprehensible. Consequently, special costs jurisprudence has become quite unwieldy, in my view. I consider that some of the

cases where special costs have been awarded do not exhibit the exceptional element required.

[39] Nevertheless, the British Columbia Court of Appeal has generally been consistent in finding that awards of special costs are limited to exceptional circumstances. It is this exceptional element ("something more") that can bring the law of special costs into focus.

[40] I have identified and summarized a number of Court of Appeal decisions as well as several decisions of this court to justify this proposition and to aid the court in determining whether special costs are merited in the circumstances.

[41] I have attempted to review this jurisprudence in thematic groups. These thematic groups do not attempt to impose a categorical approach upon special costs awards, although it may be helpful as a guide when faced with similar factual circumstances.

(a) Meritless Claims *and* Improper Motive

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

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

[44] In *Mattson v. ALC Airlift Canada Inc.* (1996), 68 B.C.A.C. 228, the court declined to vary a special costs award in the third party's favour in view of the defendant corporation's misconduct. The court found there were ample grounds to conclude special costs were justified in the circumstances. The defendant had pursued baseless third party claims even after its own corporate officer had

expressed support for the opposing party's position. These claims unnecessarily prolonged the trial and imposed substantial legal costs on the third party. The defendant had also litigated the issue of taxing special costs, forcing the third party to hire fresh counsel.

[45] In *Solex Developments Co. v. Taylor (District)* (1998), 60 B.C.L.R. (3d) 53 (C.A.), Madam Justice Southin upheld the order of special costs but not for the reasons found by the trial judge. The trial judge held that Solex had "surreptitiously" collected evidence with the object of enjoining the construction and operation of the defendant's plant. In Southin J.A.'s view, persisting with a judicial review claim which affects someone's private right that is bound to fail may amount to "misconduct in litigation" (para. 27). This misconduct, combined with "material non-disclosure" to the trial judge, was sufficient to justify the order of special costs (para. 28).

[46] In *Olson (Guardian ad litem) v. Hoar*, 2009 BCCA 533, the Court of Appeal found there was no error in principle and no injustice resulting from the trial judge's award of special costs. The trial judge found that the allegations of fraud and misconduct against the health practitioners and the Office of the Attorney General were made without foundation. The trial judge also found that the lawsuit was a collateral attack to discredit the DNA findings made by a laboratory with the aim of bolstering the plaintiff's claim in relation to a paternity dispute.

[47] In *Ahluwalia v. Richmond Cabs Ltd*., [1994] B.C.J. No. 1552, 28 C.P.C. (3d) 226 (S.C.), Madam Justice Newbury (as she then was) framed the question as follows: "whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court" (para. 5). She held that a special costs order was warranted in the circumstances, noting that 18 plaintiffs had advanced allegations of fraud and deceit and testified to facts that were found to be untrue. They had delayed the process, had exerted pressure on the defendant outside the courtroom

and had refused to abide by the orders and rules of the court. Newbury J. characterized their conduct as an abuse of the court's process (para. 8).

[48] In *Hung v. Gardiner*, 2003 BCSC 285, Mr. Justice Joyce expounded upon the necessary proof for establishing reprehensible conduct:

> [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations: [citations omitted.]

[49] Joyce J. dismissed the claim for special costs, holding the plaintiff had not pursued her claims for an improper motive. (*Hung* was relied upon in *Cimolai v. Hall*, 2007 BCCA 225 at para. 68).

[50] A case that exemplifies what I consider to be the "milder" end of the spectrum of reprehensible conduct is *Crown West Steel Fabricators v. Capri Insurance Services Ltd.*, 2003 BCCA 268. This case involved steel fabricating facilities that were destroyed by fire. The plaintiffs were the tenant and the owner of the facilities. They sued the insurance broker and its employee responsible for their account for failing to recommend adequate insurance coverage. The plaintiffs for the most part succeeded at trial: the insurance company and the employee were found contributorily negligent. The tenant plaintiff, however, was also found contributorily negligent and appealed the contributory negligence apportionment of its damages. The defendants cross-appealed the trial judge's conclusion that the owner had suffered uninsured demolition and debris removal costs and expense as there was no evidence to support such a finding. The appeal was dismissed and the cross-appeal allowed, referring the matter back to the trial judge for the parties to tender further evidence on whether the owner sustained uninsured costs (2002 BCCA 417). After the appeal was decided, the plaintiff owner consented to the dismissal of its claim in respect of debris removal costs. The defendants sought special costs in a

separate application to the Court of Appeal on the basis the claim was unfounded. The Court of Appeal found that the plaintiffs had an obligation to discover some evidence to support the claim before advancing it (para. 5). Special costs were awarded to the defendants.

[51] An ill-informed position will not always attract special costs. An extreme example is *Webber v. Dulai Roofing Ltd.*, 2006 BCCA 501. The brothers, Singh and Jhajj, owned property together. Dulai Roofing obtained judgment against the brothers, which was registered against their interest in the property. Singh and Jhajj subsequently entered into an agreement with the plaintiffs to sell the property. Dulai refused to cancel the registration of its judgment against the interest in the property. The plaintiffs then sought their deposit back, which Singh and Jhajj refused. The plaintiffs commenced an action, naming the brothers and Dulai as defendants. However, no claim in fact lay against Dulai; the claim properly lay against the brothers. Dulai appeared at the summary trial and maintained that it was entitled to the full satisfaction of its judgment out of the sale. The trial judge found in favour of the plaintiffs. He awarded special costs to the plaintiffs against the brothers and Dulai, apportioning 40% of those costs against Dulai. He also ordered that Dulai's judgment against the brothers' interest in the property be cancelled and that an amount of the proceeds of sale be paid into court to secure Dulai's claim. Dulai appealed.

