No. S-224444
Vancouver Registry

THE SUPREME COURT OF BRITISH COLUMBIA

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

BOOK OF AUTHORITIES (ADJOURNMENT)

Dennis Dawson James Aitken LLP Suite 770 – 666 Burrard Street Vancouver, BC V6C 2X8 Attention: Craig Dennis and Scott Dawson (Counsel for Stikeman Elliott LLP and Karen Fellowes, K.C.) Email: cdennis@djacounsel.com sdawson@djacounsel.com Tel: 604 659 9480 / 604 659 9487	FTI Consulting Canada Inc. 1450 – 701 W. Georgia St. (P.O. Box 10089) Vancouver, BC V7Y 1B6 Attention: Craig Munro and Hailey Liu (Counsel for Monitor) Email: craig.munro@fticonsulting.com hailey.liu@fticonsulting.com Tel: 604 757 6108 / 403 454 6040
Bennett Jones LLP Suite 2500 – 666 Burrard Street, Vancouver, BC V6C 2X8 Attention: David E. Gruber and Mia Laity (Counsel for Monitor) Email: gruberd@bennettjones.com laitym@bennettjones.com morenoe@bennettjones.com Tel: 604 891 5150	Dentons 20th Floor – 250 Howe Street Vancouver, BC V6C 3R8 Attention: Jordan Schultz and Eamonn Watson (Counsel for China Shougang Int.) Email: jordan.schultz@dentons.com eamonn.watson@dentons.com avic.arenas@dentons.com chelsea.denton@dentons.com Tel: 604 691 6452 / 604 629 4997

Harper Grey LLP Suite 200 – 650 W. Georgia Street Vancouver, BC V6B 4P7 Attention: Erin Hatch and Roselle Wu (Counsel for Canada Zhonghe Investments Ltd.) Email: ehatch@harpergrey.com rwu@harpergrey.com Tel: 604 895 2818	Fasken Martineau DuMoulin LLP Suite 1500 – 1055 W Georgia St. Vancouver, BC V6E 4N7 Attention: Kibben Jackson and Mihai Tomos (Counsel for Canadian Kailuan Dehua Mines Co., Ltd.) Email: kjackson@fasken.com mtomos@fasken.com Tel: 604 631 4786 / 403 261 7386
Lawson Lundell LLP Suite 1600 – 925 W Georgia Street Vancouver, BC V6C 3L2 Attention: William L. Roberts (Counsel for Accurate Court Bailiff Services) Email: wroberts@lawsonlundell.com Tel: 604 631 9163	Weiheng Law 16th Floor, Tower A, China Technology Trading Building No. 66 North Fourth Ring West Road, Haidian District, Beijing Attention: Wei Heng (Counsel for Feicheng Mining Co., Ltd.) Email: weiheng@weihenglaw.com Tel: +86 10 6264688
BLG Suite 1200 – 200 Burrard St. P.O. Box 48600, Vancouver, BC, Canada V7X 1T2 Attention: Ryan Laity and Jennifer Pepper (Counsel for Huiyong holdings (BC) Ltd.) Email: rlaity@blg.com jpepper@blg.com Tel: 604 632 3544	Fasken Martineau DuMoulin LLP Suite 2900 – 550 Burrard Street, Vancouver, BC V6C 0A3 Attention: Fergus McDonnell and Johanna Fipke (Counsel for Staray Capital Limited) Email: fmcdonnell@fasken.com jfipke@fasken.com Tel: 604 631 3220
McMillan LLP Suite 1500 – 1055 W. Georgia Street, PO Box 11117 Vancouver, BC, V6E 4N7 Attention: Daniel Shouldice (Counsel for HD Mining International Ltd.) Email: Daniel.Shouldice@mcmillan.ca Tel: 604 691 6858	Fraser Litigation Group Suite 1100 – 570 Granville Street, Vancouver, BC V6C 3PI Attention: R. Barry Fraser (Counsel for Qu Bo Liu) Email: bfraser@fraserlitigation.com hliu@fraserlitigation.com Tel: 604 343 3101

Department of Justice Canada British Columbia Regional Office 900 – 840 Howe Street Vancouver, BC V6Z 2S9 Attention: Aminollah Sabzevari and Julio Paoletti (Counsel for His Majesty the King in right of Canada) Email: aminollah.sabzevari@justice.gc.ca julio.paoletti@justice.gc.ca khanh.gonzalez@justice.gc.ca Tel: 587 930 5282	THC Lawyers Suite 2130, P.O. Box 321 Toronto, ON M5K 1K7 Attention: Ran He (Counsel for Feicheng Mining Group Co., Ltd.) Email: rhe@thclawyers.ca Tel: 647 792 7798
DLA Piper (Canada) LLP Suite 2800 – 666 Burrard Street Vancouver, BC V6C 2Z7 Attention: Colin D. Brousson and Jeffrey D. Bradshaw (Counsel for Petitioner) Email: colin.brousson@dlapiper.com jeffrey.bradshaw@dlapiper.com dannis.yang@dlapiper.com Tel: 604 643 6400 / 604 643 2941	McEwan Cooper Kirkpatrick LLP Suite 900 – 980 Howe Street, Vancouver, BC V6Z 0C8 Attention: Robert W. Cooper, K.C (Counsel for TaneMuhata Capital, Ltd. and Aref Amanat) Email: rcooper@mcewanpartners.com adhawan@mcewanpartners.com Tel: 604 283 7740
Nathanson, Schachter & Thompson LLP Suite 750 – 900 Howe Street, Vancouver, BC V6Z 2M4 Attention: Stephen R. Schachter (Counsel for West Moberly First Nations) Email: sschachter@nst.ca Tel: 604 662 8840	Canadian Dehua Living International Mines Corp. 310 – 1155 Pender Street West Vancouver, BC V6E 2P4
Bullmoose Mining Ltd. 3577 West 34th Avenue Vancouver, BC V6N 2K7	Canada Revenue Agency C/O N. Sindu (462-11) 9755 King George Blvd. Surrey, BC, V3T 5E6
CIBC-CEBA 400 Burrard Street Vancouver, BC V6C 3M5	

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RULE 4-3 – PERSONAL SERVICE

When documents must be served by personal service

(1) Unless the court otherwise orders or these Supreme Court Civil Rules otherwise provide, the following documents must be served by personal service in accordance with subrule (2):

(a) a notice of civil claim;

(b) a petition;

(c) a counterclaim if that counterclaim is being served on a person who is not a party of record;

(d) a third party notice if that third party notice is being served on a person who is not a party of record;

(e) a subpoena to a witness who is not a party of record;

(f) a subpoena to a debtor under Rule 13-3;

(f.1) a subpoena under Rule 25-12;

(g) a citation referred to in Rule 25-11;

(h) a notice of intention to withdraw under Rule 22-6 if that notice is being served on the person who was being represented by the lawyer who filed the notice;

(i) a notice of application under Rule 22-8 for an order for contempt;

(j) any document not mentioned in paragraphs (a) to (i) of this subrule that is to be served on a person who is not a party of record to the proceeding or who has not provided an address for service in the proceeding under Rule 8-1 (11);

(k) any other document that under these Supreme Court Civil Rules is to be served by personal service.

[am. B.C. Reg. 149/2013, s. 2.]

