

CANADA / JUDGMENT

672047 B.C. Ltd. v. Johal

2024 BCSC 995

COURT

Supreme Court of British Columbia

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2024 BCSC 995 672047 B.C. Ltd. v. Johal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

672047 B.C. Ltd. v. Johal,

2024 BCSC 995

Date: 20240404

Docket: S218268

Registry: Vancouver

Between:

672047 B.C. Ltd. and Avtar Singh Johal

Plaintiffs

And

Harvinder Singh Johal and Susan Frances Little

Defendants

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment on Costs

(In Chambers)

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.

March 8, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 4, 2024

[1] THE COURT: On December 28, 2023, I issued reasons for judgment in this matter, indexed at 2023 BCSC 2261. I granted leave for the parties to request a further hearing to make submissions as to costs. They are now back before the court for that purpose. As the plaintiff, Avtar Johal, and the defendant, Harvinder Johal, have the same surname, I will refer to them by their first names, but of course mean no disrespect in doing so.

Background

[2] The background facts are canvassed in detail in my reasons for judgment, and I will not repeat them here.

[3] The underlying litigation involves two proceedings:

- (a) a family action between Harvinder and Ms. Little; and
- (b) a civil claim brought by the plaintiffs, Avtar and his numbered company, 672047 B.C. Ltd., against Harvinder and Ms. Little.

[4] As noted, the plaintiffs in the civil action are Avtar and his personal numbered company. The defendants are Avtar's son, Harvinder, and Harvinder's ex-wife, Ms. Little.

[5] Prior to the dissolution of Harvinder and Ms. Little's marriage, Avtar advanced \$500,000 to Harvinder by way of his numbered company. These funds were later used by Harvinder and Ms. Little towards the purchase of a residential property in North Vancouver. The property was the family home of Harvinder, Ms. Little, and their children during the course of their marriage.

[6] In the civil action, the plaintiffs' primary position was that the funds were advanced as an equity investment in the property by operation of the presumption of resulting trust. In the alternative, they pleaded claims in debt and unjust enrichment. Ms. Little defended the civil action on the basis that the funds were a gift. Harvinder defended the civil action on the basis that the funds were advanced pursuant to a loan agreement between him and Avtar

that was partly oral and partly by conduct. In the family action, Harvinder took the position that the funds constituted a debt.

- [7] By order made September 2, 2021, the family action and the civil action were ordered to be joined and tried at the same time. On October 20, 2021, Ms. Little made an offer to settle to the plaintiffs in the civil action and Harvinder in the family action. The offer sought a consent dismissal order in exchange for a waiver of costs in the civil action, and required Harvinder to acknowledge in the family action that Avtar had no claims in debt or to any equity in the property. The offer was not accepted by the plaintiffs or Harvinder, and the matter proceeded to trial.
- [8] In the course of trial, Harvinder and Ms. Little settled the family proceeding. It was settled in a manner that preserved the plaintiffs' and Harvinder's positions in the civil action. A final order was made by consent, and an uncontested divorce granted on April 28, 2023. The final order, as I mentioned, preserved the plaintiffs' potential entitlement to the funds by providing that any amount found to be owing to the plaintiffs in this action was to be paid out of the proceeds of sale from the property.
- [9] Following settlement of the family action, the central issue remaining in dispute in the civil action was how the funds were to be characterized. The plaintiffs said they were advanced as an equity investment in the property, but maintained alternative pleas in debt and unjust enrichment. Harvinder defended the plaintiffs' claim by taking the position that they were advanced pursuant to an oral loan agreement, though his position differed from that of the plaintiffs on the issue of whether interest was payable. Ms. Little defended the plaintiffs' claim by taking the position that the funds were advanced as a gift.
- [10] I found that the funds were advanced as a gift and dismissed the plaintiffs' claims in equity and debt. This finding was also determinative of the plaintiffs' alternative claim in unjust enrichment. The action was thus dismissed in its entirety.