[52] Mr. Justice Lowry for the Court of Appeal commented that the award of special costs against the brothers was unusual given that neither had opposed the relief sought. He further noted that the trial judge had awarded special costs on the basis that Singh, Jhajj and Dulai caused the plaintiffs' expense and inconvenience, without going so far as to characterize that conduct as reprehensible. No cause of action lay against Dulai, even though it did appear at the hearing of the matter. Lowry J.A. continued:

> [18] Certainly, the mere fact that Dulai took a position that proved to be legally ill-founded and that it sought to challenge Jhajj's rather unique 1/100 registered interest as being his true beneficial interest was in no way conduct that was reprehensible and deserving of rebuke. The three authorities on

> which the judge relied in particular speak to the situation where litigants are careless or indifferent with respect to the facts on which they have advanced unmeritorious positions with serious repercussions. The considerations in this case are not the same where, with the benefit of legal advice, Dulai simply took a position that proved not to be sound. There is nothing in its conduct justifying an award of special costs against it.

(b) Abuse of the Court's Process

[53] Abusing the court's process will amount to reprehensible conduct.

[54] In *Chudy v. Merchant Law Group*, 2009 BCCA 93, the Court of Appeal upheld the trial judge's decision to award special costs for the following reasons:

> [9] The appellant has not demonstrated error on the part of the trial judge in his conclusion that the conduct of the appellant during this litigation, both pre-trial and during the trial, was reprehensible as that term is used in Garcia. The evidence abundantly supports the conclusion. The appellant brought pre-trial motions that were without merit; it brought a specious application, based in part on false evidence, challenging the jurisdiction of the court to try the matter; it avoided a peremptory trial date by adding Mr. Shaw as a third party but did not require him to file a defence, did not examine him for discovery, did not cross examine him at trial with respect to its allegations against him, and in a lengthy written submission at the end of the trial, did not refer to its claim over against Mr. Shaw (the trial judge tersely dismissed the third party claim); it brought a motion (returnable on the date scheduled for the hearing of a R. 18A application for a summary trial brought by the respondents) for removal of the respondents' counsel on ridiculous grounds, a tactic which the trial judge at para. 236 stated, with the benefit of his unique perspective of the appellant's entire conduct, "was not only without merit but was calculated to prevent the Rule 18A application from proceeding as ordered"; on the hearing of the respondents' R. 18A motion, Mr. Merchant produced a large number of documents, not previously disclosed and not sworn to, in support of his position that the action could not be determined on a summary basis; and, finally but of most significance, Mr. Merchant offered evidence at trial that the trial judge determined was false and misleading.
>
> [10] As to the final point, the respondents refer to Brown v. Lowe, 2002 BCCA 7, in which Southin J.A. said (at para. 149): "To give false evidence relating to the matters in question at any stage of the proceedings is a grave matter. By "false", I do not mean "erroneous"; I mean knowingly untrue." The falsity of Mr. Merchant's evidence is commented on by the trial judge at several points in his judgment and is referenced by the majority judgment in this court. There is no need to particularize it here.
>
> [11] The evidence as a whole clearly supports the conclusion of the trial judge that the legal basis for the awarding of special costs was established in this case.

[55] *Chudy* could fall under any of the thematic categories for special costs awards as an example of outrageous conduct.

[56] In *Holland (Guardian ad litem of) v. Marshall*, 2010 BCCA 562, the court considered an application for review of an appellate chambers order declaring the appellant and her son to be vexatious litigants. In dismissing the application, the court awarded special costs, noting the appellant's "spurious allegations" against the chambers judge, an expert witness and counsel as well as her efforts to seek recusal of members of the division on "specious grounds".

[57] Contempt orders have also consistently been held to attract special costs. A special costs award serves the purpose of chastising the contemnor and providing indemnity for the complainant: *Telus Communications Inc. v. Telecommunications Workers Union*, 2008 BCCA 144 at paras. 30 - 31.

(c) Sharp Practice Derogating from the Rules of Professional Conduct and the Rules of Court

[58] Similar to meritless claims, sharp practice alone will not result in an award of special costs.

[59] In *Canadian Resort Development Corp. v. Swaneset Bay Golf Course Ltd*., 2000 BCCA 597, the Court of Appeal set aside the trial judge's award of special costs. The basis for the special costs award was the defendants' failure to withdraw allegations until the second day of trial. The trial judge found that those allegations were in "the nature of dishonesty" and that there was no evidentiary basis for them. The trial judge also inferred that this was a tactical maneuver to intimidate the plaintiff and deter him from prosecuting his claim. The Court of Appeal held that the evidence only suggested confusion on the part of counsel, not improper motive. Failure to withdraw in a clear and timely fashion alone was insufficient to merit an award of special costs.

[60] In contrast, sharp practice did merit special costs in *Johal v. Dosang* (1998), 48 B.C.L.R. (3d) 236 (C.A.). The Insurance Corporation of British Columbia (ICBC)

served as counsel for the defendant in a motor vehicle collision. On the day before the trial was to begin, ICBC filed third party notice, alleging the defendant had failed to cooperate with ICBC in defending the action. It also filed a new statement of defence denying liability, unlike the initial statement of defence which admitted liability. That notice had not yet been served on the defendant as of the first day of trial. It was also evident that ICBC had not taken any steps to meet with the defendant beforehand, which was particularly problematic given the defendant's first language was not English. On the first day of trial, ICBC sought to withdraw as counsel for the defendant on the basis of its third party notice. The trial judge adjourned the trial and discharged the jury panel. He also awarded special costs in favour of the plaintiff for the costs thrown away by reason of the adjournment. In doing so, he found ICBC's actions were "high-handed" and "unreasonable". ICBC appealed, alleging that the trial judge had misapprehended the standard for an award of special costs. The Court of Appeal rejected that argument as an excessively literal reading of the trial judge's decision. Considering the whole of the trial judge's reasons, the Court of Appeal found the trial judge was justified in finding ICBC's conduct merited an award of special costs.