PART 22 – GENERAL

RULE 22-1 – CHAMBERS PROCEEDINGS

Definition

(1) In this rule, **"chambers proceeding"** includes the following:

(a) a petition proceeding;

(b) a requisition proceeding that has been set for hearing under Rule 17-1 (5) (b);

(c) an application, including, without limitation, the following:

(i) an application to change or set aside a judgment;

(ii) a matter that is ordered to be disposed of other than at trial;

(d) an appeal from, or an application to confirm, change or set aside, an order, a report, a certificate or a recommendation of an associate judge, registrar, special referee or other officer of the court;

(e) an action that has, or issues in an action that have, been ordered to be proceeded with by affidavit or on documents before the court, and stated cases, special cases and hearings on a point of law;

(f) an application for judgment under Rule 3-8, 7-7 (6), 9-6 or 9-7.

[am. B.C. Reg. 277/2023, Sch. 3, s. 1.]

Failure of party to attend

(2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

Evidence on an application

(4) On a chambers proceeding, evidence must be given by affidavit, but the court may

(a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

(b) order the examination of a party or witness, either before the court or before another person as the court directs,

(c) give directions required for the discovery, inspection or production of a document or copy of that document,

(d) order an inquiry, assessment or accounting under Rule 18-1, and

(e) receive other forms of evidence.

Hearing of application in public

(5) Except in cases of urgency, a chambers proceeding must be heard in a place open to the public, unless the court, in the case of a particular chambers proceeding, directs that for special reasons the chambers proceeding ought to be dealt with in private.

Adjournment of application if applications not heard on date set

(6) If a chambers proceeding has been set for hearing on a day on which the court does not hear chambers proceedings, the chambers proceeding stands adjourned without order to the next day on which the court hears chambers proceedings.

Power of the court

(7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may

(a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,

(b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,

(c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and

(d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

Powers of court if notice not given

(8) If it appears to the court that notice of a chambers proceeding ought to have been but was not served on a person, the court may

(a) dismiss the chambers proceeding or dismiss it only against that person,

(b) adjourn the chambers proceeding and direct that service be effected on that person or that notice be given in some alternate manner to that person, or

(c) direct that any order made, together with any other documents the court may order, be served on that person.

Urgent chambers proceeding

(9) Rules 8-4 and 8-5 apply to chambers proceedings.

Adjournment

(10) The hearing of a chambers proceeding may be adjourned from time to time by a registrar.

Notes of applications

(11) A registrar must

(a) attend at and keep notes of the hearings of all chambers proceedings, and

(b) include, in the notes kept under paragraph (a) in relation to the hearing of a chambers proceeding, a short statement of the questions or points decided or orders made at the hearing.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Navarro v. Doig River First Nation,* 2015 BCSC 2173

Date: 20151126
Docket: S123116
Registry: Vancouver

Between:

Carlos F. Navarro, Car & Mar Ortho, P.L.L.C. and Man & Cfn Ortho, P.L.L.C.

Plaintiffs

And

Doig River First Nation, Terry Aven, Sicily Candice Aven, Tracy Hunter and Peejay Environmental Ltd.

Defendants

Before: The Honourable Madam Justice Dillon

Reasons for Judgment

Counsel for the Plaintiffs:	R. Fleming D. Cowper
Counsel for the Defendants:	J. Schmidt D. Yaverbaum
Place and Date of Trial/Hearing:	Vancouver, B.C. October 27 and November 5, 2015
Place and Date of Judgment:	Vancouver, B.C. November 26, 2015

Introduction

[1] The plaintiff, Carlos F. Navarro ("Navarro"), applied to adjourn the trial of this matter which was set for 15 days commencing on November 23, 2015. This action was referred for case management following a trial management conference on October 1, 2015. A further trial management conference on October 20, 2015, conducted by the newly appointed case management judge, set November 3 or 5 as the hearing date for an application to adjourn the trial. Following argument at the hearing of the adjournment application on November 5, the adjournment was granted with reasons to follow. These are those reasons.

Facts

[2] Prior to discussing the nature of this claim and details of the litigation, it should be known that the corporate plaintiffs were deemed to have discontinued their action against all defendants. This followed from the second trial management conference when it became known that the corporate plaintiffs were both in bankruptcy proceedings in the United States and that the trustees in bankruptcy did not want to pursue this litigation and refused to provide instructions to plaintiffs' counsel. It follows that Navarro is the sole plaintiff in this action.

[3] It should also be acknowledged that this action has been discontinued against the Doig River First Nation.

[4] The background facts to the claim are complicated and certainly not altogether clear at this point. In describing briefly the background to this application, no conclusions of fact have been reached and this is impressive only for purposes of the adjournment application.

[5] The defendant, Peejay Environmental Ltd. ("PJ"), in its first incarnation known as Doig River Environmental Ltd., held an industrial leasehold interest in certain lands in the Peace River District of British Columbia and held various permits to operate the lands as a waste disposal and treatment site. Terry Aven was the chief executive officer of PJ. The company, CanadaFirst Environmental Management LLC

("CFEM"), controlled by Roger Gaskins ("Gaskins") and Mike Marsolek, had access to certain soil reclamation technology that was of interest to the principals of PJ. CFEM and PJ entered into discussions to build a waste treatment facility on the leased lands (the "project"), which discussions resulted in June 2009 in "two agreements" which expressly provided that "they were not intended to create contractual relations", according to the defendants. As a further result of these "non-binding agreements", a new British Columbia company was incorporated called CanadaFirst Environmental Management-Peejay Limited ("CEP").

[6] Terry Aven was the sole director of CEP after it was incorporated in July 2009 until March 2011. It was intended by PJ and CFEM that Navarro was to be the primary investor in CEP. The defendants assert that, prior to incorporation of CEP, Navarro entered into agreements with the yet to be incorporated company as represented by Gaskins to invest funds into CEP "to fulfill [CEP's] obligations pursuant to [CEP's] agreements with [PJ]". The nature of this "obligation" is unknown. The defendants say that Navarro was to invest US$1,000,000 in exchange for 100% of the class A stock in CEP.

[7] Navarro says that he transferred US$1,000,000 to a bank account in the name of CEP between April and August 2009, the details of which are not clear. The plaintiff states that he was to receive all of the shares of CEP. However, the defendants say that no shares of CEP were ever issued and no further steps were taken to organize CEP. However, CEP subsequently paid most of these monies towards improvements on the leasehold lands held by PJ. CEP is not a party to this action. The plaintiff also advanced a large sum to CFEM for purposes of the project and the plaintiff says that only a small percentage of these funds can be traced into the project. The defendants dispute both the amounts and where the funds went.

[8] Construction at the project stopped in November 2009 because PJ became concerned about outstanding payables. A meeting was held between the plaintiff, Terry Aven, Sicily Aven, Gaskins and others to discuss a proposed partnership to facilitate payment for construction. No agreement was reached. Subsequent to this,

approximately $308,000 was transferred from a CEP account to an account in the name of a partnership over which Terry Aven among others, but not the plaintiff, held signing authority. The defendants say that no further efforts were made after a meeting in March 2010 to resolve the matter of outstanding payables on the project.