Issues in dispute

- [11] The plaintiffs concede that Ms. Little is entitled to her costs at Scale B. However, the parties each seek additional costs orders as follows:
- (a) Harvinder says that the claim against him was dismissed, so he is entitled to his costs as a successful party. The plaintiffs oppose this order;
 - (b) Ms. Little says that she is entitled to double costs based on her October 20, 2021 offer to settle. The plaintiffs and Harvinder oppose this order; and
 - (c) The plaintiffs and Ms. Little say that Harvinder should be jointly and severally liable with the plaintiffs for Ms. Little's costs pursuant to Rule 14-1(14) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], and/or the authority of *Griffiths v. New Westminster (City of)*, 2002 BCSC 239. Harvinder opposes any order making him liable for Ms. Little's costs.

[12] The issues I must decide on this application are therefore:

- 1) Is Harvinder entitled to costs as a successful party under Rule 14-1 of the Rules;
- 2) Is Ms. Little entitled to double costs under Rule 9-1 of the Rules on account of her October 20, 2021 offer to settle; and
- 3) Should Harvinder be liable for Ms. Little's costs, either pursuant to Rule 14-1(14) or by way of an order of joint and several liability.

Issue #1: Is Harvinder entitled to costs as a successful party under Rule 14-1?

- [13] The plaintiffs assert that, despite the claims against Harvinder being dismissed, Harvinder is not entitled to an order of costs because he was not successful in establishing that the funds were advanced as a loan. Rule 14-1(9) provides that, unless the court otherwise orders, costs of a proceeding must be awarded to the successful party. The onus is on the unsuccessful party--here the plaintiffs--to persuade the court to depart from the general rule that costs follow the event: *Purewal v. Purewal*, 2007 BCSC 901 at para. 4; *Townshend v. Abbott*, 2022 BCSC 57 at para. 15; see also *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 24.
- [14] Generally speaking, the successful party is a plaintiff who establishes liability under a cause of action and obtains a remedy, or a defendant who obtains dismissal of a plaintiff's case: *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2019 BCCA 26 at para. 18, citing *Loft v. Nat*, 2014 BCCA 108 at para. 46; *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at para. 90 [*Sze Hang Holding*].
- [15] The court should not depart from the general rule absent special circumstances. A successful litigant has a reasonable expectation of obtaining an order for costs: *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27 at para. 26.
- [16] A successful party may, however, be deprived of costs if that party acted disreputably or reprehensibly: *Bilin v. Sidhu*, 2022 BCSC 1780 at para. 11.
- [17] In multi-party litigation, the court retains broad discretion to determine the appropriate costs award. While the starting point remains that costs are usually awarded to successful parties, there is no overarching formula beyond this: *Advantage Tool & Machine Ltd. v. Cross Industries*, 2023 BCSC 827 at para. 12.
- [18] When litigation concerns multiple causes of action, the more flexible "substantial success" test will usually be more appropriate: *Cottrill* at para. 17, citing *Sze Hang Holding* at paras. 91 to 92; see also *Bilin* at paras. 10 and 39.
- [19] The "substantial success" standard was described by Justice Bouck in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, leave to appeal ref'd, 2002 BCCA 454, as being about 75 percent or better, looking at the various matters in dispute globally, and weighing their relative importance to the parties. While *Fotheringham* was a family law proceeding, the principles set out therein are commonly applied in civil proceedings.