[61] The distinctive factor in *Johal* is that the conduct of counsel was aimed at prejudicing the defendant. The derogation from the rules of court was also more egregious.

[62] A similar result was reached in *Grewal v. Nijjer*, 2011 BCCA 505. In that case, the court upheld the trial judge's special costs award against the appellants, finding at para. 17: "[t]he Nijjers put Mr. Grewal to much trouble and expense in striving to obtain proper document discovery and particulars, only to be met with what the judge found to be 'ongoing delay and obfuscation'".

[63] Another example is *Commonwealth Trust Co. (Re)*, 2012 BCCA 138, where the court upheld the award of special costs against the appellants. The chambers judge had awarded special costs, considering a number of factors. The appellants had made allegations of serious professional misconduct against the liquidator and

its counsel, including breach of trust and misleading the court. The appellants had also argued the respondents were not entitled to fees. The appellants wasted the court's time in cross examination, raised trivial issues and mischaracterized the evidence. The chambers judge further based her decision to award special costs on the Registrar's finding that the delay in the liquidation was solely attributable to the appellants.

[64] Poor advocacy alone will not attract special costs. In *Gichuru v. Smith*, 2010 BCCA 352, the Court of Appeal allowed the appeal of a special costs order against the plaintiff, granted on the basis of the "woeful inadequacy" of the plaintiff's pleadings and, consequently, the defendants had to bring an application to strike and dismiss the claims. The chambers judge had found that as the plaintiff was a lawyer and was capable of drafting proper pleadings, he should bear the full cost burden of the defendants. In overturning this decision, the Court of Appeal noted the chambers judge had not made any reference to the law of special costs; she had merely granted a lump sum cost award that amounted to special costs. Nor had she referred to Mr. Gichuru's conduct as reprehensible. The Court of Appeal concluded the conduct of the appellant was not reprehensible and the fact that his pleadings were "woefully inadequate" did not justify an award of special costs (para. 25).

(d) Misleading the Court

[65] Fraudulent claims and untruthful testimony are a particularly reprehensible form of conduct deserving of rebuke.

[66] An example of fraud is *Insurance Corporation of British Columbia v. Katinic*, 2003 BCCA 147. The plaintiffs brought personal injury claims for motor vehicle accidents, which were tried by a judge and jury. ICBC brought a separate action alleging that various persons had been party to deceiving the court with fraudulent claims for accidents that did not happen. The trial judge awarded special costs in ICBC's fraud actions but declined to award special costs in the negligence actions commenced by the plaintiffs.

[67] ICBC appealed, seeking special costs for the negligence claims as well. The Court of Appeal held that the fraudulent foundation of the negligence claims was sufficient to attract an order of special costs. By commencing fraudulent proceedings, the plaintiffs were engaged in conduct that perverted justice. The court further found it was unnecessary for there to be some other form of reprehensible conduct in addition to the fraudulent basis of those claims to justify an award of special costs.

[68] Another example of deceiving the courts is found in *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 (leave to appeal refused, [2011] S.C.C.A. No. 442). This case involved a complex series of actions in relation to a hotel in Vancouver. The hotel went into receivership and a group of investors incorporated to protect their investment. A struggle ensued regarding who owned portions of the hotel. In one action, the plaintiff sought specific performance of the terms of a settlement agreement it had reached with Dr. Louie to exercise an option to purchase some of the units in the hotel he owned. A second action was commenced by the Nomani Company for a declaration that it owned a valid leasehold and right of first refusal to Dr. Louie's units. The plaintiff filed a counterclaim that Mr. Nomani had induced Dr. Louie to breach the settlement agreement and that Mr. Nomani and Dr. Louie had conspired with one another. In the settlement agreement action, the court ordered specific performance of the option to purchase the lots owned by Dr. Louie and for Dr. Louie to pay damages. Special costs were awarded against Mr. Nomani and his company. Special costs were also awarded against Mr. Nomani and his company in the second action.

[69] One of the grounds of Mr. Nomani's appeal was that special costs could not have been awarded against him and his company in the first action as they had not been parties to that action. The Court of Appeal held that the court enjoys inherent jurisdiction to award special costs against a non-party. It further observed that a person "who attempts to perpetrate a deceit on the court is guilty of reprehensible conduct" (para. 125). The court noted that the trial judge justified the award of special costs on the basis that Mr. Nomani was primarily responsible for

manipulating the evidence to mislead the court with respect to the issue of whether the right of first refusal agreements were formed before the settlement agreement. Furthermore, he was found to have attempted to hide Dr. Louie's funding of four separate actions commenced separately against the plaintiff. The Court of Appeal held that the two actions were "inextricably linked" and that the fabrication of the right of first refusal agreements was central to both actions, justifying an award of special costs in each action.

[70] The Court of Appeal has cautioned that an untruthful witness will not always attract an award of special costs. In *Unternaher v. Wheat Sheaf Inn Ltd*. (1999), 114 B.C.A.C. 299, the court allowed the appeal of the trial judge's decision to decline to award special costs. The trial judge had found that while the defendant's employees had concocted their evidence on issues that directly impacted the question of liability, the defendant had not acted reprehensibly. The Court of Appeal cautioned that its decision was not to be taken as authority for the proposition that special costs should be awarded simply because a witness is untruthful, although in this particular case it was merited as the testimony was designed to defeat the plaintiff's claim. I extract from this reasoning that there must be evidence of some improper motive at play.