[9] This action was commenced on May 2, 2012. The plaintiffs filed a certificate of pending litigation ("CPL") on the leased lands. PJ sold the lands in 2012 to Petrowest for $5,000,000 plus future royalties to a maximum of $2,500,000. However, the transaction could not complete because of the CPL. The plaintiffs and defendants entered into an agreement to discharge the CPL upon payment into trust of the claimed amount of $1,893,750. PJ assigned all of its assets and liabilities to a new company, Aventura Energy Corp., in August 2012 "as part of a corporate reorganization". None of the proceeds of sale were paid from PJ to CEP, although PJ paid other payables owing on the project. CEP was dissolved in August 2012 for failure to file its annual report.

[10] The history of the plaintiff's pleadings shows confusion as to the nature of the claim to be made. Initially, the claim pleaded a partnership between the plaintiff, the Aven defendants, and the Doig River First Nation. The defendants filed a Response to Civil Claim in June 2013, pleading that the claim was an attempt to pierce the corporate veil and attack underlying shareholders and partners of the corporations CEP and CFEM. The first Amended Notice of Civil Claim filed on April 30, 2014 claimed that CEP was owned and controlled by the personal defendants and claimed misrepresentation against the Aven defendants for representations made at a certain meeting. Allegations of a partnership and breach of fiduciary duty were struck on September 2, 2014, following application by the defendants. A second Amended Notice of Civil Claim, filed with leave on June 29, 2015, claims fraudulent misrepresentation as to a partnership that was to be formed. It also alleges breach of an oral agreement between the plaintiff and the Aven defendants and unjust enrichment by the defendants.

[11] The plaintiff was represented by the same counsel until August 20, 2015 when the plaintiff, who lives in Texas, filed a Notice of Intention to Act in Person. Present counsel, R. Fleming, represented the plaintiff at the trial management conferences and at the adjournment application under a retainer limited to these purposes. However, Mr. Fleming reviewed the state of pleadings and concluded that they were miscast. New counsel would seek to revive the nature of the initial claim within an oppression action or derivative action by Navarro involving CEP and CEP would be added as a plaintiff claiming breach of fiduciary duty against Terry Aven and breach of a partnership agreement and resulting trust with tracing against PJ. It is proposed that CEP would be restored and added as a party. CFEM and its principals would also be added as parties.

[12] The litigation has been hotly contested. Since the defendants filed the first response in June 2013, there have been eleven applications, six of which proceeded to hearing. The corporate plaintiffs posted security for costs in the amount of $70,000, ordered on November 7, 2013. The discovery of the defendant, Terry Aven, was ordered adjourned in May 2014 pending hearing of an application to strike the Amended Notice of Civil Claim. The Amended Notice of Civil Claim was partially struck on September 2, 2014. An application to release funds held in trust resulted in $839,750 being released by order of October 31, 2014. The plaintiff was given leave to further amend the claim in May 2015. An application to add Aventura Energy Corp. as a defendant was adjourned generally by consent on January 14, 2015 and remains pending. The corporate plaintiffs ceased being parties to the action by order of October 27, 2015, leaving Navarro as the sole plaintiff.

[13] Some discoveries have been held. The defendants said that discovery of the plaintiff is complete. In an effort to ready this matter for trial, the case management judge directed the plaintiff to complete discoveries by November 5, with liberty to re-apply for further discovery if an adjournment of trial was granted. No further discoveries of the defendants took place due, at least in part, to the limited retainer of present counsel and the plaintiff's stated inability to act on his own, despite the Notice of Intention to Act in Person.

[14] The defendants set this matter for trial in April 2014 for 15 days, beginning November 23, 2015. There have been no previous applications for or adjournments of trial, although the plaintiff requested an adjournment at the first trial management conference on October 1, 2015. The judge hearing the trial management conference agreed with the defendants that the matter should be heard upon application with proper materials.

[15] The plaintiff sought an adjournment of trial because both the named parties and pleadings are deficient and the plaintiff is most obviously not ready to proceed. The defendants oppose this application, saying that the failure of the plaintiff falls on his shoulders and that the amendments and applications that would have to be made to proceed as described by present counsel would contradict the state of the evidence at present and previous positions taken by the plaintiff.

Discussion

[16] The court may order adjournment of a trial by application pursuant to Rule 12-1(9)(a) or at a trial management conference according to Rule 12-2(9)(l). An adjournment order under Rule 12-2 cannot be based upon affidavits (Rule 12-2(11)(a)) but can be made based upon the trial briefs and statements of counsel, even if one party objects (*Jurczak v. Mauro*, 2011 BCSC 512 at paras. 5-7 (*Jurczak*)). If a trial management judge considers that further evidence by way of affidavit is required, the matter may be referred to chambers for application. Reasons for adjourning at a trial management conference include that the matter cannot be completed in the time set for trial or that there are outstanding pre-trial matters that show that the matter is not ready for trial (*Jurczak* at para. 11). These considerations are also available should the adjournment request proceed by application (*Jurczak* at para. 18).

[17] Here, the trial management judge directed that the adjournment be heard by application by the case management judge who was to be appointed. The plaintiff did not file an affidavit specific to this application, relying on an earlier affidavit that set out the background facts as understood by Navarro. There was a recent affidavit

from Terry Aven attesting to the background facts, to having the $1,000,000 held in trust inaccessible for longer should this matter not proceed to trial, and to having been "personally stung" by the accusation of fraud.

[18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made (*Cal-Wood Door v. Olma*, [1984] B.C.J. No. 1953 at para. 13 (C.A.) (*Cal-Wood Door*)). The discretion must, of course, be exercised judicially in accordance with appropriate principles (*Dhillon v. Virk*, 2014 BCSC 745 at para. 8 (*Dhillon*)). The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant (*Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82 at paras. 8-11 (C.A.) (*Sidoroff*)). This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties (*Sidoroff* at para. 10). The Court of Appeal will be extremely reluctant to interfere with a decision of a trial judge on an adjournment matter which is integral to exercise of judicial discretion (*Sidoroff* at para. 11;*Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 at para. 36 (*Toronto-Dominion Bank*)).

[19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action (*Cal-Wood Door* at para. 13; *Graham v. Vandersloot*, 2012 ONCA 60 at para. 12 (*Graham*)). Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits (*Graham* at para. 12). The natural frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case (*Graham* at para. 12).

[20] Other factors or considerations include (in no particular order of priority):

- the expeditious and speedy resolution of matters on their merits (Rule 1-3(1); *Sidoroff* at para. 10);

- the reasonableness of the request (*Dhillon* at para. 16);
- the grounds or explanation for the adjournment (*Dhillon* at para. 16; *Toronto-Dominion Bank* at para. 38);
- the timeliness of the request (*Dhillon* at para. 16);
- the potential prejudice to each party (*Dhillon* at paras. 16-17);
- the right to a fair trial (*Dhillon* at para. 16);
- the proper administration of justice (*Dhillon* at paras. 16 and 39; *Toronto-Dominion Bank* at para. 36);
- the history of the matter, including deliberate delay or misuse of the court process (*Toronto-Dominion Bank* at para. 38); and
- the fact of a self-represented litigant (*Toronto-Dominion Bank* at para. 39).

[21] Securing a fair trial on the merits of the action is the ultimate goal. This requires consideration of the nature of the claim. If the claim is novel, then the prospect for success is one factor to consider (*Sangha v. Azevedo*, 2005 BCCA 184 at para. 15 (*Sangha*)). However, the prospect for substantive success should not be the sole basis for refusal of an adjournment (*Toronto-Dominion Bank* at para. 41).