- [20] Substantial success is not a mathematical calculation based on issues, but rather based on the overall effect of the judgment, taking into account a broad array of factors as the court sees fit: *McLeod v. Law Society of British Columbia*, 2023 BCCA 217 at para. 12. Substantial success is meant to serve as a rough-and-ready guide when all of the disputed matters are considered globally: *Fotheringham* at para. 45.
- [21] The plaintiffs pleaded multiple causes of action in advancing their claim to an equity interest in the property, or alternatively return of the funds, namely:
- (a) a trust claim for an equity interest in the property by operation of the presumption of resulting trust;
 - (b) in the alternative, a contractual debt claim predicated on the funds having been advanced as a loan; and
 - (c) in the further alternative, a claim in unjust enrichment.
- [22] However, all of these causes of action derive from a single overarching issue, namely the characterization of the funds as either an investment, loan, or gift. The central "matter in dispute" in the civil action, determined by reference to its importance to the parties, weight, and time spent at trial, remained the characterization of the funds. On this issue, I accepted Ms. Little's position that the funds were a gift, which resulted in dismissal of the plaintiffs' claim in its entirety against both defendants. In doing so, I rejected both the plaintiffs' alternative claim and Harvinder's primary defence that the funds constituted a loan.
- [23] In this respect, Harvinder benefited from Ms. Little's position prevailing, despite his position not being substantiated in the evidence. That being said, Harvinder was nonetheless successful, together with Ms. Little, in defending against the plaintiffs' claim to a proprietary interest in the property.
- [24] The position that the funds were a loan was most forcefully advanced at trial by Harvinder. However, despite Avtar testifying on examination for discovery that the alternative pleading of a loan agreement in his notice of civil claim was a mistake, the plaintiffs never amended the notice of civil claim, and their debt claim remained alive on the pleadings at trial. Further, while Avtar maintained his position at trial that the funds were an equity investment, he also testified that he considered all investments to be loans.
- [25] Moreover, the evidence at trial related to the characterization of the funds as either an equity investment, loan, or gift was in large part intertwined, and it overlapped in material respects. While some additional time was required to adduce the documentary and viva voce evidence regarding the history of Avtar providing interest-free loans to Harvinder for education and business purposes, it is difficult to determine with precision how much additional trial time was occupied by Harvinder's assertion of the loan agreement as a discrete issue regarding characterization of the funds separate and apart from the plaintiffs' assertion of equity investment and Ms. Little's position that they were a gift. This is particularly difficult in the absence of submissions from the parties on this point.

- [26] Regardless, and in the absence of the plaintiffs having amended their claim to withdraw the claim in debt, Harvinder was entitled to defend the loan alleged in the plaintiffs' notice of civil claim by asserting a loan agreement on different terms, and he was entitled to do so forcefully.
- [27] The fact that Harvinder was not successful in that respect does not negate the fact that he nonetheless enjoyed substantial success in the action as a whole as a result of the dismissal of the plaintiffs' claims in their entirety. The plaintiffs have thus not met the onus of persuading me that the usual rule that costs follow the event ought to be departed from in this case.
- [28] As a defendant who obtained dismissal of the plaintiffs' claim against him, Harvinder is the successful party: Loft at para. 46. Accordingly, Harvinder is entitled to an award of costs in his favour at Scale B.

Issue #2: Is Ms. Little entitled to double costs under Rule 9-1 on account of the Offer?

- [29] Ms. Little seeks double costs from October 21, 2021 onwards, based on the offer to settle she made on October 20, 2021, to both Avtar and Harvinder. The offer was made to the plaintiffs in this action and also to Harvinder in the family action under Rule 9-1 of the Rules, and Rule 11-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009, respectively (the "Offer"). The Offer was not accepted by the plaintiffs or Harvinder.

- [30] More specifically, the Offer provided as follows:

Susan Little will agree to a consent dismissal without costs, as if heard on the merits, of the 672047 B.C. Ltd. and Avtar Singh Johal claims in action no. S-299627 New Westminster Registry. The consent dismissal without costs will need to be agreed and filed by all parties prior to Monday, November 1, 2021.

This offer to settle requires the Respondent, Harvinder Singh Johal, in Supreme Court of British Columbia Vancouver Registry action no. E-201620 to acknowledge that his father, Avtar Singh Johal, has no claims in debt or to any equity in the property at 1717 Grand Boulevard, North Vancouver, BC.

[Emphasis added]

- [31] Rule 9-1(4) permits the court to consider an offer to settle when exercising its discretion in relation to costs. An offer to settle must meet three requirements as set out in Rule 9-1(1)(c), namely:
- (a) it must be made in writing by a party to a proceeding;
 - (b) be served on all parties of record; and
 - (c) contain the prescribed wording maintained in the option to bring the offer to the attention of the court for consideration in relation to costs after judgment.