[71] In *Marchen v. Dams Ford Lincoln Sales Ltd*., 2010 BCCA 29, the Court of Appeal upheld a special costs award made on the basis that shortly after termination, the employer began to lay the groundwork for a false defence and persisted with this defence throughout the trial, which was ultimately rejected by the trial judge. The Court of Appeal rejected the appellant's submission that an award of special costs has a chilling effect on the ability of a defendant to advance a legitimate defence. It found there was no question that a defendant is entitled to advance a defence in good faith. In this case, the defence advanced was designed to mislead the trial judge.

[72] In contrast, in *Grewal v. Sandhu*, 2012 BCCA 26 (leave to appeal refused, [2012] S.C.C.A. No. 120), the defendant appealed the award of special costs against

him. The trial judge had been satisfied that an award of special costs was appropriate on the bases that the defendant had ignored his professional and fiduciary duties, that the plaintiff could not be fully compensated otherwise and that the defendant had lacked candour and had attempted to conceal evidence. The Court of Appeal found this award to be an error in principle. Special costs are not compensatory ─ rather, they serve a punitive purpose (para. 106). The Court of Appeal noted that two awards of special costs had already been made against the defendant in respect of his pre-trial conduct. The Court of Appeal further held that it was improper to base a special costs award on the acceptance or rejection of testimony, reasoning at para. 107: "[i]f it were otherwise, instead of being an extraordinary measure, special costs could be imposed whenever credibility was in issue."

Discussion of the Law of Special Costs

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

a) the court must exercise restraint in awarding specials costs;

b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;

c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;

d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the

court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;

e) special costs can be ordered against parties and non-parties alike; and

f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[74] I will also comment upon the procedure of special costs applications.

[75] The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits: R. 1-3(1). This includes, so far as practicable, that the proceeding be conducted in a manner that is proportionate to the amount involved, the importance of the issues in dispute and the complexity of the proceeding. Costs are not the central focus of litigation. The disposition of costs should be conducted in a manner that recognizes their secondary importance. As such, the court's examination of whether to award special costs ought not to require, as an example, a detailed examination of the correspondence record between the parties to determine whether they conducted themselves properly.

Position of the Parties

The Plaintiffs

[76] The plaintiffs provided a lengthy argument, along with substantial affidavits and exhibits, to demonstrate the conduct of the litigation. I have summarized their position but I do not intend to address the details of their submission.

[77] As noted, the plaintiffs assert that the majority defendants' conduct throughout this litigation has and continues to be reprehensible. Specifically, the plaintiffs assert that:

(a) the majority defendants advanced unmeritorious cross-claims and proceeded with an indifference to the deficiency of the cross-claims throughout the litigation of the dispute. They ignored and disregarded the

plaintiffs' repeated warnings regarding those deficiencies. They also ignored the plaintiffs' warnings that they intended to seek special costs if the majority defendants proceeded with such claims;

(b) the majority defendants advanced and proceeded with claims for which there was no evidence; and

(c) the majority defendants conducted the litigation in a manner that delayed and greatly increased the cost of defending the invalid cross-claims by engaging in the following reprehensible, obstructive and improper conduct:

(i) reprehensible pre-litigation conduct;

(ii) unreasonably refusing to make admissions;

(iii) relying on improper, misleading and unsatisfactory affidavits;

(iv) refusing to provide proper document disclosure; and

(v) refusing to attend examinations for discovery and respond to outstanding requests from examination for discovery.

The Majority Defendants

[78] The majority defendants assert that they did not conduct themselves in an outrageous, scandalous or reprehensible manner. There is nothing in the majority defendants' conduct that warrants the chastisement or punishment of the Court. This is not a case where the Court should exercise its discretion to award special costs.

Are the Plaintiffs Entitled to Special Costs?

[79] The plaintiffs have demonstrated that the majority defendants may have contributed to some delay, resulting in an increase in the costs in these proceedings, but I am not convinced that their conduct is reprehensible.

[80] I found that, on the evidence, the majority defendants' cross-claims were not proven but I do not consider their conduct in pursuing those cross-claims meets the

threshold of reprehensibility. It is well-settled that meritless claims alone will not justify an award of special costs. The majority defendants' claims were not obviously unfounded, reckless, made out of malice or an improper motive. They did not engage in a collateral attack.

[81] Evidence may have been lacking with some of the allegations. I cannot find that this deficiency in the majority defendants' claim merits an award of special costs with respect to the conduct of Action #2. In part, that is why the procedure of summary trial was pursued.

[82] The plaintiffs also point to withheld admissions, denied facts, delayed pre-trial procedure, non-attendance at examination for discovery and deficient document production. These issues do not necessarily give rise to the inference of obstructive conduct. Given the number of parties involved, these issues could have easily arisen from problems of communication and scheduling on both sides. Significantly, none of these alleged procedural deficiencies resulted in "material non-disclosure".

[83] The plaintiffs point to affidavit evidence containing hearsay. They further allege that the affiant lacked knowledge of the facts sworn to and failed to understand the meaning of some of the terms in their sworn affidavit. The plaintiffs characterize these issues as "misleading". Based on the case law reviewed, the meaning of misleading bears a far more sinister meaning, where the party intentionally seeks to affect the outcome of the litigation by falsifying evidence or committing perjury, as examples.

[84] Nor do I find the majority defendants conducted themselves in a manner that was reprehensible or deserving of rebuke. There is no basis for an assertion that the majority defendants conducted the litigation fraudulently or dishonestly. They did not engage in misconduct.

[85] The majority of defendants did not abuse the court's process. They did not conduct themselves in a high handed or unreasonable manner. They did not engage in obfuscation. They did not waste time by raising trivial issues or mischaracterizing

the evidence. They did not perpetuate a deceit on the Court or mislead the Court. Any errors on their part were purely procedural and did not create any substantial prejudice for the plaintiffs.