[22] The expeditious and speedy resolution of a matter raises the question of whether there has been a previous adjournment and, if so, the reasons for that prior adjournment. If the circumstances have not changed, a subsequent application will likely not be successful (*Kendall v. Sirard*, 2007 ONCA 468 at para. 46).

[23] Timeliness of the request is a factor. An application made at the opening of trial on the grounds that a party cannot be present will be carefully scrutinized as to the effect upon other parties, whether the party's evidence is crucial, and what other recourse was available (*Warner v. Graham* (1945), 62 B.C.R. 273 at 277-278 (S.C.)). If the trial is already underway and an adjournment may be indefinite, the court will want to consider whether it is certain that granting an adjournment would

resolve the issue that was the cause of the adjournment request (*Dhillon* at para. 11).

[24] The explanation for the need of an adjournment is an important consideration. It has been said that simple neglect to get properly ready for a hearing, while irksome for the other party, will still usually lead to an adjournment on the theory that the prejudice to the person denied the adjournment will be greater than prejudice to the person who is forced to accept an adjournment (*Michel v. Lafrentz*, 1998 ABCA 224 at para. 12). It would be unjust to decide, without more, that a party who has been less than diligent will be forced to go to trial unprepared (*Trumbley v. Belanger*, [1994] B.C.J. No. 2178 at para. 4 (S.C.)). Failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client under the "often applied principle that the sins of the lawyer should not be visited upon the client" provided that relief can be given on terms that protect the innocent adversary as to costs thrown away and as to the security of the legal position he has gained (*Graham* at para. 10). However, counsel's simple statement that he is not ready for trial may not be sufficient (*W. Thomson & Co. v. British America Assurance Co.* (1930), 43 B.C.R. 194 at 196 (C.A.)). The fact of a medical condition that may impair a party's ability to conduct his case as well as he might does not, in itself, mandate an adjournment, but it is a serious consideration (*Sangha* at para. 15).

[25] Prejudice to the parties if an adjournment is granted or is not granted must be considered. Any prejudice to be suffered by either side must be weighed and balanced. However, it is non-compensable prejudice that is pivotal (*Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 at para. 19 (C.A.); *Graham* at paras. 7 and 9). If the problems raised by an explanation of prejudice can be met by conditions of an adjournment, then, upon consideration of all of the circumstances, an adjournment may be granted (*Cal-Wood Door* at para. 17).

[26] Overall delay in the history of proceedings may be a factor. Prolonged delay due to tactical considerations may be inexcusable and result in injustice to the other side because a fair trial is no longer possible (*Irving v. Irving* (1982), 140 D.L.R. (3d)

157 at 160-163, [1982] B.C.J. No. 970 at paras. 8-11 (C.A.) (*Irving*)). However, a delay forced on a party by negligent solicitors, impecuniosity, or illness is distinguished from tactical delay. The issue is whether the delay is excusable in light of the reason for it and other circumstances (*Irving* at 163 D.L.R., para. 11 B.C.J.).

[27] The fact that a litigant is self-represented is relevant, but does not entitle him to a "pass" (*Toronto-Dominion Bank* at para. 39). The object is to facilitate as far as reasonable the ability of a self-represented litigant to fairly present his case on the relevant issues. If counsel is appointed and assumes conduct of a case after the matter has been set for trial, he may be required to clear his calendar to facilitate the trial date (*V.(K.L.) v. R.(D.G.)* (1993), 13 C.P.C. (3d) 226 at para. 10 (B.C.S.C.)).

[28] The court may impose terms and conditions to an adjournment order (Rule 13-1(19)). However, the terms must be just in all of the circumstances (*Serban v. Casselman* (1995), 2 B.C.L.R. (3d) 316 at para. 9 (C.A.)). A party seeking certain terms and conditions should generally prove that he will be prejudiced in some way by the order.

[29] In this case, the adjournment application was made against the following relevant background. This is the first application notwithstanding the request made at the first trial management conference. It is made at a time when the plaintiff is essentially self-represented. There is no significant history of delay by the plaintiff and any delay has not been prolonged. There was a year delay by the defendants in filing a response to the initial Notice of Civil Claim and the defendants had not filed a response to the Amended Notice of Civil Claim, filed on June 29, 2015, by the time of the second trial management conference on October 20, 2015, even though trial was about a month away. The adjournment application was brought soon after the case management judge was appointed.

[30] Present plaintiff's counsel with the limited retainer has described the problems in the framing of the action which have led to the request for this adjournment. From the outset, the defendants have said that the plaintiff's claim was miscast. All parties described the pleadings situation as a "mess". It is not surprising that plaintiff's

counsel would have difficulty in properly identifying the parties and in defining the cause of action given the complex and fluctuating relationships between the parties and others involved in the project and the oblique and/or unfulfilled nature of any agreements that were made. Contrary to the position taken by the defendants, the plaintiff should not have to assume sole responsibility for this difficulty to the extent of jeopardizing a fair trial on the merits of the claim and the plaintiff's chance to make out his case.

[31] The defendants have not established prejudice should the trial be adjourned. While allegations of fraud and having to hold monies in trust weigh upon the personal defendants, these are not undue. No specific personal or professional attributes of the defendants have been suggested to be jeopardized by these allegations. The holding of monies in trust was by agreement of the defendants. The defendants have security for their costs. On balance, the plaintiff stands to lose the most because he most certainly would not be able to properly conduct a trial at this time.

[32] The matter is not ready for trial. There are several pre-trial applications that are reasonably contemplated by plaintiff's counsel. Additional discoveries may have to be undertaken for the plaintiff to properly prepare for trial. Furthermore, after review of the trial briefs of the parties, including the amended trial brief of the plaintiff that was required to be amended as part of the adjournment application, it appears that this matter could not have been concluded within the time set for trial.

Conclusion

[33] These are the reasons that the trial was adjourned on November 5, 2015. No order will be made as to costs.

[34] The parties are directed to obtain a date in the first week of January 2016 for a case planning conference. If the plaintiff has not filed a Notice of Appointment or Change of Lawyer by the time of the case planning conference or if the appointed lawyer will not be in attendance at the case planning conference, the plaintiff is required to attend in person. The parties are required to prepare and exchange in

advance of the case planning conference a list of further steps to be taken in the litigation and must be prepared to fix a schedule for same. The parties are also required to be prepared to speak to setting a trial date at the case planning conference.

"Dillon J."

The Honourable Madam Justice Dillon

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Walsh v. Muirhead,*
2020 BCCA 225

Date: 20200807
Docket: CA45291

Between:

Moira Eleanor Walsh

Respondent
(Plaintiff)

And

Stephen Kerry Walsh and Ronald Stewart Walsh, also known as Ronald Steward Walsh, Executors of the Estate of Lindsay Clinton Walsh, Lynda Gail Walsh, Stephen Kerry Walsh and Dana Leanne Miller

Respondents
(Defendants)

And:

Jacy Wingson

Respondent

And

Nathan Muirhead

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2018 (*Walsh v. Walsh*, 2018 BCSC 617, New Westminster Docket S138489).

