

CANADA / JUDGMENT

Aero Attack Systems Inc. v. Safari Express Aircraft Maintenance Ltd.

2022 BCSC 544

COURT

Supreme Court of British Columbia

DECIDED

5 April 2022

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2022 BCSC 544 Aero Attack Systems Inc. v. Safari Express Aircraft Maintenance Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aero Attack Systems Inc. v. Safari Express Aircraft Maintenance Ltd.,

2022 BCSC 544

Date: 20220405

Docket: S154709

Registry: Vancouver

Between:

Aero Attack Systems Inc. and KiTov Resources Corp.

Plaintiffs

And

Safari Express Aircraft Maintenance Ltd., Nazir Jan Mohamed

and ABC Professional Bailiffs Ltd.

Defendants

And

Rod Salinger

Defendant by Counterclaim

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Appearing on his own behalf and as representative for the Plaintiffs:

R. Salinger

Counsel for the Defendants, Safari Express Aircraft Maintenance Ltd. and Nazir Jan Mohamed:

N. Preshaw

Place and Dates of Hearing:

Vancouver, B.C.

February 14-16 and March 2, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 5, 2022

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Introduction

- [1] The defendants Safari Express Aircraft Maintenance Ltd. and its principal, Nazir Jan Mohamed, apply for an order that the plaintiffs, Aero Attack Systems Inc. ("Aero Attack") and KiTov Resources Corp. ("KiTov"), and their principal, Mr. Rod Salinger, who is also the defendant by counterclaim, pay them special costs of this action.
- [2] For ease of reference, I will refer to the applicant defendants collectively as "Safari Express". Safari Express is an aircraft maintenance organization which operates out of the Boundary Bay Airport ("Airport") located in Delta, B.C. Mr. Mohamed is its sole director.
- [3] Aero Attack is incorporated in this province and KiTov in the State of Delaware (which is a non-reciprocating jurisdiction under the regulations to the Court Order Enforcement Act, R.S.B.C. 1996, c. 78). Mr. Salinger is a director of both plaintiffs.
- [4] Since the action never proceeded against the defendant ABC Professional Bailiffs Ltd., it is not a party to the application.
- [5] The plaintiffs and Mr. Salinger bring their own application in which they seek directions from the Court striking certain evidence and the written submissions of Safari Express, as well as an order that Safari Express is not entitled to an award of any costs.
- [6] The facts discussed in these reasons are my findings of fact.

Background Facts

- [7] The genesis of this action arises from a demand that Safari Express made of Mr. Salinger of approximately \$16,800 for arrears of rent for space in an airplane hanger at the Airport used by Mr. Salinger to store his Cessna aircraft shell together with its log books, engine, and miscellaneous parts (collectively the "Cessna"), and related transportation and towing services. In approximately 2014, Mr. Salinger entered into an oral sublease with Safari Express to park his Cessna outside Safari Express' hangar at the Airport at a cost of \$200 per month. Safari Express terminated the sublease when Mr. Salinger failed to pay rent, and had his aircraft towed to another location at the Airport.
- [8] The plaintiffs commenced this action against Safari Express in June 2015. In their notice of civil claim, they alleged that Aero Attack as opposed to Mr. Salinger had rented the space from Safari Express. Until December 2021, when the plaintiffs amended their notice of civil claim, they also advanced a claim against Safari Express for \$54,327, which they alleged was owing for airplane repair services Safari Express had requested of the plaintiffs (according to the plaintiffs, that sum was the net of an original amount owing of \$86,703.75 less a credit note of \$32,377). I refer to this as the "Repair Services Claim".

- [9] Mr. Salinger was not allowed to attend at the Airport as a consequence of a restraining order ("Restraining Order") issued against him in another action involving different defendants (VA S192835). KiTov and Mr. Salinger are the plaintiffs in that action. They sued Alpha Aviation Inc. ("Alpha") and the City of Delta in respect of the same Cessna shell that is the subject of the instant action. I will refer to it as the "Alpha Action".
- [10] This action remained dormant until September 2017, when a settlement agreement ("Settlement Agreement") was reached between the parties. The parties agreed that the plaintiffs would discontinue the Repair Services Claim against Safari Express and Mr. Salinger would pay Safari Express' claim in the reduced amount of \$10,000.
- [11] Mr. Salinger paid \$2,000 of that sum but no more. The plaintiffs also did not withdraw the Repair Services Claim.
- [12] Safari Express issued a counterclaim against Mr. Salinger in January 2020 seeking specific performance of the Settlement Agreement because the plaintiffs and Mr. Salinger had still not performed their outstanding obligations under the Settlement Agreement.
- [13] On December 31, 2020, the plaintiffs filed their amended their notice of civil claim to withdraw the Repair Services Claim, leaving their claim for performance of the Settlement Agreement and costs extant. However, they did not pay the \$8,000 owing under the Settlement Agreement.
- [14] Safari Express eventually filed a summary trial application predicated on the Settlement Agreement and scheduled it for hearing in April 2021. The application was adjourned because Mr. Salinger maintained he had not been served. The summary trial application was rescheduled for hearing on July 5, 2021, peremptory on the plaintiffs and Mr. Salinger, by the order of Master Cameron issued April 28, 2021.
- [15] I presided over the hearing of the summary trial application on the newly scheduled date. The plaintiffs and Mr. Salinger initially opposed the application, premised in part on unfiled and unsworn affidavit materials. However, through the course of submissions, Mr. Salinger confirmed that he would pay the remaining amount owing under the Settlement Agreement so long as he could inspect the Cessna before it was returned to him. The difficulty with the inspection was that Mr. Salinger could not attend at the Airport since the Restraining Order was still in effect.
- [16] The inspection issue was resolved by the parties during the hearing, and the parties agreed to an order I issued with their consent dismissing, inter alia, all claims except costs ("Consent Order"). Both sides advised they would seek special costs from the other (the terms of the Consent Order are discussed in a subsequent section of these reasons).
- [17] The judgment amount was paid, the Cessna was inspected and returned to the plaintiffs and Mr. Salinger, and the Consent Order was entered with the registry. In the result, all claims except those concerning costs were dismissed by consent.

- [18] Only Safari Express filed application materials seeking an order for special costs. During his oral submissions on Safari Express' instant application for special costs, Mr. Salinger said that he should be entitled to special costs, although he did not file any application materials (by a court ordered deadline) in that respect in spite of ample opportunity for him to do so.

Overview of Safari Express' Application

- [19] Safari Express contends that Mr. Salinger, acting for himself and on behalf of the plaintiffs, engaged in reprehensible conduct throughout this litigation. Safari Express advances the following five overarching categories of reprehensible conduct to support its claim for an award of special costs:
- (a) Mr. Salinger commenced and pursued a meritless claim (i.e., the Repair Services Claim) on behalf of the plaintiffs against Safari Express;
 - (b) After letting this action sit dormant, Mr. Salinger reactivated the action with an improper motive in response to what he viewed to be a hostile affidavit sworn by Mr. Mohamed and filed on behalf of the defendants in the Alpha Action;
 - (c) Mr. Salinger obstructed service of court documents in this action, improperly used service issues to delay, and in some instances avoid altogether, interlocutory applications, and attempted to delay or thwart certain interlocutory processes, all of which put Safari Express to unwarranted expense;
 - (d) Mr. Salinger made resolution of this action far more difficult than it ought to have been; and
 - (e) Mr. Salinger engaged in reprehensible correspondence with the law firm representing Safari Express.
- [20] Mr. Salinger and the plaintiffs vehemently deny that any of their conduct was reprehensible and deny any grounds exist to award special costs. Mr. Salinger, for himself and the plaintiffs, advances the following answers to the claim.
- [21] Mr. Salinger denies that there is any basis to suggest that the Repair Services Claim lacked merit. He points out that the plaintiffs' ex parte application for an interim order to enjoin Safari Express from selling or dealing with or moving the Cessna predicated on that claim was successful. Justice Watchuk granted an initial order on June 8, 2015, valid for 48 hours expiring at 4 pm on June 10, 2015. On June 10, 2015, the order was extended "until further order of this Court" by Justice Bruce. Mr. Salinger also points out that neither order was appealed and no application was brought to set either aside.
- [22] Although he concedes that Mr. Mohamed's affidavit was hostile to his interests in the Alpha Action (and the evidence shows he accused Safari Express of breaching the Settlement Agreement when the affidavit was served in the Alpha Action), Mr. Salinger argues that it had no bearing on his conduct and that of the plaintiffs in this action. Moreover, he says the plaintiffs' decision to abandon the Repair Services Claim was based on considerations of