- [32] It is not contested that the Offer is an "offer to settle" within the meaning of Rule 9-1(1). The Offer meets the threshold requirements prescribed by Rule 9-1(1)(c). Rule 9-1(5)(b) provides that double costs may be awarded where an offer to settle has been made. An award of double costs is a punitive measure for failure to accept an offer to settle that should have been accepted: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 25.
- [33] The factors to consider are set out in Rule 9-1(6) as follows:
- 1) whether the offer to settle was one that ought to reasonably have been accepted, either on the date the offer to settle was delivered or served or on any later date;
 - 2) the relationship between the terms of the settlement offered and the final judgment of the court;
 - 3) the relative financial circumstances of the parties; and
 - 4) any other factor the court considers appropriate.
- [34] The Offer was made jointly to both plaintiffs in the civil action and to Harvinder in the family action, and thus is a global offer. As Justice Horsman, as she then was, noted in *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 1435 at paras. 17-19, there is a tension in the jurisprudence regarding whether global offers are considered valid under Rule 9-1.
- [35] In *Hall-Smith v. Yamelst*, 2016 BCSC 325 at para. 13, Justice Dillon concluded that Rule 9-1 represented a movement away from the "narrowly formulated, rigidly-applied approach" to costs under the former Rule 37, such that the law on global offers under the former Rule 37 was of little assistance. Justice Dillon concluded that global offers are valid under Rule 9-1, even where they involve parties without a joint interest and relate to more than one proceeding: *Hall-Smith* at para. 18 and *Canfield* at para. 18.
- [36] However, in the subsequent decision of *Sherwood v. The Owners, Strata Plan VIS 1549*, 2018 BCSC 2105, Chief Justice Hinkson relied on *AWD v. CCDD and SJD*, 2006 BCSC 450 at para. 16, which interpreted the former Rule 37 and concluded that the parties must have a joint interest for a joint offer to be effective under Rule 9-1: at paras. 48-49.
- [37] In the present circumstances, I come to the same conclusion as Justice Horsman did in *Canfield* at para. 19, namely that it is not necessary for me to reconcile *Sherwood* and *Hall-Smith* as assuming, without deciding, that global offers are valid under Rule 9-1. The weight of the jurisprudence establishes that offers made to multiple parties that require joint acceptance are not offers that ought reasonably to have been accepted pursuant to 9-1(6)(a), and therefore do not attract double costs consequences: see also *0956375 B.C. Ltd. v Regional District of Okanagan-Similkameen*, 2021 BCSC 1849, at paras. 44 and 52.

- [38] Further, in this respect, Sherwood is consistent with the balance of the jurisprudence interpreting and applying Rule 9-1 to offers that require joint acceptance by multiple parties. In Sherwood, the Chief Justice noted that for an offer to settle to have an effect on a party's costs, it must be one that was capable of being accepted by that party without the necessity of obtaining the cooperation or consent by another party: at para. 51.
- [39] The Chief Justice went on to find that had the offer not been invalid due to a lack of a joint interest, he would nonetheless have concluded that it was not one that ought reasonably to have been accepted, reasoning as follows:
- [53] In my view, the Offer was not capable of acceptance by the Sherwoods or BA Strata Corporation without the other also accepting. Cinnabar's offer to BA Strata Corporation was contingent on the Sherwoods accepting the offer. It was explicitly premised on the Sherwoods having accepted Cinnabar's offer. But the Sherwoods could not compel BA Strata Corporation to accept the offer, nor could BA Strata Corporation compel the Sherwoods to do so. Thus, neither party could separately accept the Offer and thereby bring the proceeding to a conclusion as was discussed in *Aspen Enterprises Ltd. v. Quiding*, 2009 BCSC 50 at para. 19.
- [54] Further, if the Sherwoods accepted Cinnabar's offer by agreeing to either the new roof or the two-roof design, BA Strata Corporation's approval was required. Pursuant to s. 71 of the Act, this would require a three-quarters vote at an annual or special general meeting. Neither the Sherwoods nor BA Strata Corporation were capable of guaranteeing this approval.
- [55] Finally, BA Strata Corporation was only offered \$13,300 - \$15,000 "as final settlement of all matters" related to both this action and the Victoria Lawsuit in which its claim was well in excess of \$15,000. The Offer also required all three parties to execute a mutually agreeable release and therefore, to later agree on the terms of the three party mutual release instrument. I am not prepared to accept that that Offer was one that ought reasonably to have been accepted.
- [40] The same conclusion was reached in *Aulakh v. Nahal*, 2018 BCSC 719, in circumstances somewhat similar to the case at bar: an offer made by one defendant to the plaintiff and other defendant, and required agreement of both parties. Justice Skolrood, as he then was, concluded that offers of that nature are not ones that can reasonably be accepted within the meaning of Rule 9-1(6)(a):
- [24] Nonetheless, I conclude that I am unable to consider the offer when assessing costs. The offer was made to both the Aulakhs and the Nahals and required both parties to agree. Various cases have held that such offers are not ones that can reasonably be accepted within the meaning of Rule 9-1(6)(a): see *Aspen Enterprises Ltd. v. Quiding*, 2009 BCSC 50, at paras. 17 to 19; and *469238 B.C. Ltd. (Lawrence Heights) v. Okanagan Aggregates Ltd. (Motoplex Speedway and Event Park)*, 2016 BCSC 1159, at paras. 18 and 23.