Counsel for the Appellant (via videoconference):	J.S. Forstrom
Counsel for the Respondent Jacy Wingson (via videoconference):	V. Anderson
The Respondent Dana Miller, appearing in person (via videoconference)	D. Miller

Place and Date of Hearing:	Vancouver, British Columbia July 8, 2020
Place and Date of Judgment:	Vancouver, British Columbia August 7, 2020

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Harris

Summary:

The lawyer appellant was ordered to pay special costs after an application brought by his clients was dismissed as "unnecessary" and "misconceived". He appealed the order, submitting that it was procedurally unfair and that the chambers judge did not apply the correct legal test for special costs against a lawyer. Held: The appeal is allowed and the order is set aside. The judge made the order without notice to the appellant, unfairly depriving him of an opportunity to make submissions on whether he should be personally responsible for special costs. Rather than remit the issue back to the Supreme Court for reconsideration, it is in the interests of justice to order that costs for the dismissed application be paid by the appellant's clients on a party and party basis.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] The lawyer appellant, Nathan Muirhead, seeks to overturn an order that he pay special costs for an unsuccessful application brought by his clients in the context of acrimonious estate litigation.

[2] The appellant says the order was procedurally unfair. He also contends that the chambers judge erred in principle by failing to apply the correct legal test for special costs against a lawyer, including the requirement for a finding of "reprehensible" conduct.

[3] For the reasons that follow, I agree the order was procedurally unfair. On that basis, I would allow the appeal and set aside the special costs award.

Background

[4] It is not necessary to detail the history of the estate litigation.

[5] Instead, for purposes of this appeal, it is sufficient to note that the appellant acted as legal counsel for the executors of a contested estate in respect of which the parties reached a mediated settlement in 2013, resulting in a redistribution of benefits. Problems arose with execution of that agreement and, more importantly, with the completion of ancillary documentation and steps necessary to give effect to the settlement. Eventually, the death of one of the affected parties (the plaintiff spouse of

the deceased), disagreement on outstanding issues, and intransigence culminated in multiple court applications that proceeded together in Supreme Court chambers.

[6] One of these applications was brought by the executors of the estate and sought the destruction of certain affidavits. The respondents, Jacy Wingson Q.C., and Dana Miller (a contingent beneficiary under the estate) both attached copies of the executed settlement agreement to affidavits filed in support of requests for court-ordered relief relevant to implementation of the settlement. The executors took issue with the propriety of using the signed agreement for that purpose and wanted the impugned affidavits removed from the court file(s) and destroyed. If successful on their application, the executors sought costs against Ms. Wingson and Ms. Miller.

[7] Ms. Wingson represented the plaintiff spouse at the time of the mediated settlement. The context surrounding the application for the destruction of affidavits included an allegation that in her role as counsel, Ms. Wingson breached an undertaking to not "release" or "deal" with the settlement agreement except for the limited purpose of having the agreement executed by Ms. Wingson's client and Ms. Miller. In light of the undertaking, the executors took the position that attaching copies of the signed agreement to affidavits was improper.

[8] The executors' application was heard on September 1, 2016. By that time, Ms. Wingson had consented to destruction of the affidavit filed in the matter over which she had conduct. As such, the only relief sought in relation to Ms. Wingson was an order for costs. The executors asked to have Ms. Wingson pay those costs personally because her client (the plaintiff spouse) had passed away. Ms. Miller did not agree to destroy the affidavit filed in her application for relief. As such, whether she had an obligation to do so because of the undertaking remained a live issue in the executors' application.

[9] The chambers judge summarily dismissed the application for destruction, "with costs":

> THE COURT: … Mr. Muirhead, with respect, it seems to me your -- your whole submission rests here on a very, very fine point.

> Ms. Miller, you've conceded, could have attached to her affidavit a -- an unexecuted copy of the settlement agreement. She could have deposed in her affidavit that this settlement agreement reflected the settlement of all -- or the terms concluded by all parties that they'd agreed to, and she could have testified, "I have seen with my own two eyes an original of the settlement agreement signed by Stephen Walsh and Ronald Walsh." She could have done all that. So what does it matter that she actually attaches a copy of the document that demonstrates all those things?
>
> …
>
> THE COURT: Mr. Muirhead, I'm sorry. This application is misconceived, and I am dismissing the application with costs.
>
> [Emphasis added.]

[10] The chambers judge did not specify who would be responsible for those costs. In discussion with counsel, he described the undertaking said to have been breached as one that Ms. Wingson "never should have accepted". The undertaking was poorly drafted and had no end date. The judge thought the appellant should not have asked Ms. Wingson to agree to it. Furthermore, from the judge's perspective, the executors should not have taken formal action to enforce the undertaking. The judge found it "appalling" that they did so.

[11] Before the chambers judge, the appellant took personal responsibility for the undertaking, saying "It [was] entirely an error of judgment on [his] part". He also accepted that any breach of the undertaking by Ms. Wingson was "inadvertent". The judge noted that in advancing the application, the appellant did not allege fraud or dishonesty by Ms. Wingson.

[12] Following the September hearing, the parties to the various chambers matters provided written submissions on costs (over the lunch recess, they resolved the remainder of the substantive matters set for hearing that same day). Although they spoke to costs before the chambers judge, he asked the parties to provide a written summary of their respective positions and reserved his decision on costs pending receipt of those submissions.

[13] In April 2018 (after further developments and court appearances in the estate file), the chambers judge released his decision on costs, including costs specific to the

application for the destruction of affidavits. He determined that costs on that application, referred to in his reasons as the "Undertaking Application", would consist of special costs paid personally by the appellant.

Reasons of Chambers Judge

[14] The judge's reasons on costs are indexed as *Walsh v. Walsh,* 2018 BCSC 617. The rationale provided for special costs paid by the appellant is briefly stated:

> [22] In dismissing the Undertaking Application, I stated:
>
> > … Mr. Muirhead, the undertaking you put Ms. Wingson on ought never to have been accepted by her, because it was an undertaking that had no end date to it. On its face, it would still be in effect today. She would still require your consent to be dealing with the settlement agreement in any way. That can't possibly be right. That can't possibly be what was intended by her. It was an undertaking she never should have accepted, but at the same time, Mr. Muirhead, it was an undertaking you never should have put a fellow counsel under an obligation to accept. And it was never an undertaking you should have sought to enforce.
>
> I remarked that I was appalled by the attempt to enforce the undertaking and seek costs against Ms. Miller and against Ms. Wingson personally.
>
> [23] Mr. Muirhead apologized for the undertaking, saying that it was entirely an error of judgment on his part, for which he took full responsibility, and that it was through no fault on the part of his clients.
>
> [24] I find that the costs awarded to Ms. Wingson and Ms. Miller in respect of the Undertaking Application should be paid by Mr. Muirhead personally.
>
> [25] I further find that those costs should be assessed as special costs. Contrary to Ms. Wingson's submissions, I do not do so on the basis that the Undertaking Application, in seeking costs against her personally, was an attack on her professionalism. Clearly, the Undertaking Application sought costs against Ms. Wingson personally only because her client was deceased, and there was no other person to whom a costs order against the plaintiff could attach. Ms. Wingson had acted without instructions, putting herself in a position where she had to expect to be found personally responsible for costs, were the Walsh Defendants successful on the Undertaking Application.
>
> [26] I do find, however, that the allegation of breach of undertaking, and in particular the steps taken to enforce an undertaking that never should have been sought in the first place, is conduct deserving of rebuke. Mr. Muirhead's clients were not prejudiced in any manner by the executed 2013 Settlement Agreement having been attached to the affidavits. The application was entirely unnecessary and misconceived.
>
> [Emphasis added.]