costs and upon a promise from counsel for Safari Express that if the claim was withdrawn, the case would be remitted to the jurisdiction of the Provincial Court, Small Claims Division, where costs awards are generally not available.

- [23] Mr. Salinger contests Safari Express' assertions that he has impeded service and used service issues as a delaying tactic. He acknowledges that Safari Express' applications for orders requiring the plaintiffs to post security for costs (Aero Attack does not own any land or real property in this province; according to Safari Express, it is not aware of KiTov owning any land or real property in British Columbia as well, and KiTov did not adduce any evidence to establish that it did at any time material to this action) and for specific performance of the Settlement Agreement did not proceed to hearing due to issues with service on the plaintiffs and Mr. Salinger. However, Mr. Salinger contends that he and the plaintiffs were entitled to rely on their right under the Supreme Court Civil Rules [Rules] to insist on personal service.
- [24] Mr. Salinger also denies that he and the plaintiffs made resolution of this action more difficult. To the opposite, he says that he sought to resolve the case on the terms agreed upon in the Settlement Agreement with the proviso that before they paid the remaining funds owing, he should have the right to inspect the Cessna to ensure it had not been damaged (which was the position that he and the plaintiffs took at the hearing of Safari Express' summary trial application).
- [25] Mr. Salinger also points out that in January 2020, Safari Express offered to waive its costs, and consequently, it should not now be allowed to seek an award of costs.
- [26] Lastly, Mr. Salinger contends that it is Safari Express and its law firm who should be rebuked for their conduct in the action, and in particular, for their anti-Semitic remarks and behaviour towards Mr. Salinger.

Overview of the Application of the Plaintiffs and Mr. Salinger

- [27] The plaintiffs and Mr. Salinger seek two directions and two orders in their notice of application. For ease of reference, I will refer to the plaintiffs and Mr. Salinger in this section of these reasons collectively as "Mr. Salinger".

Directions Sought

- [28] Mr. Salinger seeks directions from the Court to strike Safari Express' written submissions on its special costs application and, as he describes it in his notice of application, "certain parts of the evidence filed by the plaintiffs relied on for their submissions for [s]pecial [c]ost", on the basis that both "are inadmissible as they breach important statutes of British Columbia." The evidence impugned by Mr. Salinger concerns a complaint he had filed to the Law Society of British Columbia ("Complaint") about the conduct of a lawyer with Kornfeld LLP ("Kornfeld") who represented the defendants in the Alpha Action.

Safari Express' Written Submissions

- [29] Mr. Salinger objects to Safari Express' written submissions because they refer to decisions of judges of this Court and the Court of Appeal in the Alpha Action, and other actions in this Court and in another jurisdiction reflecting adversely on the merits of his claims and his credibility. In particular, Mr. Salinger complains that the excerpts from the reasons for judgment of Justice Verhoeven concerning the defendants' summary trial application in the Alpha Action (indexed at 2020 BCSC 820) included in Safari Express' written submissions are inadmissible. According to Mr. Salinger, Verhoeven J. was inappropriately influenced when shown the Complaint.
- [30] Different lawyers at Kornfeld represent Safari Express in this action.
- [31] Mr. Salinger also says that Alpha acted improperly when its manager attached a copy of the Complaint to his affidavit because it did so without his consent and thus contravened the restrictions on disclosure set out in s. 87(2) of the Legal Profession Act, S.B.C. 1998, c. 9 [LPA].
- [32] That section of the LPA provides:
- (2) If a person has made a complaint to the society respecting a lawyer for law firm, neither the society nor the complainant can be required to disclose or produce the complaint and the complaint is not admissible in any proceeding, except with the written consent of the complainant.
- [33] Mr. Salinger claims that putting the Complaint into evidence swayed Verhoeven J. against him and caused him to unfairly award special costs. Many of Mr. Salinger's submissions in this respect sought to reargue the merits of the award made by Verhoeven J.
- [34] Mr. Salinger also says that Safari Express' written submissions are inadmissible because they chastise his religious faith as further means to vilify him.
- [35] In terms of the impugned evidence, Mr. Salinger objects to Safari Express' reference to the Complaint in its submissions on its special costs application, even though it was Mr. Salinger, as opposed to Safari Express, who put it into evidence in his application in the case at bar.
- [36] For contextual accuracy, Verhoeven J. awarded Alpha special costs in view of what he found to be Mr. Salinger's reprehensible conduct on behalf of himself and KiTov in respect of his allegations of anti-Semitism and harassment against certain lawyers and staff at Kornfeld.
- [37] I have excerpted some of the passages from his reasons and also of the Court of Appeal because Mr. Salinger sought to reargue on the instant applications the same submissions that were rejected by Verhoeven J. (2020 BCSC 820 [KiTov SC]) and Justice Grauer who wrote the decision for the Court of Appeal (indexed at 2021 BCCA 110 [KiTov CA]).
- [38] In his reasons, Verhoeven J. wrote:

- [73] In addition to the legal and commercial grounds for Alpha's refusal to deal with the plaintiffs any further, Mr. Salinger has made baseless personal attacks on Alpha's staff and legal counsel, and has sought to broaden the dispute by involving third parties needlessly.
- [74] As noted, on August 8, 2018, via emails to Ms. Sayers, Mr. Salinger made various threats and accusations against Alpha, including an accusation against Alpha and by extension Ms. Sayers personally of anti-Semitism. Clearly this communication would only serve to harden Alpha's position that it did not wish to have continued dealings with the plaintiffs.
- [75] Despite this, on August 10 Alpha agreed to allow the aircraft to remain at the airport for three months, but made clear that no extension would be allowed.
- [76] Mr. Salinger continued thereafter to make similar allegations of anti-Semitism. In addition he has accused defence counsel of deliberately misleading the court, of other professional misconduct, of anti-Semitism (repeatedly), and of attempting to engender anti-Semitic bias against him with the court. These accusations are all completely groundless and inappropriate.
- [77] The tone and tenor of his communications with Alpha's personnel and agents has been hostile and vitriolic. Alpha is entitled to protect its employees and its legal counsel from this kind of conduct.
- [91] I referred previously to the hostile, inappropriate nature of interactions with Alpha, and its counsel. In my brief oral reasons on October 4, 2019 I referred to the concerns and indeed fears of the airport manager in relation to dealings with Mr. Salinger. The amplified record I now have has not altered the view of the matter I took at that time. Ms. Sayers deposes that her personal unease and her fears regarding Mr. Salinger has in fact increased since then, based upon his communications and accusations. Her concerns are well-founded.
- [95] In its application materials in the first instance, Alpha presented evidence contending that on February 12, 2019, Mr. Salinger had attempted to attend the aircraft on the airport apron without authority, and had failed to identify himself accurately when challenged. Mr. Salinger disputes all this. On the disputed evidence as to what occurred, I make no findings about this particular episode. However, it is necessary to comment upon Mr. Salinger's allegations about this minor event. He says that he is being vilified merely for using what he describes as his actual Jewish first name, Avraham, on that occasion. This contention forms part of his allegations of anti-Semitism. I have already stated that I consider Mr. Salinger's accusations of anti-Semitism groundless and inappropriate. The concern raised by Alpha has nothing to do with the name "Avraham" as such, or Mr. Salinger's ethnicity or religion. It was that Mr. Salinger had sought to mislead Alpha's operations manager as to his true identity, and was on the airport's airside without permission or authority.
- [96] The matter of Mr. Salinger's ethnicity and religion was raised by Mr. Salinger and has been repeated by him numerous times. Alpha and its counsel have made no discriminatory remarks, but have objected to the accusations Mr. Salinger has made.