- [41] Turning to the case at hand, while I agree with Ms. Little that the Offer was a reasonable and genuine attempt to settle both actions and that it largely predicted the result Ms. Little achieved at trial, I nonetheless conclude that the Offer was not one that the plaintiffs ought reasonably to have accepted, because it could not be accepted by them without Harvinder's cooperation and consent in two respects:
- 1) the Offer required that the consent dismissal order in this action "will need to be agreed and filed by all parties"; and
 - 2) the Offer also required Harvinder to acknowledge in the family action that Avtar had no claim in debt or to equity in the property.
- [42] Ms. Little suggests that the plaintiffs could have unilaterally filed the consent dismissal order contemplated in the Offer, thereby rendering superfluous the requirement for Harvinder's agreement and acknowledgment in the family action that Avtar had no claim to the property. It is unclear what the effect of filing a consent dismissal order in the civil action would have been on Harvinder's position in the family action, given that the family action was settled.
- [43] Regardless, Ms. Little's suggestion does not account for the fact that the Offer remained contingent on both parties accepting, as it required that the consent dismissal order "be agreed to and filed by all parties" in the civil action, thereby requiring not just the plaintiffs' and Ms. Little's consent, but also that of Harvinder.
- [44] The Offer thus remained one that was contingent on acceptance by both the plaintiffs and Harvinder. For these reasons, I dismiss Ms. Little's application for double costs.

Issue #3: Should Harvinder be liable for Ms. Little's costs?

- [45] Ms. Little asserts that the plaintiffs should be liable for her costs under Rule 14-1(14) and/or on the basis of the authority in Griffiths.
- (a) Rule 14-1(14) - Unnecessary or improper conduct
- [46] Ms. Little seeks an order under Rule 14-1(14) on the basis of Harvinder having filed his response to civil claim in October 2021, alleging the funds were a loan, after examinations for discovery were conducted in which Avtar disavowed any loan and said that his pleading of a loan in his notice of civil claim was a mistake.
- [47] Avtar's pleading was never amended and his alternative plea of a loan remained alive on the pleadings at trial. Rule 14-1(14) provides that:
- (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.

[48] Rule 14-1(14) has been applied in circumstances where a party has:

- (a) tendered improper affidavit evidence: *The Owners, Strata Plan VR 390 v. Harvey*, 2014 BCSC 2580;
- (b) failed to comply with orders made at a trial management conference and deliver particulars and produce documents: *Boutin v. MacPherson*, 2013 BCSC 831;
- (c) tendered improper expert evidence from an unqualified witness: *Sartori v. Gates*, 2011 BCSC 419; or
- (d) failed to produce documents, thereby extending the time required for a summary trial: *Ghuman v. ICBC*, 2019 BCSC 1380.

[49] I was provided with no authority in support of the submission that Harvinder's conduct in filing a response to civil claim that took a position adverse to his co-defendant Ms. Little, and inconsistent with evidence given by the opposing party Avtar on discovery, equates to something done improperly or unnecessarily so as to warrant an order under Rule 14-1(14). This is not, in my view, conduct of a similar nature as in the jurisprudence outlined above where Rule 14-1(14) has been applied.