[15] The special costs order reads as follows:

> Nathan Muirhead, counsel for the Walsh Defendants, shall personally pay to Jacy Wingson, Q.C. and Dana Leanne Miller, their costs of the notice of application filed on May 27, 2016, assessed as special costs.

Leave to Appeal

[16] The appellant sought leave to appeal the special costs award. Leave was granted on two issues: (1) the identity of the payor of costs; and (2) if the appellant should be liable to pay costs, whether the court below erred in granting special costs (*Walsh v. Muirhead,* 2018 BCCA 345).

[17] Although aware of the appeal, the executors did not participate in the application for leave. Nor have they participated in the appeal.

[18] Ms. Wingson and Ms. Miller both responded to the appeal. Ms. Miller represented herself. She prepared written submissions, and, although produced outside the prescribed timelines, the Court exercised its discretion to consider Ms. Miller's submissions to the extent that they addressed issues properly before the Court: Rule 52, *Court of Appeal Rules*, B.C. Reg. 297/2001.

Issues on Appeal

[19] The appellant challenges the special costs award on two bases: (1) he says it was procedurally unfair to order special costs against him without notice and without an opportunity to make submissions; and (2) in any event, the judge erred in principle by not applying the correct legal test for special costs against counsel, including the requirement for a finding of "reprehensible" conduct.

Standard of Review

[20] The parties agree that a costs award, including special costs, involves an exercise of discretion. As such, a deferential standard of review applies. However, where the process leading to the award was demonstrably unfair, the award resulted from an error in principle, or it is manifestly unjust, the appeal court may intervene: *Gichuru v. Pallai,* 2018 BCCA 78 at paras. 85–90; *Hollander v. Mooney,*

2017 BCCA 238 at paras. 22–23; *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 52 [*Jodoin*].

Discussion

Fresh Evidence Application

[21] The appellant applied to tender an affidavit in the appeal deposing that had he been aware of the possibility of a costs award against him, he would have retained legal counsel. The affidavit also attaches various documents relating to the undertaking at issue in the court below, a full transcript of the chambers hearing, and copies of the written submissions that were prepared post-hearing at the request of the chambers judge.

[22] Ms. Wingson opposes the fresh evidence application, except for the appellant's assertion that had he known he might be subject to an order for special costs, he would have retained legal counsel.

[23] In my view, the affidavit is admissible as fresh evidence. The contents, including the written submissions filed in the court below, are relevant to the issue of procedural fairness raised by the appellant and the integrity of the process followed by the chambers judge. In that specific context, the Court generally adopts a more flexible approach to the admissibility of fresh evidence: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 194.

General Principles on Costs against Lawyers

[24] Superior courts unquestionably have the power to order that a lawyer personally pay the costs that flow from an unsuccessful application brought on behalf of their client(s).

[25] Indeed, Rule 14-1(33) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [the Rules], specifically authorizes this type of order:

> (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:
>
> …
>
> (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;
>
> …
>
> [Emphasis added.]

[26] The predecessor to Rule 14-1(33) was considered by a five-member division of this Court in *Nazmdeh v. Spraggs*, 2010 BCCA 131. The Court held that what was then Rule 57(37) allowed for costs against counsel in the form of special costs or costs assessed on a party and party basis (at para. 42). Moreover, using substantially the same language as 14-1(33), the predecessor Rule "expanded" the scope of conduct that was previously available to justify a costs award against a lawyer:

> [101] Prior to the enactment of the Rules, the Supreme Court of British Columbia had power to make orders against lawyers to pay costs personally under the court's inherent jurisdiction. Such orders were generally made only in cases of "serious misconduct". The Rules, particularly Rule 57(30) and its successor Rule 57(37), have, however, expanded the scope of conduct which might support costs orders against lawyers. The Court now has a discretion to order a lawyer to pay costs where he has "caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault".
>
> [102] Under Rule 57(37), mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer. …
>
> [Per Finch J.A.; emphasis added.]

See also *Nuttall v. Krekovic*, 2018 BCCA 341 at paras. 34–35.

[27] An order for costs against a lawyer who is not a party to an action is also available under a superior court's inherent authority to supervise the conduct of the lawyers who appear before it. As explained by Gascon J., writing for the majority in *Jodoin*:

> [16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some

> other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).
>
> [17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.
>
> [18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; [*Attorney-General of Quebec et al. v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.)] at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).
>
> [Emphasis added.]

[28] It is not apparent from the reasons of the chambers judge whether he relied on Rule 14-1(33)(c) to order special costs against the appellant or the court's inherent authority. At the hearing of the appeal, the question arose as to whether Rule 14-1(33) has subsumed the common law on costs against a party's lawyer, thereby restricting a judge in civil cases to the specific orders enumerated therein (see, for example, the Court's comments in *Gichuru v. Smith,* 2014 BCCA 414 at para. 84).

[29] In my view, it is not necessary to resolve that question on the appeal. Under *both scenarios*: a judge must exercise restraint when ordering costs against a lawyer; the same test applies for imposing special costs; and the lawyer must receive notice of the potential for a personal costs award and be given an opportunity to be heard.

[30] In *Nazmdeh,* the Court described the power to order costs against legal counsel as one that must be used "sparingly":

> [103] The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of [now Rule 14-1(33)] 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.
>
> [per Finch J.A.; emphasis added.]

See also *Pierce v. Baynham,* 2015 BCCA 188 at paras. 41–42; *Young v. Young*, [1993] 4 S.C.R. 3 at p. 136.

[31] The need for "restraint and caution" was similarly emphasized in *Jodoin*, albeit in the context of a criminal proceeding:

> [26] The type of conduct that can be sanctioned [through an order for costs] was analyzed in depth in [*Attorney-General of Quebec et al. v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.)]. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.
>
> [Emphasis added.]

[32] As a matter of settled principle, an order for *special costs* against a party's lawyer attracts a particularly stringent threshold. *Nazmdeh* makes clear that ordering counsel to personally pay special costs under Rule 14-1(33), as opposed to party and party costs, requires a finding of "reprehensible" conduct (at para. 102). Consistent with the rationale underlying the need for restraint in awarding costs against counsel, generally, the stringent test for special costs respects the duties of lawyers to protect the confidentiality of their clients and to advocate with courage (*Nuttall* at para. 27, citing *Young* at p. 136). It also takes into consideration the uniquely punitive nature of the award.

[33] In *Nuttall,* the meaning of "reprehensible" conduct in the context of special costs against a lawyer was explained through reference to the "high threshold" articulated for a costs award in *Jodoin.* There, Justice Gascon noted that:

> [29] … 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. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.
>
> [Emphasis added.]

[34] As such, in this province, a special costs award against a lawyer, whether grounded in Rule 14-1(33)(c) or the superior courts' inherent authority, requires a finding of "reprehensible" conduct that amounts to a "serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on [their] part, that is deliberate" (*Jodoin* at para. 29). An order for the personal payment of special costs cannot be justified on a "mistake, error in judgment or even negligence" (*Nuttall* at para. 29). Instead, there must be a "marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (*Jodoin* at para. 27, quoted with approval in *Nuttall* at para. 28).

Was the special costs order procedurally unfair?