[97] Among other things, Mr. Salinger contends:

1. that the order affects his professional reputation and employment as a pilot;
2. he has been attending the airport since 1989, (or 1990), for recurrent instrument training, and in his work as a pilot and in connection with aircraft business;
3. several years ago he had to make an emergency landing at the airport.

[98] The point about his reputation is a bare assertion and is not persuasive. As to instrument training, he does not provide facts demonstrating that instrument training at this airport is essential, or that attendance at this airport is essential to his work or business interests. Ms. Sayers states that Alpha would accommodate any emergency forced landing that might occur. She notes that the operation of the airport runways are governed by government rules and regulations. [Parking of aircraft at an airport apron is subject to regulation under the Airport Traffic Regulations, C.R.C., c. 886 (1978)]. I note that the order only prohibits trespass, a tort, which is not likely to be apply in such circumstances. Potential breach of the Trespass Act, R.S.B.C. 2018, c. 3 is not material here. There would be no need or purpose in a court order prohibiting an offence under the statute.

[110] I accept the contention of the defendants that Mr. Salinger has engaged in a campaign designed to harass them, and their employees and agents, including their legal counsel.

[111] In my view, where the injunction may serve to prevent such conduct in future, and where the plaintiffs have not satisfied me of real and substantial practical prejudice arising from the injunction, it should not be set aside. I therefore decline to set aside the trespass order.

[39] Writing for the panel of the Court of Appeal, Grauer J.A. also rejected Mr. Salinger's complaint regarding disclosure of the Complaint:

[64] It would appear that attaching a copy of that complaint to the affidavit would be contrary to section 87(2), which states that the complaint is not admissible in any proceeding except with the consent of the complainant. There is no record of any consent, or, for that matter, any objection at the time of the hearing. Whether the lawyer breached the statute is not, however, for us to decide on this hearing. That is properly a matter for the Law Society.

[65] The inadmissibility of the document, and illegality of the action, were not raised before this hearing, but the appellants did submit before Justice Butler that Justice Verhoeven ought not to have considered the merits of the complaint.

[66] Assuming, for the purposes of this application, that the complaint letter was inadmissible into evidence before Justice Verhoeven, it does not follow that its admission led to a material error.

- [67] The appellants view it as the foundation of the entire judgment. Indeed, Mr. Salinger submitted that he was being punished because he made a complaint to the Law Society, and urged us to reinstate the appeal lest people should fear having any complaint they make used against them.
- [68] In my view, Mr. Salinger's view of the effect of this inclusion of the Law Society's letter in an affidavit is not supportable. As I see it, the admission into evidence of the document has no meaningful impact on the interests of justice or the merits of the proposed appeal. Not only was its subject matter only one of nine interactions raised by Alpha's general manager, but those nine interactions were only one aspect of the overall pattern of dealings that led the judge to the conclusion at which he arrived.
- [69] In terms of the complaint itself, what was relevant in the proceedings before the judge was not the document, but the fact that Mr. Salinger continued to make baseless allegations of anti-Semitism referred to elsewhere in the judgment. All this was raised in the context of what led Justice Verhoeven to conclude:
- [77] The tone and tenor of [Mr. Salinger's] communications with Alpha's personnel and agents has been hostile and vitriolic. Alpha is entitled to protect its employees and its legal counsel from this kind of conduct.
- [70] That conclusion was amply supported by the admissible evidence, and, again, would be entitled to deference in this Court.
- [40] On the instant applications, Safari Express says in its written submissions that it raised the issue of Mr. Salinger's complaint to the Law Society in its application materials for these reasons:
34. These Defendants raise the issue of Salinger's complaint to the Law Society regarding Ms. [L] [a lawyer at Kornfeld] in the course of the Alpha Action to explain both the context of the complaint and emphasize that it became a matter of public record on the release of Justice Grauer's Reasons in March 2021.
72. Despite Justice Verhoeven's June 2020 decision Salinger's reprehensible communication continued unabated.
- [41] In its oral submissions, Safari Express added that it referred to the decisions of Verhoeven J. and the Court of Appeal to show that Mr. Salinger persisted with the very same conduct towards Kornfeld lawyers acting in this case and continued to do so even after he was rebuked in the Alpha Action.
- [42] However, that submission does not explain Safari Express' reference to other decisions from this Court and Australia commenting adversely on Mr. Salinger's credibility.
- [43] During the course of the hearing on the instant applications, I ruled on the directions sought by Mr. Salinger since he raised them as preliminary objections. I ruled that there was no basis to strike Safari Express' written submissions and the impugned evidence. In doing so, I

advised the parties that I was only concerned with whether Mr. Salinger's conduct in this proceeding (and not others) fell within the rubric of reprehensible conduct as defined in the case authorities. I also said that this was not the appropriate forum to reargue the merits of the award made by Verhoeven J. and the decision of the Court of Appeal. While I did not rule out considering Safari Express' submission that Mr. Salinger continued to engage in the same conduct in this action after he was rebuked by Verhoeven J., I told the parties that I would not consider any submissions from Safari Express concerning judicial comments in other cases about Mr. Salinger nor any submissions concerning his propensity.

Impugned Evidence

[44] I also ruled that there was no basis to strike the Complaint since it was Mr. Salinger, not Safari Express, who chose to put it into evidence in his application materials (thereby abandoning any rights afforded to him under s. 87(2) of the LPA) and moreover, that it was clear that he, as opposed to Safari Express, intends to rely on the contents of that document to oppose the claim for special costs.

Orders Sought

[45] Mr. Salinger seeks two orders in his notice of application.

[46] One is that he be granted leave to further amend the notice of civil claim to add champerty, maintenance, and inducing a breach of contract as causes of action based on his allegation that one of the defendants in the Alpha Action is paying for the fees of Safari Express in this action and that Safari Express "assisted" the defendants in the Alpha Action to repudiate their contract with KiTov.

[47] I also ruled on this part of Mr. Salinger's application during the hearing. I dismissed it because all claims in the action except costs were dismissed by the Consent Order issued July 7, 2021. Since it has been entered, I am functus of all matters save costs. Following my ruling, Mr. Salinger advised of his intention to bring a fresh action in respect of those claims.

[48] The other order he seeks concerns Safari Express' entitlement to costs. Mr. Salinger joins issue with Safari Express in this respect since he asks for an order denying it any award of costs.

[49] As a consequence of my rulings, these reasons concern the parties' competing applications regarding Safari Express' entitlement to costs.