[86] The plaintiffs' submission in respect of special costs demonstrates exasperation and frustration with the majority defendants' positions but this too is not a foundation for awarding of special costs. Expense and inconvenience are not sufficient to attract an award of special costs. As stated in *Garcia*, something more would be required to justify special costs.

[87] The plaintiffs were successful in summary trial. Costs address that success, not special costs.

[88] The plaintiffs' application for special costs is dismissed.

Costs at Scale C

Legal Framework

[89] Appendix B of the *Rules* sets out the parameters for awarding costs pursuant to scale A, B or C, scales which relate to the level of difficulty of the matter litigated. Subsections 2(2) and (3) provide:

> (2) In fixing the scale of costs, the court must have regard to the following principles:
>
> (a) Scale A is for matter of little or less than ordinary difficulty;
>
> (b) Scale B is for matters of ordinary difficulty;
>
> (c) Scale C is for matters of more than ordinary difficulty.
>
> (3) In fixing the appropriate scale under which costs will be assessed, the court may take into account the following:
>
> (a) whether a difficult issue of law, fact or construction is involved;
>
> (b) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[90] In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd*., 2010 BCSC 1494, Mr. Justice McEwan summarized the law as it applies to the determination of the appropriate scale of costs to be awarded under Appendix B and the factors that are relevant to a determination of the appropriate scale of costs at para. 6:

> (a) Length of trial;
>
> (b) Complexity of issues;
>
> (c) Number and complexity of pre-trial applications;
>
> (d) Whether or not the action was hard-fought with little or nothing conceded along the way;
>
> (e) The number and length of examinations for discovery;
>
> (f) The number and complexity of expert reports;
>
> (g) The extent of the effort required in the collection of and proof of the facts.

Position of the Parties

The Plaintiffs

[91] The plaintiffs submit that the summary trial took eight days, which they say is a very lengthy period of time for a summary disposition. The plaintiffs attempted to save hearing time and mitigate their costs by disposing of eleven other claims and cross-claims in summary judgment/striking applications in Actions #1 and #2. They also assert that the summary trial would have been longer if the majority defendants had not abandoned cross-claims at or immediately before the summary trial.

[92] The plaintiffs argue that the litigation was complex, because of the nature of the relationships between the parties, the number of parties and the majority defendants' conduct in bringing, maintaining and abandoning at the last minute unmeritorious cross-claims. The plaintiffs suggest that the pleadings are further indicative of the complexity of this matter as the majority defendants filed two separate responses to civil claim and two separate proposed responses to civil claim.

[93] In addition, the plaintiffs assert the parties advanced several different theories of liability on the basis of these complex and varied contractual arrangements that in

turn made the case difficult to manage, noting *Harbuz v. Capital Construction Supplies Ltd.*, 2011 BCSC 778 at paras. 22 - 25, and 50 where Mr. Justice Harris stayed the action as a whole pending further court order and resolution of the best procedure to adjudicate the issues.

[94] The plaintiffs say they commenced Action #2 in order to work towards a resolution of the dispute but the complexities in the litigation remained. Throughout Action #2, the majority defendants struggled to articulate the legal basis for their defences and cross-claims. They refer to my finding that it was unnecessary to determine the legal framework of the majority defendants' defences and cross-claims and that for purposes of determining the summary trial application, all of the legal claims were accepted. They argue that the legal issues brought a level of complexity to these proceedings that should merit an award for costs against the majority defendants assessed at scale C.

[95] The plaintiffs assert that a matter is more than ordinarily difficult if it involves a large number of parties and different bases of liability, as found in this case.

[96] The plaintiffs say that there were many complex pre-trial procedures, including applications for document discovery, attendance at examinations for discovery and clarification of the evidence. The majority defendants also brought several applications, including an application to cross-examine the plaintiffs' expert and an application for documents, which were both abandoned. The plaintiffs' application for summary judgment was particularly complex legally. The litigation was extremely hard fought with almost every issue, no matter how minor, disputed.

[97] The plaintiffs argue that the number and length of examinations for discovery and the number and complexity of expert reports also militates in favour of costs on scale C.

[98] Finally, the plaintiffs complain that the conduct of the majority defendants caused considerable difficulty in the collection and proof of the facts, relying on their submissions on special costs.

The Majority Defendants

[99] The majority defendants submit that the scale of costs for matters of ordinary difficulty, scale B, should apply unless a higher or lower scale clearly applies. They refer to the decision of Mr. Justice Johnston in *Meghji v. Lee*, 2012 BCSC 379 where he addressed the factors of length and complexity. Johnston J. emphasized that time spent did not equate with the level of difficulty of the issues at paras. 54 and 59:

> Measuring difficulty by length of trial can be an exercise in ambiguity: relatively straightforward issues assume complexity as a function of the time taken to explore them; conversely, the time spent exploring an issue, or, for example, cross-examining an expert on matters within his or her field of expertise, is not necessarily a function of the issue's difficulty. While counsel should be commended for briefing themselves so as to conduct knowledgeable cross-examinations of experts, they should not be rewarded for time spent scoring points in an exercise where the returns diminish by the hour.
>
> … Now, assuming that scale B represents ordinary difficulty, it should perhaps cover a broader range than ordinary difficulty did under the former rules. Otherwise, the range of "more than ordinary difficulty" becomes so broad that there is little on which to base a principled distinction of ordinary from more than ordinary.