[50] It was necessary for Harvinder to file a response to civil claim and not improper for him to plead that the funds were advanced pursuant to a loan agreement, irrespective of the evidence given on examination for discovery. This is particularly the case given that, despite Avtar disavowing a loan agreement in his evidence on discovery, that claim remained alive on Avtar's pleadings as an alternative to his position that the funds were an equity investment. Put differently, the plaintiffs never amended their notice of civil claim to abandon the alternative plea of a loan agreement such that the issue of whether the funds were a loan remained alive on the pleadings as between the plaintiffs and Ms. Little, irrespective of the position taken by Harvinder in his response to civil claim.

[51] There is not, in my view, anything improper, as that term is understood in the context of Rule 14-1(14), about Harvinder filing a response to civil claim alleging a loan agreement in such circumstances.

[52] Accordingly, I make no order under Rule 14-1(14).

(b) Costs of one successful defendant payable by another successful defendant

[53] Turning next to Ms. Little's assertion that her costs as one successful defendant ought to be paid by Harvinder as another successful defendant. In this respect, Ms. Little relies on *Griffiths* in support of her assertion that Harvinder should be liable for her costs. The Court in *Griffiths* determined that the combined effect of Rule 57(9) and 57(15), now 14-1(9) and 14-1(15), was broad enough to allow one successful defendant to have the costs which would ordinarily be paid by an unsuccessful plaintiff, be paid by another successful defendant.

However, such an order is only to be made in exceptional circumstances or unusual cases: Griffiths; see also *Seattle at al v. Purvis at al*, 2006 BCSC 724 at para. 19.

- [54] Rule 57(15) has subsequently been replaced by Rule 14-1(15). Ms. Little does not rely on Rule 14-1(15), and the parties did not address it in their submissions.
- [55] Accordingly, in the absence of submissions from the parties on the applicability of Rule 14-1(15), I will limit my consideration of this issue to the basis put forward by Ms. Little; namely that the order sought follows from the Griffiths decision.
- [56] In my view, the present circumstances are not akin to Griffiths. In that case, the position advanced by the successful defendant was found to have "increase[d] to a very substantial degree the costs and expense of the action" and relied on an "often confusing, often incomprehensible" standard form contract: at paras. 21-22.
- [57] This is not the case here. Harvinder's position that the funds were a loan remained alive on Avtar's pleadings at trial. It was not an issue raised only by Harvinder in defence of the plaintiffs' claim.
- [58] Additionally, the evidence regarding how the funds ought to be characterized--whether as an investment, loan, or gift--was intertwined and overlapped to such an extent that it cannot be said that Harvinder's defence substantially increased the degree, cost, or expense of the action, as was the case in Griffiths.
- [59] Accordingly, I decline to exercise my discretion to order that Harvinder pay Ms. Little's costs on the authority of Griffiths.

(c) Joint and several liability for costs

- [60] Finally, the plaintiffs and Ms. Little assert that Harvinder should be held jointly and severally liable for Ms. Little's costs together with the plaintiffs, because he was unsuccessful in establishing the funds were a loan. This submission was not advanced in any material respect in oral argument, and I was provided with no jurisprudence in support.
- [61] Multiple plaintiffs in separate actions have been found jointly and severally liable for costs, but such orders are exceptional in nature: see, e.g., *0956375 B.C. Ltd.* at paras. 55-68.
- [62] Neither the plaintiffs or Ms. Little provided any legal basis for making an order holding a successful defendant jointly and severally liable with an unsuccessful plaintiff for another successful defendant's costs. Accordingly, I decline to make an order holding Harvinder jointly and severally liable with the plaintiffs for Ms. Little's costs.
- [63] I would have come to the same conclusion had I considered the issue pursuant to Rule 14-1(18), which Harvinder submitted is the appropriate approach, despite neither the plaintiffs or Ms. Little seeking relief pursuant to that provision.