When Special Costs May Be Ordered

- [50] Special costs may be ordered against a party who engages in reprehensible conduct in the proceeding. They are punitive as opposed to compensatory in order to rebuke and deter such conduct and are awarded when a court seeks to dissociate itself from such conduct in a proceeding: Rules, R. 14-1(1)(b); *Sandhu v. Mangat*, 2019 BCCA 238 at paras. 4-5; *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.) at para. 17; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 57, 133-134.
- [51] In *Sandhu*, citing from *Garcia*, the Court of Appeal said at para. 4 that there is a "continuum of circumstances in which special costs could be awarded, ranging from 'milder forms of misconduct deserving of reproof or rebuke' to 'scandalous or outrageous conduct.'" Reprehensible conduct can include conduct that is neither scandalous nor outrageous: *Garcia* at para. 5. Reprehensible conduct, Justice Lambert wrote in *Garcia* at para. 17, "is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder form of misconduct deserving of reproof or rebuke."
- [52] From the case authorities, it is clear that special costs may be ordered in the following circumstances:
- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - (d) where a party made the resolution of an issue far more difficult than it should have been;
 - (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - (g) where a party brings a proceeding for an improper motive;
 - (h) where a party maintains unfounded allegations of fraud or dishonesty; and
 - (i) where a party pursues claims frivolously or without foundation.
- [53] See, e.g., *Garcia* at paras. 23-25; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724 at paras. 7-13; *Webber v. Singh*, 2005 BCSC 224 at para. 28; *McLean v. Gonzalez-Calvo*, 2007 BCSC 648 at paras. 26, 29; *Buchan v. Moss Management Inc.*, 2008 BCSC 1286 at paras. 11-12; and *Edwards v. Bell*, 2004 BCSC 399 at paras. 12, 43-45; *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11.

Meritless Claim and Response to Hostile Affidavit

[54] In terms of the merits issue, the plaintiffs persuaded Watchuk J. to grant a temporary injunction based on the prima facie merits of their application materials. Safari Express has not demonstrated that Watchuk or Bruce JJ. were misled on the ex parte applications. Despite the temporal proximity of service of Mr. Mohamed's affidavit in the Alpha Action and the filing of the plaintiffs' notice of intention to proceed in this action, Safari Express has not established that Mr. Salinger specifically reactivated this action in response to Mr. Mohamed's affidavit. Safari Express has also not established that Mr. Salinger's other explanation for the plaintiffs dropping their claim, i.e., that he did not believe the costs to pursue it were not warranted, lacks credibility. I therefore agree with Mr. Salinger that Safari Express has not established reprehensible conduct in respect of initiating and/or pursuing a meritless claim and of Mr. Mohamed's affidavit. That said, I reject Mr. Salinger's submission that Safari Express breached the Settlement Agreement when Mr. Mohamed swore his affidavit and allowed it to be used by parties in the Alpha Action.

Impeding Service and Delay

- [55] While I agree with Safari Express that some of the reasons that Mr. Salinger proffered in the past for objecting to service by email (e.g., he told Safari Express that he is prohibited by the Defence Production Act, R.S.C. 1985, c. D-1 from downloading documents) are not supported by the evidence or of dubious veracity and that he was often late in filing application materials, the plaintiffs and Mr. Salinger were entitled as a matter of right under the Rules to insist on personal service. No application for an alternate means of service was brought by Safari Express.
- [56] I disagree with Safari Express that the two incidents it highlighted as overt examples of service issues used by Mr. Salinger to cause delay constitute reprehensible conduct.
- [57] The first incident involved Safari Express' attempt to personally serve application documents by courier on Mr. Salinger at his home in November 2020 during the early stages of the COVID-19 pandemic lockdown. Mr. Salinger says he was concerned about the risk of transmission of the COVID virus into his home where his elderly mother resided with him at the time.
- [58] There is a conflict in the evidence as to whether the courier actually gave the documents to Mr. Salinger or left them at the front door. Mr. Salinger contends they were soiled as a result of him leaving the documents on his front door step until the documents were picked up for return to the law firm. The courier's evidence is that he handed the documents to an individual who took them inside Mr. Salinger's residence. Regardless, Mr. Salinger caused them to be returned to counsel for Safari Express, and told the law firm that he did not wish documents to be brought into his home in the midst of the pandemic at a time when there were widespread reports of easy transmission of the virus by touching objects that were not subject to quarantine. The documents were returned to Safari Express soiled by water and

some debris.

- [59] While I agree with Safari Express that it acted properly in serving the documents at Mr. Salinger's residence since it was Mr. Salinger who had insisted on personal service at that address, I do not agree that his reaction in the context of the information concerning transmission of the virus at that time constitutes reprehensible conduct. Moreover, once the documents were returned, Mr. Salinger readily offered up an alternate means of service. He arranged for documents to be served on him at the office of Flash Couriers in Vancouver on an ongoing basis and filed a notice of address for service dated December 4, 2020, with the registry on December 10, 2020, to that effect (according to Safari Express, Master Cameron rejected the appropriateness of service by way of delivery to a courier company and said service should occur by way of registered mail, but there is no evidence Safari Express took any further steps to challenge the change in method of service).
- [60] The other incident pertains to the scheduling of the hearing of Safari Express' special costs application. The hearing was originally scheduled for January 18, 2022. It was adjourned when Mr. Salinger advised that he had not been notified by Flash Couriers that he had been served with the application documents until shortly before the hearing because Flash Couriers had misplaced them.
- [61] Mr. Salinger produced an email dated January 19, 2022 (through his affidavit no. 7, sworn February 4, 2022), he said he received from Flash Couriers advising that it could not confirm if it had in fact notified Mr. Salinger of service, and I adjourned the application to February 14, 2022.
- [62] The email put into evidence by Mr. Salinger confirms his advice that he was not notified of service but does not state that it was because Flash Courier had misplaced the documents. The contents of that email are set out below:

From: Shipping

Sent: January 18, 2022 10:20 AM

To: Rod Salinger

Cc: Shipping

Subject: RE: File delivered.

Dear Rod

After checking our records I confirm that Flash Couriers received a shipment from Kornfelds on about 23 November 2021 but for some unknown reason we overlooked sending you advice that it had arrived and on forwarding it to you. We are very sorry for causing you any inconvenience.

Yours sincerely,

Flash Couriers,

1213 Frances St

Vancouver BC

[Emphasis added]

[63] During the hearing of its special costs application, Safari Express produced an email from the president of Flash Couriers sent on January 19, 2022. Its contents, Safari Express says, contradict the document produced by Mr. Salinger. In addition, and relying on that document, Safari Express questions the provenance of the email tendered into evidence by Mr. Salinger. However, in the email, although Flash Couriers' president advised it held the documents for Mr. Salinger throughout, and notified him when documents were delivered, he could not confirm that it had in fact notified Mr. Salinger of service of the special costs application documents.

[64] The president's email states, in part:

Flash Courier Services Inc. confirms the following:

- o On November 23, 2021. we received a phone call for Arian of Kornfeld & LLP to pickup an envelope for our client #13822 Aero Attack Systems Inc c/o Mr. Rod Salinger.

- o The envelope was picked up and delivered to the Flash Courier Services Inc. office at 1213 Frances St. Vancouver B.C. V6A 1Z4 on the same day November 23, 2021.

- o As was prearranged between Mr. Salinger and Flash Courier Services Inc:

- We agreed to receive any documents like mail or courier shipments on his behalf and hold for him until notified by him to deliver to his new address once he had completed him relocation from his old Vancouver address.