[100] The majority defendants assert that this case was hard fought but that this does not justify costs at a higher scale. In *Mainland Sawmills Ltd. v. IWA-Canada Local 1-3567*, 2008 BCSC 454, the court considered the provisions in Appendix B in the former *Rules* as well as the individual factors enumerated above with respect to determining the scale of costs and concluded that despite a lengthy trial, many parties, pre-trial applications, examinations for discovery (though brief relative to the number of parties) and a hard-fought case, costs at scale B were nevertheless appropriate.

[101] It has been held that it is not reasonable to award costs at a higher scale where a question of law of greater than ordinary difficulty was raised by the court and counsel were directed to make submissions on that point: *Laurentian Pacific Insurance Co. v. Halama* (1991), 60 B.C.L.R. (2d) 190 at 205 (S.C.).

[102] In respect of the *Slocan* factors, the majority defendants say:

a) at only eight days (including the numerous applications that were heard during that time), the summary trial was not outside of ordinary length. This factor militates against an award of costs at scale C;

b) The essential nature of the case (breach of contract and negligence) was never unclear. The defences, cross-claims and the factual matrix underlying the leasehold interests were not novel;

c) the legal complexity of the relationships between the parties highlighted by Harris J. and the submissions made in response to the memorandum request of Harris J. do not weigh in favour of a higher scale of costs;

d) the plaintiffs list 11 "pre-trial procedures" and submit that "many" were complex. Many of the orders sought by the plaintiffs prior to the summary trial were in fact obtained by consent. Further, in the circumstances of this case, the number and complexity of pre-trial applications, including short discoveries, were of ordinary difficulty. This factor does not support an award of costs on scale C;

e) in the circumstances of this case, examinations for discovery were relatively brief despite the large number of parties. Therefore, this factor does not support an award of scale C costs;

f) the plaintiffs allege that the expert reports were long and detailed. However, Mr. Gallant's opinion was only 12 pages in length and Ms. Williams' opinion only six pages in length. Further, the attendance of only one expert for less than a half-day of cross-examination is not more than ordinary. The time spent familiarizing and reviewing expert reports to prepare rebuttal reports and the time spent conducting cross-examinations is of ordinary difficulty. In the circumstances, this factor militates against an award of costs at a higher scale;

g) the law is clear that costs may not be awarded on an increased scale as a result of misconduct in a proceeding; and

h) the rebuttal of evidence and collection of facts in this case was of ordinary difficulty. Therefore this factor also militates against an award of costs at scale C.

Are the Plaintiffs Entitled to Costs at Scale C?

[103] Applying the *Slocan* factors, I conclude as follows.

[104] The summary trial lasted eight days. While this is perhaps lengthy for a summary trial, it is obviously substantially less time than a trial could have taken. I find this factor to be neutral.

[105] I do not consider that this case was complex or novel. Counsel for the plaintiffs reiterated throughout their submissions at the hearing of this matter that the case was not complicated. It was a clear case concerning debt from the plaintiffs' perspective. Nor do I consider that the majority defendants' positions or cross-claims were legally complex. The factual complexity only resulted from the relationship between the parties that was developed over a significant period of time. I note that this case involves three plaintiffs and more than 170 defendants.

[106] In the course of this matter, several pre-trial procedures arose. However, most of those procedures related to the establishment of a process by which the matter could be heard and determined efficiently. Harris J.'s emphasis on establishing such a procedure was warranted and the time it took to do so was equally warranted.

[107] I agree with the majority defendants' counsel that the action was hard fought and that there was little or nothing conceded along the way. At the same time, I reiterate my comments about the worthiness of case management and the ability of the parties to have the matter heard by summary trial.

[108] Given the amount of money that was in dispute and the number of defendants involved, I consider the number and length of examinations was reasonable.

[109] The number and complexity of expert reports filed in this matter do not support an order for costs at scale C.

[110] Again, in the circumstances, I consider the effort expended by both parties was significant but in the proper measure.

[111] In all of the circumstances, I dismiss the plaintiffs' claim for costs at scale C.

Denial of costs

Legal Framework

[112] Rule 14-1(9) of the *Rules* provides that the court has residual discretion to deny a successful party costs to which it would otherwise be entitled. As the general rule is that "costs follow the event", the onus is on the party seeking to displace the usual rule to establish the basis on which the court should use its discretion to deny an award of costs. The discretion must be exercised on a principled basis: *Grassi v. WIC Radio Ltd*., 2001 BCCA 376 at para 24.

[113] The trial judge may consider the conduct of the party not merely during the course of the proceedings but also leading up to or contributing to the litigation: *R.L.L. v. R.L.*, 2001 BCCA 386 at paras. 31 - 32.

Position of the Parties

The Majority Defendants

[114] The majority defendants submit that the plaintiffs' obstructive pre-litigation conduct considerably delayed the hearing of the dispute on its merits and substantially increased their costs. They argue that the plaintiffs should be denied some or all of their costs relating to the summary trial.

[115] The majority defendants' refer to the plaintiffs' refusal to honour agreements regarding the termination of the leasehold interests and refusal to cooperate in establishing a streamlined and efficient process to have the common factual and legal issues determined. They submit that this lack of cooperation considerably delayed the hearing of the dispute on the merits and substantially increased the

costs incurred. They assert that the plaintiffs focused on technical pleadings-related issues in the face of reasonable compromise proposals from the leaseholders in order to have the merits of the dispute heard and determined.

[116] The majority defendants say that this approach continued into Action #2. The plaintiffs focused on pleadings-related issues, avoiding the real issues. Nevertheless, the dispute was going to be determined on the merits regardless of any alleged deficiencies in the pleadings.

The Plaintiffs

[117] The plaintiffs take great exception to the majority defendants' position that they be denied some or all of their costs of the summary trial. They argue that the majority defendants' position in this regard is reprehensible conduct.