[35] In this case, the appellant appropriately does not contest the power to order that a lawyer pay special costs. Instead, he complains that the manner in which the chambers judge exercised that authority was procedurally unfair.

[36] In support of his position, the appellant emphasizes the relationship between procedural fairness and the punitive nature of a special costs award. In *Gichuru v. Pallai,* the punitive aspect of special costs, even as applied against parties to an action, was held to raise procedural fairness concerns:

> [88] … the punitive nature of special costs demands some degree of procedural fairness. An opportunity to respond to a claim for special costs must generally be provided. This Court has already held that the assessment of

> special costs, absent consent, "requires a certain level of procedural fairness": *Smith* at para. 103. As Justices Harris and Goepel stated in *Smith*, this typically means providing the party against whom costs are awarded the opportunity to test the reasonableness of the fees underlying the award. I see no principled reason why the fairness that applies to the assessment of special costs should not apply to an award of the same.
>
> [Per Kirkpatrick J.A.; emphasis added.]

The appellant says that when special costs are contemplated to censure a lawyer's conduct, procedural fairness takes on even greater importance.

[37] Rule 14-1 explicitly embodies a procedural fairness requirement specific to costs ordered against counsel. Under Rule 14-1(35), an order that a party's lawyer be personally responsible for all or part of that party's costs, whether assessed as special costs or party and party, "must not be made unless the lawyer is present or has been given notice". In *Jodoin,* notice of the potential for a personal costs award against a lawyer was held to be necessary to enable the lawyer adequate opportunity to prepare a response, including calling evidence relevant to the issue where appropriate.

[38] In my view, the procedural fairness mandated by Rule 14-1(35) should be approached in a manner consistent with the fairness requirements at common law, discussed in *Jodoin.* Moreover, this should be the case whether the potential for a costs award against counsel arises before, during or after the proceeding at issue:

> [35] … a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.
>
> [36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against [them] and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.
>
> [Emphasis added.]

[39] The appellant says he did not receive notice of the potential for a special costs award, whether as contemplated by Rule 14-1(35) or *Jodoin*.

[40] On dismissal of the Undertaking Application, none of the parties sought costs against the appellant personally. Ms. Wingson concedes this point on the appeal. It is confirmed by a review of the record.

[41] At the September 2016 hearing, counsel for Ms. Wingson was asked by the chambers judge whether Ms. Wingson was "seeking special costs simply against the litigants or against Mr. Muirhead personally". Counsel responded, "Simply against the litigants". In his post-hearing submissions on the Undertaking Application, counsel for Ms. Wingson described the executors as "recklessly indifferent" to the deficiencies in the "misconceived application" and sought an award of special costs for their conduct. The written submissions for Ms. Miller sought special costs against the executors and other beneficiaries of the estate "personally". No mention was made of a possible award against the appellant.

[42] The appellant's post-hearing submissions evince an understanding on his part that costs on the Undertaking Application had been ordered against his clients and that the only issue left for him to address on the matter was whether those costs should be assessed as special costs or party and party. He argued in favour of party and party costs, assessed on Scale B:

> **Undertaking Application**
>
> - This application has been dismissed with costs against the Walsh Executors
> - Although the application was ill-conceived, it was brought in good faith in the context of litigation that has been hard fought on all sides
> - No allegation of fraud or dishonesty was made – there is an evidentiary basis to the allegation Ms. Wingson breached an undertaking through inadvertence
> - Costs should be at Scale B

[43] In my view, the appellant's understanding of what was required of him was reasonable in light of the fact that none of the parties sought costs against him personally. I also note that during an exchange with the chambers judge, the appellant

referenced the order for costs on the Undertaking Application as an award made against his clients and the judge did not take issue with that characterization:

> MR. MUIRHEAD: Well, you've already awarded costs against my client -- the executors --
>
> THE COURT: Yes.
>
> MR. MUIRHEAD: -- for the application they brought, and in my submission, those costs should be at Scale B. It was an error in judgment and an incorrect application, ultimately, that was not allowed, but in my submission, isn't the sort of reckless application that results -- that ought to result in an order of special costs.
>
> [Emphasis added.]

[44] Rule 14-1(35) and *Jodoin* make clear that lawyers facing a costs sanction in their role as counsel "should be given prior notice of the allegations … and the possible consequences" (*Jodoin* at para. 36). That did not occur here, and it rendered the process leading to the order for special costs against the appellant procedurally unfair. I reach this conclusion appreciating that, as noted in *Jodoin*, procedural fairness requirements are flexible and contextually applied. In deciding whether a procedure was unfair, relevant considerations might include: the type of costs at issue; the extent to which the potential for a personal award would have been apparent from the parties' materials or discussion before the presider; the nature and scope of the impugned conduct; the complexity of the litigation; and the circumstances surrounding the behaviour under review. These, as well as other factors not contemplated here, may logically inform the degree of notice and preparation reasonably required by the lawyer to respond to the potential for a personal costs award. Allowing context to inform the analysis invariably means that what might be required to ensure a fair process in one case will not necessarily be the same for another (*Jodoin* at para. 35).

[45] Because of the lack of notice, the appellant was deprived of an opportunity to make submissions on whether an order for costs (let alone special costs) should be made against him personally. Instead, he was left with the understandable impression that any additional submissions on costs specific to the Undertaking Application should focus on the difference between special costs and party and party costs *as they related to his clients.*

[46] Ms. Wingson contends that notwithstanding the way in which things unfolded at the hearing, the appellant ought to have realized that the chambers judge might contemplate an order that he pay special costs. The respondent Dana Miller makes a similar argument on the appeal. From their perspective, it was abundantly clear that the chambers judge had serious concerns about the manner in which the appellant advanced the Undertaking Application.

[47] With respect, on the record in this case, that contention is without merit. The chambers judge provided no indication that he was considering a personal award against the appellant; no one was asking for that type of an order; and, objectively, the appellant's take on the matter post-hearing was reasonable. This is the way the judge himself framed the outstanding issue on the Undertaking Application before sending the parties away to provide written submissions:

> THE COURT: Okay. So somebody help me here summarize the issues that I have to decide. It's the question, first, of Ms. Wingson seeking special costs against Mr. Muirhead's clients in respect of the application I dismissed this morning regarding the settlement agreement. …
>
> [Emphasis added.]

[48] Counsel for Ms. Miller subsequently clarified for the judge that his client was also seeking special costs on the Undertaking Application. However, in so doing, he did not ask that the judge consider anyone other than "Mr. Muirhead's clients" as the payors:

> Mr. JOSEPHSON [Counsel for Ms. Miller]: So with respect to the applications before Your Lordship, My Lord, the one forwarded by Mr. Muirhead, special costs in favour of Ms. Wingson for the reasons that have been described, special costs in favour of Ms. Miller for the reasons that have been described.
>
> THE COURT: So special costs in favour of Ms. Miller on Mr. Muirhead's application --
>
> MR. JOSEPHSON: Yes.
>
> THE COURT: -- and on your application?
>
> MR. JOSEPHSON: Exactly.