- We performed this task for approximately 8 months during the 2021 calendar year.

- All items were stored in our locked room and at no point were ever out of our control or unaccounted for.

- Flash Courier did notify Mr. Salinger on multiple occasions that we did have stored deliveries for him but we can't confirm if he was ever notified of this specific envelope from Kornfeld LLP #354840 until we emailed him on December 31, 2021 with the specific details.

[Emphasis added]

[65] The email from Flash Couriers' president does not refer to nor does it deal with the email produced by Mr. Salinger. In the circumstances, I am unable to determine what actually occurred in respect of notice of service to Mr. Salinger. The most that can be said is that Mr. Salinger did not follow up with Flash Couriers and counsel for Safari Express to determine if he had been served with the application documents in a timely manner. However, I disagree

that his failure to do so and, for that matter, his conduct, which I find to be vexatious in respect of service of documents generally, constitutes reprehensible conduct.

Resolution Made More Difficult

[66] As at November 2020, the plaintiffs and Mr. Salinger had yet to perform their remaining obligations under the Settlement Agreement. Faced with ongoing demands from Safari Express to do so, Mr. Salinger wrote to counsel for Safari Express advising that Aero Attack would advance a claim for liquidated damages if Safari Express brought a summary trial application founded on the Settlement Agreement:

This case is all about verbal agreements. I am quite happy to proceed to a summary trial if needed. But really . Over \$8,000?? The claim by Aero Attack will then proceed. It is a claim [sic] for liquidated damages.

[Emphasis added]

[67] Then, in the following month, the plaintiffs filed an amended notice of civil claim (on December 31, 2020) abandoning the Repair Services Claim against Safari Express. As a result of their amendments, the only relief sought by the plaintiffs was a claim for specific performance of the Settlement Agreement and orders for the return of the Cessna and costs.

[68] According to Mr. Salinger, the plaintiffs amended their pleading based on a promise made by counsel for Safari Express that if that claim was withdrawn, the case would be remitted to the jurisdiction of the Provincial Court of British Columbia's Small Claims Court Division where costs are generally not awarded.

[69] However, the evidence (excerpted below) shows the opposite: it was only after Mr. Salinger told Safari Express that the plaintiffs were filing an amended notice of civil claim abandoning the Repair Services Claim that counsel for Safari Express raised the matter of the remaining claim in the action (i.e., Safari Express' claim for \$8,000 owing under the Settlement Agreement) falling within the jurisdiction of the Provincial Court. Counsel for Safari Express also advised Mr. Salinger he thought the case could be resolved and that he would seek instructions. The matter of costs was not mentioned in their communications.

[70] Mr. Salinger's correspondence to counsel for Safari Express sent at 2:58 pm on December 31, 2020 advising that an amended notice of civil claim dropping the Repair Services Claim was being filed with the registry, is excerpted below:

Dear Sir,

Please find attached the documents for the hearing on 4 January 2020 [sic]. The Amended Notice of Civil Claim is signed and is being filed at the registry as there is not enough time to file it electronically. I will send you a filed copy. This should solve the problem and result in there being no need for a trial.

[Emphasis added]

[71] The response from counsel for Safari Express is set out below:

Mr. Salinger,

Again, we deny your various accusations.

Thank you for the unfiled amended NCC. I look forward to a filed copy in due course. From my quick review, it appears the Plaintiffs proposed to drop their pursuit of approx. \$50,000.

If this claim is indeed filed, then I believe the matter should properly move to Small Claims court and may be resolvable. I will seek instructions from my clients.

We attempted to file our Book of Authorities for your Jan 4th application, but were rejected. It appears the Plaintiffs may have once again failed to file their application record by the deadline. If this is the case, then your application will not be heard on Jan 4th.

As you know, on Jan 5th my clients are applying for Security for Costs and I look forward to that hearing.

Many thanks and Happy New Year,

[Emphasis added]

[72] Not long after, on January 12, 2021, counsel for Safari Express delivered a with-prejudice settlement offer by email to the plaintiffs and Mr. Salinger. The terms of the offer called for the plaintiffs to:

- (a) pay the remaining \$8,000 due under the Settlement Agreement into Kornfeld's trust account, execute a release, and sign a consent dismissal order ("CDO") to be entered with the court registry; and
- (b) deliver those funds and documents appropriately executed/endorsed to Kornfeld before the Cessna is returned to Mr. Salinger.

[73] The offer also provided that once the funds and signed documents were delivered to Kornfeld, the plaintiffs could (in light of the Restraining Order) arrange for a representative (other than Mr. Salinger) who is agreeable to Safari Express to attend at the Airport to inspect and pick up the Cessna (at the expense of the plaintiffs and Mr. Salinger). The offer, including delivery of the settlement funds and the signed release and endorsed CDO, was valid until 5 pm on January 22, 2021.

[74] The plaintiffs and Mr. Salinger were also told that Safari Express may seek to have the claims in the action determined in court and were put on notice that it would seek costs (including special costs) if the offer is not accepted:

Should settlement negotiations fail between now and Jan 22, 2021 then in accordance with section 9-1 of the Supreme Court Civil Rules, the Defendants, Safari Express Aircraft Maintenance Ltd., and Nazir Jan Mohamed reserve the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding.

Please note, if we are unable to resolve this matter as proposed above, then my clients may decide to apply to the BC Supreme Court to have the Claim and Counterclaim determined by some form of trial and seek appropriate costs (which may include seeking special costs).

[Emphasis added]

- [75] Nonetheless, and even though the plaintiffs sought specific performance of the Settlement Agreement, neither they nor Mr. Salinger accepted the offer; moreover, they did not pay the remaining \$8,000 owing to Safari Express.
- [76] At different times, Mr. Salinger insisted on inspection of the Cessna through an agent working in the United States.
- [77] Safari Express questioned why Mr. Salinger did not seek to use an agent in the Lower Mainland in view of the delay caused by issues Mr. Salinger identified concerning the agent's inability to travel from the United States to the Airport.
- [78] An example of Mr. Salinger's position is gleaned from an email he sent to counsel for Safari Express on February 28, 2021 (it also includes comments that relate to Safari Express' complaint about the inappropriate nature of Mr. Salinger's communications with Kornfeld):

There is no need for a summary trial. We are now waiting for Mr [L] to be able to travel to Canada. You are fully aware to cross border travel at the money is problematic. It is expected that he will have travel authority in the near future. You will look like a total fool in the eyes of the court considering that no one in Canada that we know of is qualified to do the inspection as the aircraft engine is part of an American registered aircraft.

Please advise when your firm [is] ready to receive service of the criminal complaint now being drafted for service. My Mum wants to attend to the service proceedings by zoom to see the eyes of your Mr Kornfeld and to remind him that as a child of a holocaust survivor that his way of saying thanks to a family who went out of their way to fight the German Nazi forces that his parents were on the run from and to thereby save his parents and by so doing to risk the lives of our family is, somewhat in bad taste.

[Emphasis added]

- [79] Ultimately, Safari Express filed a summary trial application predicated on the Settlement Agreement and scheduled it for hearing in April 2021. It did so after it gave notice of its intention to Mr. Salinger on February 8, 2021, as follows:

Mr. Salinger,

Again, there is no need to email Mr. Kornfeld. He has no involvement in your file.

Again, we deny your various accusations.

I understood you did not have counsel. If this has changed, please let me know.

Since you did not respond to our settlement offer then the matter has to be determined by the court.

I asked you to provide your availability but you have failed to do so.

We will be scheduling a full day summary trial for this matter and I expect to be given a date in late April.

We will forward you that date once it has been scheduled.