- [64] Rule 14-1(18) addresses the forms of costs orders commonly referred to as Bullock or Sanderson orders and provides as follows:
- (18) If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.
- [65] A two-part test for establishing whether a Bullock or Sanderson order is appropriately made is set out in *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 15 at para. 17 as follows:
- (a) The threshold question is whether it is reasonable for the plaintiffs to have joined the successful defendant in the action; and
- (b) if satisfied that the threshold question has been met, then the question becomes whether it would be just and fair in the circumstances for the unsuccessful defendant to pay the successful defendant's costs.
- [66] The decision as to whether to make a Bullock or Sanderson order is a matter of discretion, which must be exercised judicially based on the circumstances of the case: *Provost* at para. 17.
- [67] The making of such an order requires some conduct on the part of the unsuccessful defendant to justify the award: *Provost* at paras. 18-19.
- [68] With regards to the threshold question, I find it is reasonable for the plaintiffs to have joined the successful defendant (Ms. Little) in the action. Both Ms. Little and Harvinder were registered owners on title to the property in which the plaintiffs claim an equitable interest. It was thus not only reasonable, but necessary, that Ms. Little be joined as a defendant in the civil action.
- [69] However, turning to the second question, it is not, in my view, just and fair in the circumstances for Harvinder to pay Ms. Little's costs. First, Harvinder is not an unsuccessful defendant, which is expressly contemplated in the wording of Rule 14-1(18) and affirmed in *Provost*, where the court framed the second question of the test as "whether 'it would be just and fair in the circumstances' for the unsuccessful defendant to pay the successful defendant's costs.": at para. 17.
- [70] Similarly, Griffiths suggests that the predecessor to Rule 14-1(18), Rule 57(18), had no application to a successful defendant (at para. 50). Though I note the correctness of this statement was subsequently questioned in *Blane v. The Corporation of Delta*, 2007 BCSC 1327 at paras. 9-10.

- [71] Regardless, I need not resolve that issue as the plaintiffs and Ms. Little have not identified any conduct on the part of Harvinder sufficient to warrant such an order: Provost at paras. 18-19. Harvinder's actions did not cause Ms. Little to be brought into the civil action. Harvinder did not assert in the civil action that Ms. Little was party to the loan agreement and thus liable for repayment of the funds. Harvinder did not plead that Ms. Little was a party to the loan agreement alleged in his response to civil claim. He pleaded the agreement was between himself and the plaintiffs. Rather, it was the plaintiffs who sought a declaration that the funds were a loan and judgment against both defendants in the amount of the funds.
- [72] The circumstances at play here are thus not akin to those in Provost where the defendants' attempts to shift blame to each other by way of multiple proceedings arising from the same motor vehicle accident resulted in multiple trials and an appeal warranted a Sanderson order.
- [73] In the result, I am not satisfied that it would be just and fair in the circumstances to make an order under Rule 14-1(18) ordering Harvinder to pay Ms. Little's costs.

Orders

- [74] Accordingly, I make the following costs orders:
- 1) Ms. Little and Harvinder are entitled to their costs of this action payable by the plaintiffs at Scale B;
 - 2) Ms. Little's application for double costs pursuant to Rule 9-1 is dismissed; and
 - 3) Harvinder is not liable, jointly and severally or otherwise, pursuant to Rule 14-1, for Ms. Little's costs.

[FURTHER DISCUSSIONS RE COSTS OF COSTS APPLICATION]

- [75] THE COURT: All right. As I see matters on the costs application, Harvinder was successful in obtaining his costs and opposing the costs order sought against him. Ms. Little was unsuccessful in obtaining an order for double costs or an order that Harvinder be responsible for paying her costs. The plaintiffs were unsuccessful in opposing Harvinder's entitlement to costs or in finding him liable for Ms. Little's costs, but were successful in opposing Ms. Little's order for double costs.
- [76] In light of that, as to this application, I order that Harvinder is entitled to one set of costs of this application payable at Scale B. Harvinder's costs are to be divided equally between the plaintiffs and Ms. Little, and by that my intention is that the plaintiffs will pay half of his costs of this application and Ms. Little will pay the other half, and Ms. Little and the plaintiffs will each bear their own costs of the application.

"Hughes J."

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