[118] They argue that the majority defendants' submission is an unreasonable position. In support of this position, the majority defendants' have made unreasonable and unfounded allegations. They have presented a distorted and misleading account of events in Action #2 as well as prior litigation. They have mischaracterized the plaintiffs' submissions and argue on the basis of incomplete and misleading facts.

[119] The plaintiffs assert:

> Much of the majority defendants' submissions constitute an unwarranted attacked on the conduct of the plaintiffs based on an incomplete or distorted account of what actually occurred in the litigation.

Should the Plaintiffs be Denied Costs?

[120] I have considered the position of the majority defendants and the affidavits and evidence tendered in support of their argument. I do not consider that this evidence forms a basis to deny the plaintiffs' costs of the summary trial. My findings in this respect mirror my findings with respect to the plaintiffs' special costs application. The plaintiffs did not conduct themselves in a manner that was high handed, unreasonable or discreditable.

[121] There is no basis to depart from the usual rule that costs follow the event.

Liability for Costs

Positions of the Parties

The Plaintiffs

[122] The plaintiffs take the position that the majority defendants must be held jointly liable for costs. The plaintiffs argue that the normal practice in costs awards is to order joint and several liability against the defendants. The plaintiffs submit that where the unsuccessful parties have acted jointly in pursuing their litigation, those parties will be held jointly and severally liable for the successful party's costs. The successful party should not have to bear the burden of pursuing each unsuccessful party for their share of the costs award. The burden falls on the unsuccessful parties to account for the contingency of losing and seek contribution from one another.

[123] The plaintiffs submit that the majority defendants conducted the litigation completely in concert. The plaintiffs further argue that they should not assume the burden of recovering against each one of the majority defendants.

[124] In reply, the plaintiffs maintained that the majority defendants have not put forward any evidence to support their argument of impecuniosity.

[125] The plaintiffs also argued that further justification for ordering joint and several liability arises from the fact that the majority defendants commenced Action #1 and brought cross-claims in Action #2.

The Majority Defendants

[126] The majority defendants take the position that the Court should exercise its discretion to award costs severally on a "pro-rata" basis to avoid any unfairness resulting from enforcement of the costs award.

[127] The majority defendants concede that the normal practice is to order joint and several liability against all defendants for costs. Nevertheless, they argue that in the

circumstances, the majority defendants should not assume the burden of litigating amongst themselves over claims of excess amounts paid as there is a real risk of potential unfairness if liability for costs is held to be joint and several. They note that many, if not the majority, of the defendants are of limited means. The costs claims are also of large magnitude.

[128] At all times, the majority defendants were in the position of defending a claim, even though they commenced Action #1 and brought cross-claims in Action #2.

[129] The majority defendants propose that the Court apportion costs severally on a pro rata basis consistent with the respective leasehold interests of the majority defendants. This approach would be consistent with how the plaintiffs have charged the leaseholders' operating expenses historically and how judgment was granted on Westsea's debt claim, referring to my reasons at paras. 319 and 322.

Should the Majority Defendants be Held Jointly Liable for Costs?

[130] Despite the position of both the plaintiffs and the defendants, it is not so clear to me that the "usual" rule is that defendants are held jointly and severally liable for costs.

[131] I note Mark Orkin's text, *The Law of Costs*, 2nd ed., vol. 1 (Toronto: Canada Law Book, 2013) at 2-116 states that typically, costs are apportioned among defendants in the same proportion as their liability for damages. The court may apportion costs between defendants on the same ratio as the apportionment of liability. The court may also order joint and several liability.

[132] This statement of the law is different from that found in the short reasons delivered in *Pressler v. Lethbridge*, 2001 BCSC 694, where the court held that it was normal practice for the court to order joint and several liability against defendants for costs (para. 11). Three other decisions of our court have followed *Pressler.*

[133] The British Columbia Court of Appeal in *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282 affirmed that this was the "usual" rule with respect to

plaintiffs, without going so far as to extend this rule to defendants as well (para. 92). The Court of Appeal in *Giles* affirmed the approach set out in *King v. On-Stream, Natural Gas Management Inc*. (1993), 21 C.P.C. (3d) 16 (B.C.S.C.) for determining whether to depart from the usual rule with respect to unsuccessful plaintiffs. In that decision, Mr. Justice Shaw held, in relevant part:

> [18] I think the first point to consider is whether the plaintiffs in bringing this action acted jointly against the Bank. In my view they did. They clearly supported each other in the venture of the court action. The counsel they retained acted for all of them. The goal of imposing liability on the Bank was common to all the plaintiffs. It follows, in my view, that any liability that may be imposed upon the plaintiffs for costs should be joint and several liability, unless there is reason why the court, in the exercise of its discretion, should order otherwise.
>
> …
>
> [21] In the case before me the "event" was won by the bank and lost by the 92 plaintiffs. As I said above, I think it follows from the fact that the plaintiffs acted jointly against the bank, that the plaintiffs are each jointly and severally liable for the bank's costs, unless this court orders otherwise. The discretion to order otherwise must, of course, be exercised judicially.
>
> …
>
> [24] I agree with the bank's position. I do not think that the bank, having won the action, should be obliged to undertake proceedings against 92 separate parties, each for a minor portion of the costs. The trouble and the risk should, in my view, rest with the plaintiffs who acted jointly and lost the action. They had to organize themselves when they commenced the action. In doing so, they will have had the opportunity to address the risk of what lay ahead and to provide for the contingency of losing. As between themselves they have at law rights of contribution from each other which can, if exercised, reduce the financial outlay of any plaintiff who may be called upon by the bank to pay some or all of its costs. When I consider whether the burden of enforcing contribution by each individual plaintiff should rest upon the bank or upon the plaintiffs, I conclude that the plaintiffs as the losing parties should bear the burden.