Many thanks,

[80] As mentioned above, the hearing of that application was adjourned because Mr. Salinger maintained he had not been served. It was rescheduled for July 5, 2021, peremptory on the plaintiffs and Mr. Salinger, by the order of Master Cameron issued April 28, 2021.

[81] After having put Safari Express to the expense of filing a summary trial application, Mr. Salinger sent an email to counsel for Safari Express on May 12, 2021, proposing, inter alia, to put \$8,000 in trust with the Vancouver law firm, Owen Bird, pending inspection of the Cessna, as a means to resolve the claim, however, he failed to retain that law firm. He subsequently advised counsel for Safari Express that he had not retained Owen Bird, but said he planned to do so along with a law firm in Israel to sue Kornfeld for human rights violations and abuse of process.

[82] The next step in the action was the hearing of Safari Express' summary trial application. I presided over the hearing of that application. The plaintiffs and Mr. Salinger initially opposed the application, premised in part on unfiled and unsworn affidavit materials. However, through the course of submissions, Mr. Salinger confirmed that he would pay the remaining amount owing under the Settlement Agreement so long as he could inspect the Cessna before it was returned to him. Safari Express agreed. The Restraining Order was still in effect, but the parties resolved issues concerning the inspection during the course of the hearing. They agreed that an agent named by Mr. Salinger in the airplane mechanical field located in the Lower Mainland would carry out the inspection. As a result, the parties agreed to the Consent Order that, inter alia:

- (a) granted judgment against Mr. Salinger in favour of Safari Express for \$8,000;
- (b) required Mr. Salinger to pay the judgment amount into Kornfeld's trust account by July 9, 2021;
- (c) allowed Mr. Salinger's agent to inspect the Cessna and then remove the Cessna from the Airport and deliver it to Mr. Salinger so long as the judgment amount was paid; and

(d) dismissed all other claims in the action except for the parties' competing claims for costs.

[83] At that time, both sides advised they would seek special costs from the other. However, only Safari Express filed application materials seeking an order for special costs. During the course of his oral submissions on Safari Express' application for special costs, Mr. Salinger said that he should be entitled to special costs, although he did not file any application materials (by a court-ordered deadline) in that respect in spite of ample opportunity to do so.

[84] The judgment amount was paid, the Cessna was inspected and returned to the plaintiffs and Mr. Salinger, and the Consent Order was entered with the registry.

[85] In all, I find that the plaintiffs and Mr. Salinger made resolution of the case unnecessarily difficult after the parties entered into the Settlement Agreement. The plaintiffs delayed in withdrawing the Repair Services Claim, threatened reactivation of Aero Attack's claim for liquidated damages if Safari Express brought a summary trial application to enforce the Settlement Agreement, did not accept Safari Express' January 2021 settlement offer and instead, continued to cause unnecessary delay when insisting that a foreign agent travel to Canada to inspect the Cessna, and delayed paying the remaining amount due under the Settlement Agreement. Mr. Salinger's conduct put Safari Express, who acted reasonably throughout, to unwarranted expense in pursuing its summary trial application (and, as mentioned, Mr. Salinger even opposed the summary trial application at the outset of the hearing in spite of the plaintiffs' claim to enforce the Settlement Agreement in its amended notice of civil claim). It was only after the hearing got underway that Mr. Salinger agreed to pay the funds owing and named an appropriate local agent to carry out the inspection. The conduct of the plaintiffs and Mr. Salinger since the Settlement Agreement was reached was unreasonable in these circumstances.

[86] To that I will add that I agree with Safari Express and find that the plaintiffs and Mr. Salinger unreasonably protracted and made difficult production of documents as required by the Rules. Safari Express' application materials highlight specific examples of numerous troubling instances in this respect.

[87] I also reject Mr. Salinger's submission that Safari Express should be denied costs because it was prepared to waive them in the settlement offer. The offer was not accepted. Moreover, the ongoing conduct of the plaintiffs and Mr. Salinger, who by that point was effectively the plaintiff in this action in addition to defendant by counterclaim, following their receipt of the offer was unreasonable, vexatious, and put Safari Express to needless expense.

Correspondence to Kornfeld LLP

[88] Mr. Salinger's correspondence in this action to lawyers at Kornfeld made numerous accusations of misconduct. A useful and accurate summary of some of his accusations contained in his email correspondence to different lawyers at Kornfeld is set out in Safari Express' written submissions, excerpted below:

70. As detailed above, the most significant rationale in support of an award of Special Costs in this matter arises from Salinger's reprehensible correspondence which inter alia:

- (a) intimated that these Defendant's counsel were spies for the Chinese government,
- (b) alleged that many members of Kornfeld LLP, including its founder Mr. Neil Kornfeld Q.C., were anti-Semitic,
- (c) claimed that he would be filing complaints with the Law Society and Human Rights Commission regarding these Defendant's current counsel,
- (d) claimed that he would somehow be pursuing criminal charges against members of Kornfeld LLP, and
- (e) compared Kornfeld LLP to Hamas, a terrorist organization listed under section 83.05 of the Criminal Code.

[89] To that should be added Mr. Salinger's allegations of conspiracy, intimidation, dishonesty, and criminal conduct, and of misleading the court.

[90] In addition to Mr. Salinger's comments in his email dated February 28, 2021, quoted in para. 78 of these reasons, other examples of Mr. Salinger's correspondence referred to by Safari Express are excerpted from his emails in the paragraphs that follow (they are reproduced as they appear in Mr. Salinger's correspondence):

Ø email sent April 20, 2020

Hopefully you don't catch the COVID Virus. Maybe Uncle Xi gave his friends some of vaccine. That may well explains why no one back in Beijing got it Eh? Clever.

Ø email sent May 22, 2020

You question how any Act prevents the download of documents. I am sorry but it shows your total ignorance to Canadian law and the vast reality of malicious code being incorporated in documents and the massive number of recent data breaches reported because of code that has been inserted in documents.

Aero Attack Systems Inc, is a military equipment company registered under the Defense Protection Act of Canada and as such we are regulated by the Controlled Goods regulations of Canada that are part of the Defence Production Act that requires us to have adequate data protection and firewalls that would enable us to detect any malicious code that may be caught up in documents that you send to me or are downloaded from your server. We do not have that

capability and I suspect that few companies do have it. We are aware that there are people in your organization with close ties to China and the Communist Party of China. The recently enacted National Security Act of China requires every Chinese citizen, person with family connections or corporation to spy for China as an when requested. That law has been well discussed by the Canadian Government and has been raised in the parliament of Australia as issues of concern for national security. Hence, your organization presents us with an elevated security risk and we are not allowed by law to download from your servers. The USB stick also provides the same problem as malicious code and Trojans are easily able to be installed on such.

Personally I think that you are out to fluff up this case with needless expenses as a deep pocket litigation strategy in order to intimidate me and cover up for the obfuscation and conspiracy to deceive the Court that your Ms. [L] was involved with in the recent matter of KiTov v Alpha. .

Ø email sent November 19, 2020

Then in that case what is the hesitation for Mr Kornfeld to submit to the very legal system he professes to believe in. In fact the Jewish laws of Heter Arkaos are very strict with Shulchan Aruch (code of Jewish law) stating that a person who disobeys it should not be counted in a Minyan and should be excommunicated from the community. Due to the serious nature of the Jew hatred / anti-Semitism your firm has created in pursuit of legal fees my Mum's Rabbinic legal counsel in Israel will be pursuing all options.

Ø email sent November 25, 2020

If you dare to mention my religion in your upcoming application I will take appropriate steps to file an official complaint with the BC Human Rights Commission and Law Society.