[49] In her factum, Ms. Wingson further contends that the costs outcome on the Undertaking Application was substantively fair, despite there being no notice of a potential order for personal payment. She says the issue of costs against legal counsel

was “front and centre” at the hearing because of the executors’ request for costs against Ms. Wingson. There was also discussion of the legal test for special costs, as Ms. Wingson and Ms. Miller both sought special costs against the executors on dismissal of the Undertaking Application, as well as in their applications for relief related to implementation of the settlement agreement. Ms. Wingson says that the hearing transcript makes it clear the judge understood that an order for special costs requires a finding of “reprehensible” conduct and that he would have brought this understanding to bear in reaching his determination vis-à-vis the appellant. Most importantly, the appellant was present at the hearing and “unconditionally took full responsibility” for the Undertaking Application. By doing so, he effectively “invited [the chambers judge] to make any costs award against him personally”.

[50] I do not find that submission persuasive. It is correct that there was discussion of principles relevant to a special costs award. However, the focus was not on how those principles might apply to the appellant’s personal conduct in respect of the undertaking, justifying an award against him as counsel. Furthermore, on my reading of the transcript, the appellant accepted responsibility for an “inappropriate” undertaking, describing it as an “error in judgment”. I agree with appellant’s counsel that he apologized to the chambers judge for *that* error. He did not accept responsibility for conduct sufficient to ground personal liability for special costs.

[51] An order that legal counsel pay special costs is a serious matter. The judge was understandably frustrated with the decision to advance the Undertaking Application. He thought the application was “unnecessary” and “misconceived”. It is also apparent from the transcript that he was concerned about intransigence among counsel, generally, and the aggressiveness of positions taken in respect of each other’s conduct. This included the appellant. At one point, the judge chided the lawyers for “slinging mud” at each other. In his reasons on costs, he expressed the view that counsel for all sides in the estate litigation may have lost sight of the bigger picture, becoming “too focused at times on asserting the technical correctness of their positions on matters of procedure”.

[52] Nonetheless, before deciding that the appellant should personally pay special costs, the judge was obliged to make him aware of the potential for that ruling in light of the significant consequences. The appellant was entitled to an audience on that issue and he was deprived of the opportunity. In the particular circumstances of this case, I find the failure to give the appellant notice of the potential for personal payment resulted in an unfairly imposed sanction.

Was there an error in principle?

[53] In light of my conclusion on the first ground of appeal, it is not necessary to determine whether the chambers judge applied the correct legal test for special costs against the appellant, as set out earlier in these reasons. The order cannot stand because it was procedurally unfair.

What is the appropriate remedy?

[54] Rule 14-1(33)(c) allows a lawyer to be held "personally liable for all or part of any costs that his or her client has been ordered to pay to another party" (emphasis added). Consistent with this language, and for the benefit of possible appellate review, a superior court that orders costs against legal counsel in a civil case should:

a) specify that there has been an order for costs in favour of one or more parties;

b) specify the nature of those costs (special or party and party); and,

c) if the payor of the costs will be a party's lawyer, identify the lawyer and indicate whether they are personally responsible for all or only part of the costs.

[55] To exemplify, this was the approach taken in *Hannigan v. IKON Office Solutions Inc./Bureau-Tech IKON Inc.* (1997), 70 A.C.W.S. (3d) 25 (B.C.S.C.). There, relying on his inherent jurisdiction (see *Nazmdeh* at para. 90), the chambers judge ordered that the defendant's lawyer pay special costs in a wrongful dismissal action for an application to set aside subpoenas. The judge granted costs to the applicants, directed that they be assessed as special costs, and then ordered that the defendant's lawyer be "personally liable for all such costs" (at para. 37). The special costs award was appealed. This Court upheld the special costs assessment. However, it determined

that the defendant's lawyer had been erroneously ordered to pay those costs and set aside that part of the order, leaving the remainder of the costs award intact: *Hannigan v. IKON Office Solutions Inc./Bureau-Tech IKON Inc.* (1998), 61 B.C.L.R. (3d) 270 (C.A.) at paras. 2, 21.

[56] Here, the order below provided only for special costs payable by the appellant. As a result, once that order is set aside, it leaves only the pronouncement at the September 2016 hearing that the Undertaking Application was dismissed, "with costs". There is no order designating the payor of those costs or directing that they be assessed as special costs.

[57] Both Ms. Wingson and Ms. Miller submit that if the appeal is allowed, the executors should be ordered to pay special costs, consistent with the positions these respondents advanced in their written submissions after the chambers hearing. They are each of the view that the executors have taken unreasonable positions in the estate litigation, have purposefully delayed the resolution of contested issues, and that as a result of their conduct, the affected parties have had to expend wasted resources. They contended below, and again in the appeal, that the Undertaking Application formed but one part of a long-standing pattern of obstructive tactics.

[58] As an alternative position, Ms. Wingson says the appellant should be ordered to pay special costs, based on his role as counsel in bringing the Undertaking Application and his admission of responsibility at the chambers hearing. Ms. Miller supports this position.

[59] Counsel for the appellant accedes that if the special costs award is set aside, this Court has jurisdiction to make its own assessment of the record and determine whether a special costs award is justified, against the executors or the appellant. By virtue of the appeal, the appellant has now had a full opportunity to respond to the possibility of a costs award against him. However, his counsel strenuously argues that at worst, the Undertaking Application reflected an error in judgment and did not come close to the type of conduct required to meet the test for reprehensibility. As a result, the only costs appropriately payable on the Undertaking Application are party and party costs against

the executors, consistent with what would ordinarily flow under the Rules with dismissal of their application.

[60] In my view, this Court should not stand as a court of first instance on the question of whether costs for the Undertaking Application should be assessed as special costs, and, if so, who should pay them. The executors did not participate in the appeal. Without their participation, the Court is deprived of the ability to fairly assess their role in advancing the Undertaking Application, its motivation, or whether the steps taken by the appellant in carrying out his instructions and his overall approach were consistent with the executors' intent. We do not have the benefit of an assessment or findings by the chambers judge on these or other potentially relevant issues.

[61] At the same time, I do not consider it in the interests of justice to remit this matter back to the Supreme Court for another hearing on costs. Doing so will further delay finality in the estate litigation and require the expenditure of additional resources by the affected parties. It is readily apparent from Ms. Miller's compelling submissions on the appeal that the litigation has taken both an emotional and financial toll on her. A further hearing on costs will only exacerbate that situation.

[62] Accordingly, I consider it appropriate that the Court exercise its discretionary authority under s. 9(1)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to make the order that, in the absence of a special costs assessment and a Rule 14-1(33)(c) determination, would have ordinarily resulted from dismissal of the Undertaking Application, namely, party and party costs payable by the executors.

Disposition

[63] For the reasons provided, I would admit the fresh evidence, allow the appeal and set aside the order for special costs against the appellant.

[64] Applying Rule 14-1(12) of the *Supreme Court Civil Rules*, I would order that costs on the Undertaking Application flow to Ms. Wingson and Ms. Miller, payable forthwith by the executors as party and party costs, assessed on Scale B.

[65] Finally, the appellant seeks his costs on the appeal. The chambers judge imposed the special costs award of his own initiative. Ms. Wingson and Ms. Miller did not seek that order. The order has been set aside for procedural unfairness, a matter not within their control. In light of the circumstances, I do not consider it appropriate that Ms. Wingson and Ms. Miller be responsible for the appellant's costs. As such, I would order that each party bear their own costs on the appeal.

"The Honourable Madam Justice DeWitt-Van Oosten"

"The Honourable Chief Justice Bauman"

"The Honourable Mr. Justice Harris"