[134] The majority defendants relied on *Amacon Property Management Services Inc. v. Dutt*, 2011 BCSC 181, which addressed a claim for joint and several liability against plaintiff tenants. A noteworthy case relied upon by the court in departing from the usual rule is *Empire Life Insurance Co. v. Krystal Holdings Inc*., [2009] O.J. No. 1095, 2009 CarswellOnt 1376 (S.C.), in which the Ontario Superior Court of Justice held:

41 In the case of *Society of Lloyd's v. Saunders, supra* at para. 5, the respondent argued that a joint and several award was justified because the appellants had joined together and were represented by the same counsel, and an unfairness would result if the Society of Lloyd's was compelled to pursue each appellant for their share of the costs. The Court of Appeal stated:

The costs against the appellants should be on a several basis, pro rata, not joint and several. Although the appellants joined together, they were defending a claim, not bringing one, as in the cases of *King v. On-Stream Natural Gas Management Inc*. (1993), 21 C.P.C. (3d) 16 (B.C.S.C.), *Lui v. Sung* (1995), 37 C.P.C. (3d) 44 (B.C.S.C.) and *Filipovic v. Upshall*, [1998] O.J. No. 4498 (Gen Div.). In *Bosse v. Mastercraft Group Inc*. (1995), 123 D.L.R. (4th) 161 (Ont. C.A.), where a joint and several order of costs was made against the plaintiffs who were defendants by counterclaim on a successful motion for summary judgment, the order was only made on consent, and in giving effect to that consent, this court noted how onerous and potentially unfair it could be. In my view, there is no basis for the appellants to be penalized with an unusually onerous costs order in this case.

42 In my view, the Court of Appeal has clearly signalled that applications for joint and several orders of costs in cases such as the one before me should be carefully scrutinized because they may well cause unfairness and impose an onerous burden on individual defendants. I also note the case of *Martens v. Acheson*, [1999] B.C.J. No. 2968 (B.C.S.C.) a similar situation to the one before me. In *Martens v. Acheson*, the plaintiffs sued the defendants as purchasers of certain units in a real estate venture. The cause of action was the same against all of the defendants, but for varying amounts, as some of the defendants had purchased more units than other defendants. It was argued that costs should be awarded on a joint and several basis. With reference to *Alberta Opportunity Co. v. Schinnour* (1991), 84 Alta. L.R. (2d) 198 (C.A.) Justice Skipp concluded that the costs should be apportioned severally and pro rata amongst the defendants.

43 I find that to award costs on a joint and several basis would create an unfair, disproportionate burden on the defendants, in contravention of the principle of proportionality. Rule 57.01(1)(0.b) and (a) together with *Boucher, supra*, make it clear that proportionality is a key principle in the awarding of costs. The average deficiency claim against a limited partner is approximately $25,000 plus accrued interest. If the costs award were awarded on a joint and several basis, each of the defendant's liability for costs could be roughly 20 times greater.

44 Finally, I emphasize that to award costs on a joint and several basis could create a significant impediment to the consolidation of proceedings with common issues. The plaintiff originally commenced 147 different claims. The statements of claim were later consolidated to avoid a multiplicity of proceedings on common issues in accordance with s. 138 of the *Courts of Justice Act*. One goal of consolidation is to reduce the overall legal costs of an action for all parties. If costs are awarded on a joint and several liability when proceedings are consolidated in circumstances such as these, individual defendants would resist the efficacy of consolidation to avoid the risk of disproportionate cost liability. Clearly, the principle is to reduce overall

> legal costs, not to cause individuals to risk excessive liability for legal costs, completely disproportionate to their own potential liability. I realize the burden that this result will place on the plaintiff; however, the unfairness that would be caused by the alternative is substantial and far outweighs the factors in favour of a joint and several costs award.

[135] *Empire* was not addressed by the Court of Appeal in *Giles*.

[136] In these circumstances, the majority defendants were defending the claim in debt, although they did bring cross-claims. *Giles* can be distinguished on that basis.

[137] Even if joint and several liability is the usual rule in these circumstances, I find it is just and reasonable to exercise my discretion and order several liability in accordance with the majority defendants' respective lease obligations. I exercise this discretion for the following reasons.

[138] This is a matter of debt arising pursuant to the lease obligations of the majority defendants. Ordering several liability is a practical form of relief for that type of claim.

[139] It would be an onerous burden upon the majority defendants to be held jointly liable for the entirety of the debt claim. I do not need evidence of impecuniosity to draw that inference in view of the size of the debt claim.

[140] Furthermore, I find that the whole purpose of bringing together the defendants in this claim was to make the proceeding more efficient for all parties involved. I am particularly persuaded by the reasoning in *Empire* at para. 44 that joint and several liability may become a deterrent for consolidation in similar circumstances where the risk of liability is too great and disproportionate to a singular defendant's liability. Similar principles underpin British Columbia's *Rules*.

[141] There will be several liability for costs, calculated at a pro rata share in accordance with the leasehold obligations of each majority defendant.

Conclusion

[142] The plaintiffs are entitled to their costs of the summary trial against the majority defendants at scale B. The majority defendants are severally liable for those costs, calculated on a pro rata basis in relation to specific leasehold arrangements. They are not entitled to special costs of costs at scale C.

[143] As both parties brought applications on costs and neither party was successful, each will bear their own costs.

[144] The plaintiffs have leave to make further submissions on the issue of their entitlement to "costs with the uplift" pursuant to s. 5 of Appendix B of the Supreme Court Civil Rules at a later date.

[145] I order several liability for costs, calculated at a pro rata share in accordance with the leasehold obligations of each majority defendant.

"Gropper J."