Ø email sent December 11, 2020

In fact I will submit that what you are doing has moved into the area of deliberate persecution of my Jewish faith.

Ø email sent December 16, 2020

Simply put Kornfeld LLP deliberately cooked up lies against me in order to strip me of assets and then when I made a valid complaint against your Ms [L] to the Law Society about her poor conduct, your firm went out on a well planned malicious and reckless campaign of illegal conduct in order to pervert the course of justice

Ø email sent December 17, 2020

What your firm has done is to make Canada a very dangerous place to live in by effectively making it a punishable action to make a complaint about a lawyer. That might suit some crooked lawyers who want to intimidate their clients but it has no place in Canada. It is the sort of thing that happens in communist countries, which goes to prove he point in my email that you make issue about.

Tomorrow morning at 10 am I have having a meeting with an important Jewish community leader about community support over the aspect of anti-Semitism that your firm has caused to happen by generating lies and the irrelevant mentioned of my Jewish religion. Telling lies or causing lies to be told and irrelevant mention of the Jewish religion meets the test of fundamental anti-Semitism. For a law firm that is headed by a Jew it is extraordinarily bad performance. I am moving my complaint ahead out of deep concern for the Jewish people at large. If fundamental anti-Semitism was stamped out some 15000 to 2000 years ago, with the false allegations against the Jewish people that the Church made up, then the holocaust would never have happened. In the meantime my lawyers in Israel are preparing to take the matter to the Canadian Ambassador in formal protest and all over a parking space in which no money was owed and your firms insatiable desire to generate legal fees over pure twaddle.

Ø email sent December 31, 2020

In light of the highly emotive issues and liability at stake for your firm over the issue, I have recently been cautioned by intelligence personnel in Israel that my personal safety is at risk and I have been advised to vacate my residence as a precaution. I truly hope that this is it not the case, however, in light of the tip off, I will caution your firm and its partners to keep any and all of your associates or agents away from me and my residence. I am also having the issue of a security threat raised with the Israeli consulate in Toronto.

Ø email sent February 8, 2021

It appears that you are once again out to generate legal fees.

It is your firm that cooked up a crooked and illegal means of preventing the inspection of the engine from taking place by a deliberate breach of the Section 87(2) of the Legal Profession Act and Rule 3-3(1) of the Law Society Rules and resultant violation of Section 139(2) of the Code in order to have me banned from a public airport over doing nothing more that what I am allowed to do by law. More to the point you inappropriately dragged my Jewish religion into a civil matter in order to win the anti-Jewish vote in court, which you were successful in doing.

By so doing your Law firm broke the Criminal Code of Canada in order to achieve a contrived result.

I am of the apprehension that your firm has conspired to conduct a deliberate act of breach Section 139(2) of the Code in order to win a court case and to generate legal fees and to create further impossibilities.

I am of the opinion that any law firm that resorts to any acts of criminality to conduct civil litigation has no right to represent a client.

The irony of the matter is that your Mr Neil Kornfeld makes a big fuss to the Jewish community and the world at large of how terrible the German Nazis were to his parents (as Holocaust survivors) yet his firm has gone all out to persecute a family that fought the Germans to liberate the Jewish people from their oppression. More so my mother who is 98 who is directly affected by

your vile conduct. She is now having her story written and expressing her revulsion at the way your law firm has in effect treated her in the ultimate hypocrisy and an insult to all those who fought the German Nazis to save the lives of people like Mr Kornfeld's parents.

Anyway, I am confident that the law Society will be able to handle yet another complaint, this time about you personally. I will send you a copy of my complaint.

Ø email sent February 8, 2021

I will at this point note the irony of the situation where your Mr Kornfeld's parents were apparently on the run from the German Nazis in World War 2 while at the same time my family members were risking their lives in fighting the German Nazis to save them and others as part of the war effort as flight crew in the Pathfinders with multiple bombing runs on enemy positions of the Nazis who were cowardly holed up in Churches in Berlin and also [as] part of the Dam Busters and in shooting down Gerry Messerschmitt fighter aircraft, while my mother (who your are deliberately persecuting by your breach of Section 139(2)) was making aircraft for the war effort and our other family was here in Canada training military in preparation for deployment to the war in Europe. Your masters simply do not know how to say thanks.

With the ability to make a few \$'s in legal fees you forget all that and live in an objectionable stereotype.

Ø email sent May 12, 2021

I am going to seek to have your Mr. Kornfeld of your firm to be officially sanctioned for deliberately persecuting me for use of my LEGAL Jewish name that appears in my Israeli passport. I am going to seek to have Mr Kornfeld banned from ever entering Israel under any circumstances due to his firms involvement in creating anti-Semitism and Jew hatred.

Ø email sent July 15, 2021

Unfortunately for Canada, the troublesome and at times illegal way your firm, Kornfeld LLP runs its legal practice affects others. Worst of all you have used a cleverly arranged form of religious persecution against me (in collaboration with your Ms [L] and the consent of Mr Kornfeld in the related matter of KiTov v Alpha) for my simply being Jewish as a means of perverting the course of justice and winning your application in that matter over parking space (yes a parking space), and in deliberately fabricating evidence and twisting things against me. Although you are trained lawyers experienced with the statutes of Canada, you appear to have no respect for the Section 87(2) of the Legal Profession Act or the Law Society of BC, when your firm deliberately and maliciously informed the court of my complaint about your inappropriate conduct to the Law Society.

What is highly concerning is that your firm flagrantly violates the laws of Canada and tries to suppress the otherwise allowed right of citizens of identifiable minorities to express concerns. Simply put, your firm did to me what the likes of fascist and communist dictators such as Fidel Castro, Joe Stalin and others of similar ilk have done to people who had legitimate complaints about the way they were treated.

My advisors in Israel are of the opinion that your firm needs to be heavily sanctioned and the title of QC removed from some of your partners for failure to have systems in place that prevent violations of the law. Expect that call to be made publicly in the press in the near future.

If Mr Kornfeld wishes to sue me in Israel then I will be ready with a team of highly qualified lawyers some of whom are civil rights lawyer who know Canadian and international law and with the anticipated full attention of the world media.

Ø email sent September 1, 2021

In understand the intense deep seated hatred your firm and its partners has for my family (which in the opinion of my Rabbi matches the level of hatred of Hamas. It is very sad as it is prohibited under Jewish law)

[91] Mr. Salinger made many similar remarks during the course of his oral submissions. He emphasized that lawyers at Kornfeld misled Verhoeven J. in the Alpha Action and presiders in this action. He said that lawyers at Kornfeld continue to engage in misconduct, adding comments such as:

Ø Mr. Kornfeld used every underhanded tactic possible to ruin me and he continues to be underhanded and flagrantly violates the laws of Canada

Ø I'm not safe any longer because of the law firm's vitriolic and constant attack

Ø They are licking their lips at all the legal fees they will be paid

[92] All of Mr. Salinger's complaints about the conduct of lawyers at Kornfeld, both in his email correspondence and in his oral submissions, are baseless. The tenor of his communications directed towards lawyers at Kornfeld was hostile, vitriolic, and vexatious to the point of gross misconduct, and put the law firm and Safari Express to unwarranted time and expense to consider and respond, both in terms of moving the action forward and in terms of attacks on the lawyers' reputational interests. Verhoeven J. said in KiTov SC at para. 77 that "Alpha is entitled to protect its employees and its legal counsel from this kind of conduct" [emphasis added]. Those remarks were cited with approval by the Court of Appeal (KiTov CA at para. 69-70) and are apposite to this case.

Determination

[93] To summarize my findings, Mr. Salinger, representing himself and the plaintiffs, impeded completion of the Settlement Agreement. After the parties entered into the Settlement Agreement, the plaintiffs and Mr. Salinger made resolution of the action most difficult and

put Safari Express to unwarranted expense. Once Safari Express took steps to compel performance of the Settlement Agreement, Mr. Salinger engaged in baseless accusations against lawyers at Kornfeld in his correspondence and oral submissions on the instant application. He persisted in those allegations despite being rebuked by Verhoeven J. for the same conduct. Mr. Salinger's conduct, acting for himself and on behalf of the plaintiffs, in these respects falls squarely within the definition of reprehensible conduct described in the case authorities and is deserving of rebuke.

Allocation

- [94] I have considered whether special costs should be awarded following the Settlement Agreement since that is the inception point for Mr. Salinger's reprehensible conduct. Generally, when special costs are ordered, it is for the entire action, absent special circumstances: *The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2017 BCCA 346 at para. 81. Departure from the rule should be invoked sparingly. The goal is to avoid a "minute dissection of the success or failure of litigants on the completion of a trial" (*Gotaverken Energy Systems Ltd. v. Cariboo Pulp & Paper Co.* (1995), 9 B.C.L.R. (3d) 340 at 343 (S.C.)) and a "meticulous costs post mortem which would add yet further expense and be contrary to the interests of justice" (*Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, 2008 BCSC 282 at para. 33).
- [95] However, R. 14-1(15)(b) provides discretion to award a party costs that relate to some particular application, step or matter in or related to the proceeding": *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2021 BCSC 2144 at paras. 88-91.
- [96] In *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27, the Court of Appeal set out the test for apportionment as follows:
- [31] The test for the apportionment of costs under Rule 57(15) can be set out as follows:
- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
 - (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
 - (3) it must be shown that apportionment would effect a just result.
- [97] The overarching consideration is whether it would be unfair to award the successful party all of its costs: *Youyi* at para. 92.
- [98] In *Sze Hang Holding*, Justice Goepel said at para. 81 that:
- [81] While special costs are usually awarded for the whole of a proceeding, it is open to a judge to make a partial award of special costs if he or she is of the view that it would be disproportionate to award special costs for the entire proceeding

- [99] I do not consider it an impediment to consider apportionment, even though Mr. Salinger did not argue it in the alternative. I must be satisfied that the scope of the award effects a just result. Justice Sinclair Prowse pointed out in *Webber v. Canadian Aviation Insurance Managers Ltd.*, 2003 BCSC 274 at para. 26 that "the circumstances of the case must establish that the failure to apportion costs would result in basic unfairness." I raised the issue with the parties and it was only Safari Express who responded by providing me with the decision of Justice Mayer in *Youyi*.
- [100] As I said above, the evidence points directly to a basis on which I can identify the inception point of reprehensible conduct in this action, i.e., following the Settlement Agreement. As Safari Express has not established that the plaintiffs commenced or prosecuted a meritless claim prior to that point, and in circumstances where no other reprehensible conduct has been identified prior to the Settlement Agreement, an award of special costs for the whole of the action would be unjust, disproportionate, and result in basic unfairness. I have determined that allocation is appropriate on the facts of this case and order that special costs be awarded from the date of the Settlement Agreement. Costs incurred prior to that date are awarded as ordinary Rules costs.

Joint and Several Award

- [101] I agree with Safari Express that the award should be against Mr. Salinger personally for the plaintiffs' reprehensible conduct that occurred prior to him being added as a party by counterclaim on January 17, 2020. The court has inherent jurisdiction to award costs against non-parties; however, such discretion must be exercised sparingly and only in special circumstances: *Anchorage Management Services Ltd. v. 465404 B.C. Ltd. Inc.*, 1999 BCCA 771 at para. 21. Special circumstances include situations where the non-party has engaged in fraudulent conduct, an abuse of process, gross misconduct in the commencement and/or conduct of the litigation, or when the non-party is the "real litigant": *Perez v. Galambos*, 2008 BCCA 382 at para. 18.
- [102] In *International Hi-Tech*, Justice Ballance applied the holdings from *Anchorage Management* and awarded special costs against the corporation and its chief operating officer (who was not a named party). She also discussed whether the elements of abuse of process in the context of special costs were the same as those required to establish the tort of abuse of process, and concluded they were not:
- [54] The issue was revived some years later in *Anchorage*. After surveying the case authorities, including the *Oasis* decision, Hall J.A. indicated that there appeared to exist four bases for making an award of costs against a non-party:
1. fraudulent conduct;
 2. abuse of process;
 3. gross misconduct in the commencement and/or conduct of the litigation; and

4. where the real litigant stays out of the action and offers up a "man of straw" to prosecute the claim.

[55] I do not take Mr. Justice Hall as purporting to enumerate an exhaustive list of the circumstances that could legitimately found the liability for costs of a non-party. Moreover, these categories are not airtight compartments conceptually and the likelihood of overlap among one or more of them is readily apparent.

[66] However, in my mind, it remains an open question as to whether the nature of the abuse of process contemplated in *Anchorage* must have all the elements of the tort of abuse of process. It is trite to observe that this court has an inherent jurisdiction to control its own process and protect against the misuse of its forum and procedure. In that sense, the concept of an abuse of process is far broader in its scope than that which is encompassed by the tort of abuse of process. In my opinion, it is that expanded notion of an abuse of process to which the courts refer in the context of a solicitor's liability in *Billows and Cunningham*. It also finds expression in Rule 19(24) of the Rules of Court. There can be no doubt that *Abi-Rached* abused this court's process, in this broader sense. That may be sufficient to fix him with costs personally. However, I decline to use that reasoning as the footing to do so because this line of argument was not addressed or developed by counsel and, for the reasons that follow, I find him accountable in costs based on his commission of a fraud upon the court.

[Bold in original; underline emphasis added]

[103] In *OZ Merchandising Inc. v. Canadian Professional Soccer League*, 2020 ONSC 119 at para. 53, *aff'd* 2021 ONCA 520, leave to appeal *ref'd* 2022 CanLII 16723 (S.C.C.), Justice Ryan Bell held that an abuse of process, in the context of non-party costs, encompasses "situations of gross misconduct, vexatious conduct, or conduct that undermines the fair administration of justice." Conduct that causes extra expense or delay was viewed to be deleterious to the fair administration of justice. The reasons refer to 1318847 Ontario Ltd. v. Laval Tool & Mould Ltd., 2017 ONCA 184 where Chief Justice Strathy held at para. 87:

[87] Safeguarding public confidence in the fair administration of justice depends on preserving the availability of court facilities for justifiable proceedings and not permitting the costs of proceedings to be needlessly inflated, particularly at a time when delays and costs of litigation are so concerning from the perspective of access to justice

In my mind, those factors fall within the ambit of the types of misconduct spoken of in *Anchorage Management* and *Perez*.

[104] Accordingly, in view of my findings concerning Mr. Salinger's misconduct since the Settlement Agreement was entered into, I order special costs on a joint and several basis against the plaintiffs and Mr. Salinger.

Summary

- [105] Special costs are awarded to Safari Express following the parties entering into the Settlement Agreement in September 2017. Costs prior to that date are awarded to Safari Express as ordinary Rules costs.
- [106] Special costs (but not ordinary Rules costs) are awarded on a joint and several basis against the plaintiffs and Mr. Salinger, such that Mr. Salinger is obliged to pay them personally.
- "Walker J."

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